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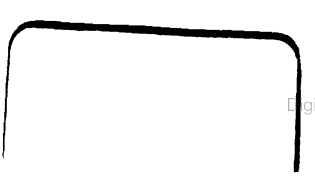

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THE LAWYERS REPORTS ANNOTATED

BOOK LIX.

ALL CURRENT CASES OF GENERAL VALUE AND IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P. FARNHAM, EDITORS.

ROCHESTER, N. Y.
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LAWYERS' REPORTS

ANNOTATED.

NORTH CAROLINA SUPREME COURT.

George N. HUTTON *et al.*
v.
Thomas M. WEBB, Sheriff, *et al.*, *Appts.*

(124 N. C. 749, 126 N. C. 897.)

The right of a riparian owner to use a navigable stream for floating logs is not derived from the state, and he cannot be deprived of such right without just compensation in some form.

(*Clark and Montgomery, JJ., dissent.*)

(May 10, 1899.)

APPEAL by defendants from a judgment of the Superior Court for Burke County in favor of plaintiffs in an action brought to enjoin the enforcement of tolls for the use of a stream of water. *Affirmed.*

Plaintiffs floated logs down the Catawba river, and thereby destroyed certain bridges which had been located thereon by Burke county. The county brought an action for damages and to enjoin the further use of the stream. In *Burke County* v. *Catawba Lumber Co.* 116 N. C. 731, 21 S. E. 941, the right to damages and an injunction was denied on the ground that the stream was

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NOTE.—*Right to obstruct or destroy rights of navigation.*

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I. *Extent of sovereign's right.*

a. *As against other sovereigns.*

As a general rule, it may be stated that no state can lawfully destroy the capacity of a body of water for navigation unless it is completely and absolutely within its jurisdiction. Whatever may be its powers with respect to waters over which it has absolute dominion, it certainly cannot destroy rights which belong equally to other states, although it has been held that an act of Congress declaring an existing bridge over the Mississippi river a lawful structure does not unconstitutionally violate the obligation of a treaty with a foreign power providing that the navigation of such river shall remain free and unobstructed forever. The Clinton Bridge, 1 Woolw. 150, Fed. Cas. No. 2,900.

This question has arisen generally with respect to the rights under our complex form of government where an attempt has been made by a state or the general government to exercise the authority, or where one state has objected to interference by a sister state.

The question has quite frequently been raised as to the effect upon the right to obstruct or destroy rights of navigation, of the provision of the United States Constitution which vests in Congress the power over commerce. The grant of such power to Congress would seem to preclude the state from totally destroying the navigation without the consent of Congress. Conversely, the fact that the grant is of the right to regulate commerce would seem to exclude a right to destroy it. Whether the united action of the state and Federal governments may do so depends on principles which will be discussed in future subdivisions.

So far as the regulation of the waters is concerned, the power of Congress is exclusive when exercised. The discussion upon the question has arisen in suits between individuals for the most part. The law may, however, be regarded as settled as firmly as though the matter had been litigated between the respective governments.

The authorization, by Congress, of a bridge over a navigable river which is the channel of commerce between states, the effect of which is to hinder the passage of vessels to ports in one state, is not prohibited by the clause of the Constitution that no preference shall be given

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navigable. The county then began to replace the bridges with others of such a nature that they would not be injured by the use of the stream. The statute under which this action was brought was then passed, requiring the board of county commissioners to remove driftwood that may gather at shoals so as to obstruct fords used for public and private crossings, and authorized them, in consideration of this service, to fix a toll on the logs which should be floated down the stream, which should be applied toward keeping the shoals unobstructed, and the remainder divided among certain counties.

Further facts appear in the opinions.

Messrs. **A. C. Avery** and **J. M. Mull** for appellants.

Messrs. **Shepherd & Shepherd, Busbee & Busbee,** and **E. B. Cline,** for appellees:

The state may, through its agencies, corporate or otherwise, provide for improvement of inland floatable streams, and where such improvements are made, tolls may be exacted of those who, being engaged in floating logs, have thus received a special benefit.

Sands v. *Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113.

Where no special benefit is conferred, a toll cannot be imposed upon the use of these streams, the "natural, common water-highways," for floatage.

25 Am. & Eng. Enc. Law, p. 497.

Where this natural right has been restricted, real improvements, such as dams, locks, and the like, have been constructed.

Gould, Waters, 143.

Statutes in derogation of common right are to be construed strictly.

Endlich, Interpretation of Statutes, § 345; Black, Interpretation of Laws, p. 300.

The clearing of the public fords is a public duty, resting upon the county just as the

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to the ports of one state over those of another. Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435. McLean and Wayne dissent on the ground that Congress has no power to authorize a bridge over a navigable stream within a state.

And a compact between two states that a river shall be free and common to the citizens of the United States will not deprive Congress of the power of authorizing the construction of a bridge over the stream. Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435.

The paramount power of regulating bridges that affect navigation on the navigable waters of the United States is in Congress. Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143.

Congress has absolute power and control over the navigable waters of the United States in the interests of commerce and the right to declare what may or may not constitute obstruction thereto. United States v. North Bloomfield Gravel-Min. Co. 81 Fed. 243.

Congress cannot construct a bridge over a navigable water under the commercial power, nor the power to establish post roads. This belongs to the local or state authorities of the state within which the work is to be done: but this authority must be so exercised as not materially to conflict with the paramount power to regulate commerce. United States v. Railroad Bridge Co. 6 McLean, 517, Fed. Cas. No. 16,114.

But the Supreme Court of the United States held that Congress may, directly or through a corporation created for that purpose, construct bridges for the accommodation of interstate commerce. Luxton v. North River Bridge Co 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891.

It is *res judicata* that New Jersey has no right to the soil under the waters below low-water mark in Staten Island sound, such as will prevent the construction of a bridge thereon in accordance with United States authority. State v. Roller, 14 N. J. L. J. 102.

Under the paramount power of Congress to regulate commerce, its determination that the construction of a bridge authorized by it will not interfere with navigation is conclusive. Miller v. New York, 13 Blatchf. 469, Fed. Cas. No. 9,585.

Congress has power to prescribe the place and manner of constructing bridges across the Mississippi river so that navigation may not be interfered with, and the United States has the right to prevent, through the process of the courts, attempts to construct them otherwise or elsewhere. United States v. Milwaukee & St. P. R. Co. 5 Biss. 410, Fed. Cas. No. 15,778.

Under its power to regulate commerce, Congress may authorize a railroad corporation to construct a bridge across navigable waters independent of the concurrence or consent of the state government. Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 9.

Congress can lawfully confer upon a private corporation the right to occupy navigable waters within the state, and to appropriate the soil under them for the erection of a bridge upon payment of just compensation to the owner, and without the consent of the state. Decker v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 434, 30 Fed. 723.

For the purpose of interstate commerce, Congress can lawfully authorize the construction of a bridge within the limits of a state which has not consented to, but has protested against, the erection of the structure. Pennsylvania R. Co. v. Baltimore & N. Y. R. Co. 37 Fed. 129.

Congress has power to order the removal of a bridge as an obstruction to navigation where it spans a navigable river over which it has assumed jurisdiction, although the river is wholly within the limits of a state which authorized its construction. United States v. Moline, 82 Fed. 592.

Power of state.

The power of Congress to control the internal navigable waters of the states under its authority to regulate commerce is exclusive when exercised: but, until Congress acts, the legislature of any state has the power to authorize the obstruction of any navigable waters within its borders by the erection of bridges, dams or other structures for the convenience and advantage of commercial intercourse. Cardwell v. American River Bridge Co. 9 Sawy. 662, 19 Fed. 562.

In one case Justice Grier held that the regulation of bridges over public streams is entirely a function of the states until Congress has exercised its powers over commerce, since there

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building of bridges. Yet this act imposes upon those using this natural highway an assessment when the improvement referred to cannot possibly be of any benefit to them.

Furches, J., delivered the opinion of the court:

We think the judgment below should be affirmed. To our minds there is too little resemblance in a public turnpike road and a navigable water course to afford analogy for argument from which proper conclusions may be drawn. The turnpike is created by legislation, and can be abolished by legislation. But a navigable water course is not created by legislation, and cannot be abolished by legislation. It is true that the legislature may by proper enactment provide for the improvement of such waterway for the benefit of navigation. But the legislature cannot impose duties upon the commerce upon such waters, for the purpose of "building public bridges, and of cleaning out the fords, public and private, across" such water courses. The right of taxation or "assessment" is a grant of sovereign power, and can only be exercised for the public good. This sovereign power cannot be granted for private benefits or for corporate gain, unless such gain be incident to the public benefit, authorizing the exercise of the taxing power of government.

It is manifest from the provisions of this act that it was passed for the benefit of the counties of Burke, McDowell, and Caldwell, and not for the public good,—the improvement of the navigation of the streams therein named,—as their improvement for such purpose is not mentioned. The duty of this "board is to remove driftwood [that may gather at shoals on said streams when the water is low, so as to obstruct fords used for public and private crossings, or pond back the water] at any point on the Catawba river," etc. And this board is to provide for the ascertainment of the number

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is no Federal common law, and, until such time, the Federal courts will follow the law of the state wherein the bridge in question is located. Milnor v. New Jersey R. Co. 6 Am. Law Reg. 0, Fed. Cas. No. 9,620.

In Devoe v. Penrose Ferry Bridge Co. 3 Am. L. Reg. 79, Fed. Cas. No. 3,845, he had held, in 1854, that where a bridge authorized by the state would be an unreasonable interference with navigation to and from a United States port of entry, the United States courts in chancery would restrain such erection, basing that decision on Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 519, 14 L. ed. 249. In 1857, however, in Milnor v. New Jersey R. Co. he overruled that decision, on the ground that the facts in the Wheeling Bridge Case did not call for a decision on the point he had accepted from a superficial reading, and that by conferring the privilege of a port of entry upon a municipality, Congress does not come in conflict with the police power of a state exercised in bridging her own rivers below such port, since Congress cannot require the receipt of favors, and the state may maintain such highways thereto as it wishes provided all citizens of the United States enjoy the same privileges. And that holding was affirmed by a divided court in The Passaic Bridges, 3 Wall. 782, and *sub nom.* Milnor v. New Jersey R. & Transp. Co. 16 L. ed. 799.

But it is now settled that waters navigable in themselves, in a state and connecting with other navigable waters so as to form a waterway to other states or foreign nations, cannot be obstructed or impeded so as to impair, defeat, or place any burden upon the right to their navigation granted by Congress. Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306.

The state has no right to seriously obstruct the navigation of streams which are channels of interstate trade. Depew v. Wabash & E. Canal Trustees, 5 Ind. 8.

A state law authorizing the erection of a bridge over a navigable stream only comes in conflict with Federal powers when it conflicts with a congressional regulation of interstate or foreign commerce. Pennsylvania R. Co. v. New York & L. R. Co. 18 Int. Rev. Rec. 142, Fed. Cas. No. 10,953.

The states within which navigable rivers lie may authorize the construction of bridges over them until Congress intervenes and supersedes their authority. Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423.

Until Congress acts upon the subject, the power of the state over bridges across its navigable streams is plenary. Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185.

The right of a state under its general police power to authorize the erection of a bridge over the navigable waters of the state wholly within its limits and accessible from other states is subordinate to the power of Congress, for the purpose of commerce, to control such navigable waters, so that a structure which contravenes the law of Congress in respect to such waters, although authorized by the state, is a nuisance which may be prevented or abated. But in the absence of congressional legislation the power of the state in this regard is unrestricted. Hatch v. Wallamet Iron Bridge Co. 7 Sawy. 127, 6 Fed. 326.

When the authority of a state over a river is undiminished, except as to the authority to improve its navigation granted to a navigation corporation, the legislature may authorize the erection of a bridge over it with the construction of a draw, which it has decided to be sufficient. Pennsylvania R. Co. v. New York & L. R. Co. 18 Int. Rev. Rec. 142, Fed. Cas. No. 10,953.

A state can legally authorize the construction of a bridge across a tidal river not in the line of general commerce, until Congress legislates upon the subject. State v. Leighton, 83 Me. 419, 22 Atl. 380.

In Dover v. Portsmouth Bridge, 17 N. H. 200, it is intimated by Parker, Ch. J., that while Congress may make such regulations as it may deem expedient in regulating commerce, and can to some extent control the exercise of such powers by states, yet it cannot control all actions of states in relation to their navigable water, or interfere with the internal concerns and police of the states in that regard.

It is further said that Congress, in its regulation of commerce and control of navigation, must legislate with reference to the existing state of things, and cannot by any direct legislation declare bridges, wharfs, etc., erected by state authority, in the absence of conflicting legislation by Congress, to be nuisances, or prohibit their further continuance, although, prior to the erection, it might have exercised its powers by requiring the bridge to be erected in a

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of logs floated, and to fix the charge thereon; and, "after paying for keeping the shoals as aforesaid, and for ascertaining the number of logs floated, any residue of the fund arising from said tolls shall be divided among said counties." This board is to report to the commissioners of each of the counties the respective part of dividends that belongs to it, and the commissioners shall "assess the same," and enter up judgment for said amount against the parties assessed, and execution shall issue thereon "as for other tax assessments." This act was passed in the spring of 1897, and under its operation the plaintiff was taxed $275.50 in the spring of 1898, and his property advertised for sale. But few private business enterprises in this state can stand such an assessment as this. In our opinion, it is in contravention of the provision of article 8, § 4, of the Constitution, there being nothing in the act limiting the power or extent of taxation. But, outside of this provision of the Constitution, we do not believe it can be sustained. It provides for the levy of "taxes or assessments" on private property for private benefit, and not for the public good. It is in conflict with the whole tenor and spirit of the Constitution and of our institutions. It is an unauthorized exercise of sovereign power in the hands of this new board of commissioners, and we think *the judgment of the court appealed from should be affirmed.*

Faircloth, Ch. J., concurs.

Douglas, J., concurring in judgment:

This case presents either necessarily or by possible implication many difficult and perplexing questions, rendered more so by their far-reaching and perhaps unforeseen results. What is and is not a floatable stream, I am at present utterly unable to define, and my inability is not lessened by reading the authorities from other states. The doctrine may be said to be of common-

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particular manner, or even to have prevented its erection altogether. *Ibid.*

The power having been delegated to Congress, a state has no power to authorize the obstruction of a navigable river, or of a canal in aid of the navigation thereof, so as to interfere with interstate commerce. Guthrie v. McConnel, 2 Ohio Dec. Reprint, 157.

The right to construct a bridge across a navigable stream as the Missouri river cannot be obtained by any grant or authority of a state, the right to grant a license being vested only in the general government by an act of Congress. Cass County v. Chicago, B. & Q. R. Co. 25 Neb. 348, 2 L. R. A. 188, 41 N. W. 246.

To bridge a tidal river within a state the concurrent authority of the state and the United States is necessary. People *ex rel.* Murphy v. Kelly, 76 N. Y. 475, 5 Abb. N. C. 383.

A state cannot authorize the construction of a bridge over a navigable river which is a medium of commerce between the states, and over which Congress has exercised its commercial power,—at least where, by a state compact sanctioned by Congress, the navigation is to be forever free, and Congress has licensed vessels to navigate the same. Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 240.

A state cannot prevent, nor seriously obstruct, the navigation of an interstate navigable stream, but may improve the navigation thereof, and may authorize the erection of dams, locks, bridges, and other works, provided the same do not substantially injure the stream for purposes of navigation. St. Joseph County v. Pidge, 5 Ind. 13.

The right of an individual state to build, or authorize the building of, a bridge across a navigable water of the United States, although within the territory of such state, can only be exercised in such manner as not materially to interfere with free navigation of such water, or seriously conflict with the Constitution and laws of the United States regulating such navigation. Thompson v. People *ex rel.* Taylor, 23 Wend. 537.

The Illinois river is a navigable stream free to all citizens of the United States, and the state cannot authorize the construction of a bridge which would be a material obstruction to its navigation. Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3,046.

But, in the absence of any restrictive legislation on the subject by Congress, the state may authorize the erection of bridges over navigable streams by statutes so guarded as to protect the substantial rights of navigation. Talbot County v. Queen Anne County, 50 Md. 245.

In the absence of congressional legislation on the subject, a state may authorize the erection of a bridge across any navigable waters therein as it may see proper, subject to the power of Congress to abate or regulate the same as an obstruction to navigation. Oregon City Transp. Co. v. Columbia Street Bridge Co. 53 Fed. 549.

The power of a state to authorize the erection of a bridge across a navigable stream within its limits must be exercised so as not essentially to impair the right of free navigation. Jolly v. Terre Haute Draw-Bridge Co. 6 McLean, 237, Fed. Cas. No. 7,441.

A state may authorize the erection of a bridge over a navigable stream without interfering with the power of Congress to regulate commerce. Com. v. New Bedford Bridge, 2 Gray, 339.

The authority of a state to construct a bridge across a navigable river should be exercised in such a manner as to interfere as little as possible with the right of free navigation. Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3,046.

A requirement in a charter granted by a state, that a bridge authorized shall have a "convenient draw," implies one that may be safely used without vexatious delay or risk. But if the bridge and draw are in accordance with the charter, and yet constitute a material obstruction to navigation, the act authorizing their construction is a nullity for want of power in the state legislature to enact it. Jolly v. Terre Haute Draw-Bridge Co. 6 McLean, 237, Fed. Cas. No. 7,441.

The Mississippi river and all navigable waters leading into it are common highways, and the legislature has no authority to make laws for obstructing the navigation of those streams. United States *ex rel.* Jones v. Fanning, Morris (Iowa) 348.

An individual acting under the authority of state legislation cannot obstruct the navigability of the Mississippi river, which is a common highway. The limit of state authority is to protect its own shores and harbors without interfering with the common rights of navigation. Rutz v. St. Louis, 2 McCrary, 344, 7 Fed. 438.

Neither the state of Louisiana, nor the city of New Orleans, can authorize any obstruction

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law origin, and, like nearly all such doctrines, is the offspring of necessity. It seems to come to us from some of the Northern states, where there are large bodies of timber, with intersecting streams, but few local railroads, and no efficient system of public roads. The present value of such lands is principally in their timber, and its value depends upon the accessibility of market. Under such circumstances, the practical use of the smaller streams is confined almost exclusively to floatage, which, being of paramount importance, came to be regarded as of paramount right. Having such an origin, the doctrine is naturally affected in different states by their different necessities and local statutes. How small a stream may be floatable, I am not prepared to say; and I am glad that at least this much difficulty has been solved by the decision of this court holding that these streams now under consideration are floatable streams. I suppose this is now the law of the case; but it does not settle the case. The term "floatable stream" implies an easement in someone to use the stream for purposes of transportation. Whether this easement belongs to the general public, or is appurtenant to the riparian lands, it is difficult to say. If it exists at all, it must belong to the riparian owner, as a natural easement. Whether it vests in him solely, or in common with others, it is needless now to discuss. If it is worth anything to anybody, it is a valuable appurtenance to his land, of which he cannot be deprived without adequate compensation. Whether this compensation must be in money, or may be in the increased conveniences afforded him by valuable improvements upon the stream, need not now be considered, as no compensation whatever appears to have been given to him, and no substantial improvements have been made which would increase the facility of transportation. I speak of the riparian owner as a class, each

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that will interfere with the navigation of the Mississippi river; and a municipal ordinance permitting a railroad company to erect wharves in front of its riparian property does not entitle it to place piles or other structures outside the line of city wharves, and it will not be protected by injunction in so doing. Texas & P. R. Co. v. New Orleans, 40 Fed. 111.

A pass caused by the overflow of the Mississippi river, making a channel to the Gulf of Mexico, through which a few fishermen have occasionally gone with small vessels carrying oysters for planting, and through which one or two cargoes of timber have passed, but which has not been used for any purpose of interstate commerce, and the gulf end of which has become closed, does not constitute a navigable water of the United States in such sense that a dam erected therein for the purpose and with the effect of reclaiming overflowed lands and rendering them fit for cultivation will constitute an obstruction in navigable waters within the meaning of the act of Congress prohibiting them. Leovy v. United States, 177 U. S. 621, 44 L. ed. 914. 20 Sup. Ct. Rep. 797, Reversing 34 C. C. A. 392, 92 Fed. 344, where the court held that an outlet of the Mississippi river near its mouth which resulted from an outbreak of the natural channel over sixty years ago, does not entitle the state or local authorities to close it for reclamation of swamp lands without the consent of the United States, where it has long been a highway for commerce; and that a state, in the exercise of its police power, is without authority to close, without the consent of the United States, a navigable channel, although wholly within the limits of the state, where the only purpose is the reclamation of swamp lands.

The legislation by Congress to exclude the authority of the state must be specific; so that mere general legislation making a stream navigable, followed by the survey and improvement of the stream, will not justify the court in enjoining the use of the stream under state statutes, by a logging company which obstructs the navigation with its booms and dams. United States v. Beef Slough Mfg. Boom. L. D. & Transp. Co. 8 Biss. 421, Fed. Cas. No. 14,559.

In Silliman v. Hudson River Bridge Co. 4 Blatchf. 395, Fed. Cas. No. 12,852, Hall, J., said that state legislation authorizing a railroad company to construct over a navigable river a drawbridge which may interfere with or affect the interstate commerce of the United States is not prohibited by the constitutional power of Congress to regulate commerce, in the absence of any exercise by Congress of that power; but the judges were equally divided in opinion.

And in Silliman v. Hudson River Bridge Co. 1 Black, 582, 17 L. ed. 81, the Supreme Court of the United States was equally divided in opinion as to whether or not the Federal court could restrain the bridging of the Hudson river at Albany.

The states are not wholly precluded from acting if Congress has taken no action in the matter, and the navigation rights are merely impaired, and not destroyed. The Passaic Bridges, 3 Wall. 782, and *sub nom.* Milnor v. New Jersey R. & Transp. Co. 16 L. ed. 709.

The state may authorize the construction of a bridge over a navigable river, provided it does not constitute a material obstruction to navigation; and mere occasional inconveniences do not, in contemplation of law, amount to obstructions. This power, when exercised, cannot be questioned, except by a paramount law of Congress. Manlius Highway Comrs. v. Chaffee, 1 Mich. N. P. 147.

So long as the legislature comes into conflict with no constitutional enactment of the general government in respect to the tide waters of an interstate river, it may bridge those waters upon such terms and conditions as only impair and diminish the freedom of navigation, without destroying the right altogether. Flanagan v. Philadelphia, 42 Pa. 219.

A state may authorize the construction of a bridge over navigable tide waters, and if such bridge be not an "unreasonable obstruction" of commerce the Federal government cannot object thereto, under the present acts of Congress. Adams v. Ulmer, 91 Me. 47, 39 Atl. 347.

A state may authorize the erection of a bridge across a tidal river at a point below where the coasting trade is carried on under license of the United States government, provided a draw is made for the passage of vessels free of expense. People v. Rensselaer & S. R. Co. 15 Wend. 113, 30 Am. Dec. 33.

A municipal ordinance requiring bridges over a navigable river to be kept closed between the hours of 6 and 7 A. M., and 5:30 and 6:30 P. M., and during the remainder of the time to be opened and closed in alternate intervals of ten minutes each, for the accommodation of navigation and land traffic, does not violate the Constitution of the United States or any act

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of whom has the easement, where it exists, as far as the floatability of the stream extends. If he owns the easement, then the state cannot charge him for the simple use of it. In the majority of cases the state has granted to him the bed of the stream, and has nothing left therein to grant to anyone else. I concede the right of the state to establish a highway on water or land, but it can acquire the bed of the highway in private lands only by sale or dedication by the owner, or by condemnation according to law, with adequate compensation. Whether the state establishes such a highway directly or through the agency of the counties, or even by a private corporation, may not be material, as in any event it would be a delegated exercise of the right of eminent domain, which is exclusively vested in the state as an inherent prerogative of sovereignty. The state cannot take private property, even for a public use, without just compensation, and cannot take private property solely for the private use of another, under any circumstances. Of course, it cannot authorize anyone else to do what it cannot do. I also admit that, where the state has made, or caused to be made, valuable improvements of a local nature, it may charge a reasonable compensation for the use of the increased facilities and benefits afforded by such improvements. But this is in the nature of a toll, and not a tax, and presupposes some corresponding benefit to him who pays the toll. Where there is an utter failure of consideration, why should the toll be paid? But it is said to be in the nature of a special tax, levied upon the property to be benefited. But on what property is it levied? Not on the logs, for they have not been benefited, nor even assisted in their journey. Moreover, a tax must possess some element of uniformity; and, if levied locally for a special purpose, its disbursement must be confined to its creative objects. While I do not

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of Congress. Escanaba & L. M. Transp. Co. v. Chicago, 12 Fed. 777.

In a suit to recover damages for the loss of a cargo alleged to be due to the defendant's obstruction of the principal channel of a navigable river with piers, the defendant must show, not only that in placing the piers he complied with the act of the state legislature authorizing the construction of the bridge, but that they did not constitute an obstruction to the free navigation of the river. Columbus Ins. Co. v. Curtenius, 6 McLean, 209, Fed. Cas. No. 3,045.

The Illinois legislature has no power to declare that a bridge constructed with a draw of a certain width is not a material obstruction to the navigation of a river. Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3,046.

A railroad company maintaining a bridge across the Wisconsin river below the city of Portage is liable for actual damages to rafts occasioned by the absence of guide booms at each end of the channel span, although such span has not been designated by the engineer of the United States, under a statute requiring th maintenance of guide booms by everyone operating a dam or bridge across such river, but providing that it shall not apply to any bridge below the city of Portage until the channel span shall have been designated by the engineer of the United States in charge of the improvement of the river, as such obstruction is unnecessary and unlawful and beyond the power of the legislature to authorize, and the latter provision only relieves the owner of such bridge from liability for treble damages provided by another section of the act. Sweeney v. Chicago, M. & St. P. R. Co. 60 Wis. 60, 18 N. W. 756.

A considerable degree of authority is accorded to the states with respect to waters which are wholly within their own limits.

Bayous, arms, and sloughs of the Mississippi river are not required by the interest of commerce to be preserved if the purposes of navigation are under control of the state governments. Those do not partake of the character of the waters referred to in the ordinance of 1887, art. 4, which are declared to be common highways and under authority conferred by the state and a state may fill up, or authorize a railroad company to fill up, a slough connected with the Mississippi river, unless it possess the character of navigability attached to the river itself. Ingraham v. Chicago, D. & M. R. R. Co. 34 Iowa, 249.

Streams, navigable only for certain kinds of inferior craft or for certain distances within the state, and not visited by vessels of commerce coming from and going to the navigable waters of other states by continuous voyage, are subject to the jurisdiction of the state in which they lie, and the legislature may authorize their obstruction when deemed proper for the public good. Neaderhouser v. State, 28 Ind. 257.

The state has exclusive jurisdiction over streams within her borders navigable for certain kinds of craft only, certain distances within the state, and not visited by vessels coming from and going to, by continuous voyages, navigable waters of other states; and may authorize obstructions of such streams for the public good. Depew v. Wabash & E. Canal Trustees, 5 Ind. 8.

A stream may be navigable in fact, but yet not be beyond the power of the state to destroy its navigation as against the authority of the general government, where it is not a stream valuable for general navigation. Peters v. New Orleans, M. & C. R. Co. 56 Ala. 528.

The laying out of a highway across a creek in which the tide ebbs and flows, but which is not navigable for any useful purpose except by scows or other flat-bottomed vessels, the passage of which would not be obstructed by a bridge, does not constitute an interference with interstate commerce. Groton v. Hurlburt, 22 Conn. 178.

The authority of the state legislature is complete over streams which are navigable only within the limits of the state. Hamilton v. Vicksburg, S. & P. R. Co. 34 La. Ann. 970, 44 Am. Rep. 451.

A state may legislate concerning navigable waters within its limits, and partially obstruct them by bridges, unless its acts conflict with some law of Congress connected with foreign commerce or that between the states. United States v. New Bedford Bridge, 1 Woodb. & M. 401, 483, Fed. Cas. No. 15,867.

A state legislature may authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river which is entirely within its own boundary so long as Congress does not interfere, and a temporary prevention of the passage of boats through an authorized drawbridge during repairs thereon is not actionable by a corpora-

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mean to attack the general constitutionality of the act, I think it is defective in application, and affords no constitutional warrant for the assessment under consideration, as no improvement whatever has been made upon the stream, and no pretense of condemnation of whatever private property may have vested therein. I do not think the state can, in the utter absence of any general system of taxation, tax directly or indirectly the easement held by the plaintiff. For the reasons stated above, I think the judgment should be affirmed.

Clark, J., dissenting:

In England the test of navigable rivers is the ebb and flow of the tide. In this country, owing to essential differences in topography, the test of a navigable river (over which class of streams alone Congress has jurisdiction) is that it is wide enough and deep enough to be navigable by seagoing vessels, and below falls or other obstructions, so as to be accessible to such vessels. Navigable streams are subject to regulation by state legislation, provided it is not repugnant to any regulation thereof by Congress (*Bagg* v. *Wilmington, C. & A. R. Co.* 109 N. C. 281, 14 L. R. A. 596, 3 Inters. Com. Rep. 803, 14 S. E. 79; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Cooley, Const. Lim. 595; 16 Am. & Eng. Enc. Law, p. 264), and this to the extent even of imposing a reasonable toll as compensation for improving the navigation of such streams, if not in conflict with some statute passed by Congress in pursuance of its paramount right (*Thames Bank* v. *Lovell*, 18 Conn. 500, 46 Am. Dec. 332; *Benjamin* v. *Manistee River Improv. Co.* 42

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tion which has leased locks on the river from the state. Green & B. River Nav. Co. v. Chesapeake, O. & S. W. R. Co. 88 Ky. 1, 2 L. R. A. 540, 2 Inters. Com. Rep. 515, 10 S. W. 6.

The board of state engineers in Louisiana has the power to close by a dam forming part of the public levee system of the state a bayou wholly within the state, the upper portion of which is not navigable. Egan v. Hart, 45 La. Ann. 1358, 14 So. 244.

But the legislature cannot authorize the total obstruction of the navigation of a tidal river. *Re* Water Comrs. 3 Edw. Ch. 290.

A state is without power to obstruct any of its navigable waters which extend to, or are connected with, the sea, or with waters flowing into the sea. Palmer v. Cuyahoga County, 3 McLean, 226, Fed. Cas. No. 10,688.

States may authorize the erection of toll bridges over the navigable waters within their respective limits. Dover v. Portsmouth Bridge, 17 N. H. 200.

The grant by two states of charters of incorporation to the same individuals for the erection of a toll bridge across a navigable river flowing between them, where they do not enter into any agreements with each other respecting it, is neither a violation of the constitutional prohibition against compacts between states, nor an exercise of the power of regulating commerce, nor an obstruction to its exercise by Congress. *Ibid.*

Neither under the power granted by the states to Congress to regulate commerce between the states and with foreign nations, nor under any other provision of the Constitution or of any act of Congress, has the power of the state to provide means of crossing the navigable rivers exclusively within their territory by bridges or otherwise, so as to render such rivers useful for their domestic purposes provided the same do not materially obstruct the free navigation thereof, been surrendered, or designed to be surrendered. Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295.

A state has authority, in the absence of congressional legislation forbidding it, to construct locks and dams upon navigable rivers within its limits in such mode and to such extent as seems best. Huse v. Glover, 11 Biss. 550, 15 Fed. 292.

In the absence of congressional legislation, a state may, in good faith and for a constitutional purpose, authorize the obstruction of one of its own tidal and navigable streams. Do-

boy & U. I. Teleg. Co. v. De Magathias, 25 Fed. 697.

A state legislature may authorize the building of a bridge across a navigable river so as to obstruct navigation, where such river is wholly within her own territory, and Congress does not interfere. Green & B. River Nav. Co. v. Chesapeake, O. & S. W. R. Co. 88 Ky. 1, 2 L. R. A. 540, 2 Inters. Com. Rep. 515, 10 S. W. 6.

In the absence of any action by Congress, a state may authorize the construction of a boom in a small navigable river of the state where its presence would do more good than harm. Found v. Turck, 95 U. S. 459, 24 L. ed. 525; Heerman v. Beef Slough Mfg. Boom. L. D. & Transp. Co. 8 Biss. 334, Fed. Cas. No. 6,320; United States v. Beef Slough Mfg. Boom. L. D. & Transp. Co. 8 Biss. 421, Fed. Cas. No. 14,559.

Effect of statute.

There has been some discussion as to the effect of certain acts on the part of the general government.

A license to engage in the coasting trade upon a navigable river is a license to navigate only so far as the stream is navigable, and does not affect the right of a state to dam or otherwise obstruct the navigation of the river. Hatch v. Wallamet Iron Bridge Co. 7 Sawy. 127, 6 Fed. 326.

A congressional act making appropriations for the improvement of a river within a state does not deprive the state legislature of the right to authorize the construction of dams, booms, piers, or bridges upon the river. The erection of such structures are not offenses against the United States laws, in the absence of a direct statute applicable to the river in which they are placed. United States v. Bellingham Bay Boom Co. 26 C. C. A. 547, 48 U. S. App. 443, 81 Fed. 658.

The provision of the act of September 19, 1890 (26 Stat. at L. 426, chap. 907, U. S. Comp. Stat. 1901, p. 3527), forbidding the erection of structures which may obstruct the navigable waters of the United States and which are not affirmatively authorized by law, was not intended to be retroactive in its effect, and did not affect lawful existing structures. *Ibid.*

A provision in an act admitting a state into the Union that the navigation of the streams shall be free does not prevent the erection of

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Mich. 628, 4 N. W. 483; *McReynolds* v. *Smallhouse*, 8 Bush, 447; *Morris* v. *State ex rel. Gusset*, 62 Tex. 728; Prentice & Egan Commerce Clause, 113, and cases cited). Streams not technically navigable in the above sense are exclusively within state jurisdiction, and are those nonnavigable, and those cut off by falls in the river from access by seagoing vessels (*Com.* v. *King*, 150 Mass. 221, 5 L. R. A. 536, 22 N. E. 905; *The Montello*, 11 Wall. 411, *sub nom. United States* v. *The Montello*, 20 L. ed. 191), and streams strictly nonnavigable are divided into floatable and nonfloatable. The distinction between floatable and nonfloatable streams is drawn in *Burke County* v. *Catawba Lumber Co.* 116 N. C. 731, 21 S. E. 941, in which it is held that the Catawba river at the location now in question is a floatable stream, and the act of the general assembly (Acts 1897, chap. 388) recites that decision, and provides for the regulation of the use of said stream for floatage purposes. It is the constitutionality of that statute which is called in question by this action.

In *State* v. *Glen*, 52 N. C. (7 Jones, L.) 321, it is said that, when a stream (not navigable) is "naturally of sufficient depth for valuable floatage, the public have an easement therein for the purposes of transportation and commercial intercourse, and in fact they are public highways by water;" this easement being explained to be as to the use of the stream for said purposes, the bed of the stream, and with it the right of fishing being capable of grant to the riparian owners. To same effect is *Buckl* v. *Cone*, 25 Fla. 1, 6 So. 160. Floatable streams being "public highways by water," as said in *State* v. *Glen*, 52 N. C. (7 Jones L.) 321, the state can, in the exercise of its powers, provide regulations for the unrestricted exercise thereof, and provide for the expense of doing so and of keeping the channel open, either by funds out of the

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bridges over them. Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811, Reversing 9 Sawy. 643, 19 Fed. 847, 7 Sawy. 127, 6 Fed. 326.

So, it was held that the provision in the act of Congress of 1859, admitting Oregon into the Union, that its navigable waters shall be common highways and forever free, does not, in the absence of congressional legislation on the subject of impediments and obstructions to the navigation of the river, deprive the state of the right to authorize the construction of a bridge over the Wallamet river, and its erection cannot be enjoined by the circuit court however much it may obstruct navigation. Scheurer v. Columbia-Street Bridge Co. 11 Sawy. 675, 27 Fed. 172.

A state statute providing for the improvement of the navigation of a river constituting a tributary of the Mississippi by the diversion of its waters by means of a canal into another river does not violate a provision in the act admitting the state into the Union, that the Mississippi river and the navigable rivers leading into the same shall be common highways and forever free. Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec 126.

The close of a nonnavigable stream wholly within the state by a dam forming part of the public levee system under an act of the legislature is not forbidden by the act of Congress admitting Louisiana into the Union. Egan v. Hart, 45 La. Ann. 1358, 14 So. 244.

In Cardwell v. American River Bridge Co. 9 Sawy. 662, 19 Fed. 562, Sawyer, J., intimated that the provision in the act admitting California into the Union (9 Stat. at L. 452, chap. 50), that all navigable waters within the state shall be common highways and forever free, constitutes legislative action by Congress with reference to the navigable waters of such state, so that its control has superseded the power of the state legislature and become exclusive.

But the Supreme Court of the United States held that the clause in an act admitting a state into the Union, that navigable waters within its limits shall be free to the citizens of the United States, does not prevent the state from authorizing the construction of bridges over them. Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423.

And it was subsequently held that the provision in the act admitting the state of California into the Union, that all the navigable waters within the state shall be common highways and forever free without any tax therefor does not refer to physical obstructions of navigable waters, but to political regulations which would hamper the freedom of commerce. Pacific Gas Improv. Co. v. Ellert, 64 Fed. 421.

A statute authorizing the construction of a bridge over a navigable stream, which it is alleged impedes navigation, is not invalid as a violation of a provision of the act of Congress admitting California into the Union, that all navigable waters within the state shall be common highways and forever free without any tax, impost, or duty therefor, as the object thereof was to insure a highway equally open to all, without preference to any, and unobstructed by duties or tolls, thus preventing the use of navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation, and did not impair or restrict the power of the state in authorizing the construction of bridges over them for the promotion of public convenience. People *ex rel.* State Harbor Comrs. v. Potrero & B. V. R. Co. 67 Cal. 166, 7 Pac. 445.

Ordinance of 1787.

The effect of the ordinance of 1787 for the government of the Northwest territory has been the subject of considerable discussion, and some judges have intimated that it was repealed or superseded when the territories were admitted into the Union, and it has been so stated by the Supreme Court of the United States. Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313. Affirming Huse v. Glover, 11 Biss. 550, 15 Fed. 292, where it was held that the declaration in the ordinance of 1787 for the government of the Northwest Territory that the navigable streams leading into the Mississippi shall be common highways and forever free does not restrict the states formed out of such territory from improving the waterways within their limits or constructing locks and dams therein.

The state and lower Federal courts had, however, treated the ordinance as binding, and its spirit may be regarded as still living.

The provision in the ordinance of 1787 declaring the navigable waters of the Northwest territory to be common highways and forever free is still in full force, and is a perpetual inhibition to the states carved therefrom from authorizing any impediments or obstructions to

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public treasury, or by tolls upon the commerce using said streams (*i. e.*, logs and rafts); and this power it can exercise through commissioners appointed directly by the state, or confer the control and the power to lay tolls upon the commissioners of the counties through which such "public highway by water" flows.

In many instances the state has devolved the duty of keeping open the use of floatable streams upon private companies, giving in consideration thereof the right to exact tolls (as is also done in the case of turnpikes), and such acts have been sustained as a legitimate exercise of legislative power, and that these do not infringe "the right of free navigation" (*Osborne* v. *Knife Falls Boom Corp.* 32 Minn. 412, 50 Am. Rep. 590, 21 N. W. 704; *Benjamin* v. *Manistee River Improv. Co.* 42 Mich. 628, 4 N. W. 483 [opinion by Cooley, J.]; *Nelson* v. *Cheboygan Slackwater Nav. Co.* 44 Mich. 7, 38 Am. Rep. 222, 5 N. W. 998; *Morris* v. *State ex rel. Gussett*, 62 Tex. 728; *Green & B. River Nav. Co.* v. *Palmer*, 83 Ky. 646; *Duluth Lumber Co.* v. *St. Louis Boom & Improv. Co.* 5 McCrary, 382, 17 Fed. 419; *Huse* v. *Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; *Sands* v. *Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113), nor conflict with the constitutional inhibition against taking private property without compensation (Gould, Waters, § 143, and cases cited). *A fortiori*, the state can confer the control of a public highway and the right to lay tolls upon the transportation thereon upon one of its own agencies, —the commissioners of the counties through which, or upon whose borders, the stream runs. It is difficult to understand why it is not competent for the legislature, under its general police power, to permit the organization of a governmental agency to improve the navigation of these streams for logs in the same way, and to devote any profit arising from tolls to the special pur-

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the water courses. Jolly v. Terre Haute Draw-Bridge Co. 6 McLean, 237, Fed. Cas. No. 7,441.

The intent of all congressional legislation since the ordinance of 1787 has been to make the Mississippi and the navigable waters leading into it common highways free from essential obstructions to navigation, and a state is without power to authorize such an obstruction contrary to the legislation of Congress. Columbus Ins. Co. v. Curtenius, 6 McLean, 209, Fed. Cas. No. 3,045.

The free navigation of navigable waters secured by the ordinance of 1787 does not necessarily mean navigation of the streams in their natural condition, unobstructed and unimpeded. Benjamin v. Manistee River Improv. Co. 42 Mich. 628, 4 N. W. 483.

The provision in the ordinance of 1787 that the navigable streams of the Northwest territory shall be common highways and forever free does not prevent their improvement by the state, or prevent the erection of bridges or dams under its legislation. *Ibid.*

The ordinance of 1787 does not affect the power of the state legislature to authorize the construction of a bridge over a navigable river. It simply placed the navigable streams on a common-law footing as established by prescriptive user. Manitou Highway Comrs. v. Chaffee, 1 Mich. N. P. 147.

Over the navigable waters within the boundaries of the states formed from the Northwest territory, Congress, in the assertion of its power to regulate commerce among the several states, may exercise control to the extent necessary to protect, preserve, and improve their free navigation; but while this power remains dormant, and until that body acts, the states have plenary authority over bridges across them, and there is nothing in the ordinance of 1787 that precludes them from exercising that authority. Commissioners v. Board of Public Works, 39 Ohio St. 628.

The ordinance for the government of the territory northwest of the Ohio river, providing that the navigable waters leading into the Mississippi river and St. Lawrence shall be common highways and forever free, is no restriction on the power of a state within that territory to grant the right to build bridges across such streams after the most approved plan so as not materially to obstruct navigation, since such ordinance refers to total obstructions, and does not mean that such rivers and their navigation shall be common highways free from all and every condition. Illinois River Packet Co. v. Peoria Bridge Asso. 38 Ill. 467.

The ordinance of 1787, declaring the navigable streams of the Northwest territory public highways, and providing that they should forever remain free to all the inhabitants of the United States without payment of taxes or imposts, does not prohibit the construction of bridges over such streams whenever demanded by public interest or convenience, even though their construction may result in some inconvenience to those who were in the habit of using such streams for navigation in a particular manner before such improvements were authorized, though not preventing their free use as highways. Williams v. Beardsley, 2 Ind. 591.

The fact that by the ordinance of 1787, declaring all navigable streams of the northwestern territory public highways, a state is prohibited from authorizing the building of a dam across a stream, and thus causing a total obstruction of the navigation, does not prevent it from authorizing the construction of bridges over such streams, necessary for the convenience of those using the highways or desiring to cross the streams, provided such structures are not incompatible with the use of streams as public highways. *Ibid.*

The legislature of Wisconsin has power to authorize the building of bridges across the navigable waters of the Wisconsin river, notwithstanding the ordinance of 1787, the constitutional provisions, and the common law; but that power must be subordinate to the rights of navigation, and bridges so authorized to be constructed and maintained must not materially or unnecessarily obstruct navigation. Sweeney v. Chicago, M. & St. P. R. Co. 60 Wis. 60, 18 N. W. 756.

The legislature of Wisconsin has no power to authorize the entire obstruction of the navigation of the Wisconsin river where its waters are navigable in fact, in view of the ordinance of 1787, adopted as part of the state Constitution, providing that the navigable waters leading into the Mississippi shall be common highways and forever free. *Ibid.*

The state may authorize booms for the interception, storage, and handling of logs in a manner to materially interfere with the navigation, by steamboat and other craft, of those rivers which the ordinance of 1787 and the state Constitution provide shall be common

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pose of improving and building such bridges as would not interfere with the passage of logs, instead of putting such profits into the coffers of the county, to be used for general county purposes. This is not a tax or an assessment (as in *Raleigh* v. *Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521, cited by plaintiffs' counsel), but a toll, which is provided for in the act in question. It is a matter of universal knowledge that the legislature has resorted to the plan of allowing persons or companies to charge toll for the purpose of keeping up certain public roads in the mountain counties in North Carolina. The charging of these tolls has been at times allowed, and at other times discontinued, by the legislature. It was always in contemplation of the state and those in charge of such roads that a profit would be realized and pocketed by those who should keep the highways in good condition. There is no reason why the state should not embark in the same business itself, or authorize one of its local agencies to engage in it, and to apply its profits for the public good. Were these charges technically taxes, instead of tolls, it has been held that even a tax levied within the constitutional limits for one county purpose may be devoted to another county purpose. *Long* v. *Richmond County*, 76 N. C. 280.

The legislature has the power to convert an ordinary public highway, used as a carriage and wagon road, into a turnpike or toll road. The courts hold in such cases that the change is not in the character of the servitude, but in the mode of sustaining the highway, or keeping it in repair, *viz.*, in substituting tolls, instead of taxes or involuntary labor. *Carter* v. *Clark*, 89 Ind. 238, 239; Elliott, Roads & Streets, p. 55, and authorities there cited. Especially see *Walker* v. *Caywood*, 31 N. Y. 51; *Wright* v. *Carter*, 27 N. J. L. 76; *Douglass* v. *Boonsborough Turnp. Road Co.* 22 Md. 219, 85

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highways and forever free, as such provisions refer only to the levying of a tax on navigation, and not to the necessary obstruction thereof for logging purposes. J. S. Keator Lumber Co. v. St. Croix Boom Corp. 72 Wis. 62, 38 N. W. 529.

A statute authorizing the erection of a mill-dam in a navigable river, which is an obstruction to its navigation, is in violation of the ordinance of 1787 declaring navigable waters leading into the Mississippi and St. Lawrence rivers common highways which shall be forever free, and is unconstitutional and void. Cox v. State, 3 Blackf. 193.

The article of the ordinance for the government of the Northwest territory in relation to freedom of its navigable waters is not annulled with the consent of both parties to the compact, so as to permit the obstruction of a navigable river by the diversion of water for a canal, although Congress had donated lands in aid of its construction on condition that its navigation shall be free to the United States for the transportation of troops and munitions of war. Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245.

Questions similar to those discussed above have arisen with respect to the Canadian government.

In Queddy River Driving Boom Co. v. Davidson, 10 Can. S. C. 222, it was held that the New Brunswick legislature could not authorize the obstruction of a tidal navigable river by the erection of booms therein, the power over navigation being in the dominion parliament.

Conflicting rights of states.

Few cases have arisen with respect to conflicting rights and interests of the states.

A state may maintain a bill in equity for injunction against the maintenance of a bridge under authority of another state across a navigable river, the effect of which is to divert commerce from its lines of transportation so as to affect its revenues and diminish the trade of the state. Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249.

And an action may be maintained by the state of Illinois against the city of St. Louis where she voluntarily appears and files a demurrer to the merits of the bill enjoining such city from obstructing a channel of the Mississippi river by dyking the Illinois shore, this being an obstruction to navigation. People v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339.

A state may, in the absence of congressional legislation, authorize the construction of a bridge within its territory over a navigable river in such manner as not to obstruct navigation, although the river continues its course into another state. Rhea v. Newport News & M. Valley R. Co. 50 Fed. 16.

A bridge, although constructed under legislative authority from two states across a navigable river flowing between them, for the purpose of accommodating traffic, the maintenance of which tends to destroy commerce, obstruct the collection of the revenue, or prevent the navy from resorting to navigable waters or to naval yards or depots necessary for their use, is an abatable nuisance. Dover v. Portsmouth Bridge, 17 N. H. 200.

In order to render a toll bridge erected under legislative authority of two states across a navigable river flowing between them a nuisance because of prior Federal legislation inconsistent with its lawful erection or maintenance, there must be some direct legislation by Congress making the continuance in its present shape unlawful; and neither the formation of certain treaties with foreign powers not affected by the presence of the bridge, nor the establishment of a port of delivery above it, will have that effect, although the passage of vessels to it is unavoidably impeded by some delay and inconvenience in passing the bridge. *Ibid.*

The provisions in the enabling acts for Wisconsin and Minnesota, and the corresponding provision in their state Constitutions, giving those states "concurrent jurisdiction" over a river forming their common boundaries, include the exercise of such legislative powers by each state as are consistent with the exercise of similar powers over the same portions of the river by the other state; and neither of those states could, as against the other, rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession, and control of the entire navigable portion of the river; but either state may, in the aid of navigation, assume or authorize reasonable occupancy, possession, and control of portions of such navigable waters as may be reasonably consistent with similar occupancy, possession, and control which may be assumed or authorized by such other state. J. S. Keator Lumber Co. v. St. Croix Boom Corp. 72 Wis. 62, 38 N. W. 529.

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Am. Dec. 647; *State* v. *Blake*, 36 N. J. L. 442.

Has the legislature the power to assume the same control over navigable and non-navigable streams as over the dirt roads, made such by authority of law? "It is too late to question that the police power of the state (which is part of its general legislative power) extends to the providing for every object which may be reasonably considered necessary for the public safety, health, good order, or prosperity, and which is not forbidden by some restriction in the state or Federal Constitution, or by some recognized principle of right or justice found in the common law. It is unnecessary to consider at present the limits of this extensive power, since it clearly includes the right to provide for and compel the clearing out, not only of such water courses as are naturally navigable, but of all such water courses and drains as are not and never were navigable, but which are necessary for carrying off the surplus drain water, thereby promoting the public health, and enabling a considerable portion of territory, otherwise uninhabitable, to be brought into cultivation. *Norfleet* v. *Cromwell*, 70 N. C. 634, 16 Am. Rep. 787." *Brown* v. *Keener*, 74 N. C. 714, 716, 717; Code, §§ 3707, 3710, 3711; *State* v. *Moore*, 104 N. C. 720–722, 10 S. E. 143; *Sands* v. *Manistee River Improv. Co.* 123 U. S. 294, 295, 31 L. ed. 151, 8 Sup. Ct. Rep. 113. The boards of commissioners of two or more counties can be united in such work by legislative authority. *Herring* v. *Dixon*, 122 N. C. 420, 29 S. E. 368. If a charter were granted to a private company to clean out the channel, and in consideration of keeping it open and of building all necessary bridges over the stream, the company were authorized to levy toll on the logs and other traffic, could there be any doubt of the legality of such charter? If not, then certainly the state can exercise the powers it could

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b. *As against subjects generally.*

STATE v. SUNAPEE DAM COMPANY, in so far as it deals with the question of impairing public rights of navigation, represents the present opinion on a subject on which there has been more or less difference. Vattel says (book 1, chap. 22) that the right of navigation in a river cannot be interfered with.

In King v. Clark, 12 Mod. 615, it was said by Holt, Ch. J., that to hinder the course of a navigable river is against Magna Charta, chap. 23.

When the great hardships which may result from such interference are alone taken into consideration, without also looking at the reasons which call for interference, there is much weight in Vattel's conclusion. As said by the New York court: The sea and navigable rivers are natural highways, and any obstruction to the common right or exclusive appropriation of their use is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it. People v. New York & S. I. Ferry Co. 68 N. Y. 71.

As against the acts of an arbitrary sovereign, the people have been very ready to defend themselves, and from the time of Magna Charta they have insisted that the King had no power to destroy public rights of navigation. Although it was said in Chester Mill Case, 10 Coke, 137*b*, that the section of Magna Charta with reference to the throwing down of all weirs refers only to open weirs for the taking of fish; yet it was held in Williams v. Wilcox, 8 Ad. & El. 314, 3 Nev. & P. 606, 1 W. W. & H. 477, that there was no greater power in the Crown to interfere with the navigation of a river before Magna Charta than afterwards: that the Crown never had the right to authorize the construction of a weir appurtenant to a fishery so as to permit it to obstruct or interfere with the navigation of the river.

By Magna Charta, 9 Hen. III., all weirs were to be destroyed, except such as were placed on the coast. Reeves, History English Law, 267.

1 Hen. IV. chap. 12, contained a provision requiring the reduction of obstructions which had been set before the time of Edw. I., but which had been added to so as to make them interfere with navigation.

These statutes were confirmed by 4 Hen. IV. chaps. 11 and 12; Edw. IV. chap. 7.

All mills, weirs, dams, and stakes are not to be put down under the statute of 23 Hen. VIII. But such as are useful and necessary are to be maintained, kept, and repaired. Callis, Sewers, 266.

Stat. 25 Edw. III. chap. 4, provided that all mills, weirs, etc., which had been set up since Edw. I., whereby ships and boats were disturbed that they might not pass the rivers as they were wont, should be pulled down.

Stat. 45 Edw. III. chap. 2, provided a penalty for the erection of obstructions.

What the people have denied to the King, they have to some extent, however, claimed for themselves. Upon purely ethical grounds, it may be questioned how far a generation of people may injure or destroy great natural highways to the prejudice of races yet unborn, but practically people are not inclined to permit such considerations to interfere with a course of action which they deem for their present advantage; and so, with regard to navigable waters, it has generally been held that the people, through their representatives, might obstruct or destroy a navigation if present advantage seemed to require it.

It has been held that a right of navigation on a public stream is held subject to the common weal, and of the time and manner of promoting that, the legislature are the judges. Flannigan v. Philadelphia, 42 Pa. 219.

So it has been held that although the Crown may grant the soil under navigable waters it cannot grant away or extinguish the public easement of passage, without a writ of *ad quod damnum*, and not then if it would work a common nuisance. Reg. v. Meyers, 3 U. C. C. P. 305.

As long ago as Fitzherbert's time there was provision for the closing of navigable channels by making compensation for the injury. In Fitz. N. B. 225, E, it is said, if there be an ancient trench coming from the sea by which boats or vessels used to pass to the town, if the same be stopped by the outrageousness of the sea, and a man will sue to the King to make a new trench and to stop the ancient one, he ought first to sue a writ of *ad quod damnum* to inquire what damage it will be to the King or others.

And in King v. Montague, 4 Barn. & C. 598, it is said that public rights of navigation may be put an end to by act of Parliament, or by

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grant, and could confer them upon the county commissioners of the riparian counties, as agencies of the state.

As to the suggestions in the argument of the possible purposes in passing the act in question, it has always been held that the courts will not inquire into the motives of legislators of any kind or grade, whether it be the Congress of the United States, the legislature of the state, or a municipal board, except in so far as they may be disclosed by the language of the act itself, and every intendment of law is in favor of the good faith of a legislative body. *State* v. *Moore*, 104 N. C. 714, 10 S. E. 143; *Soon Hing* v. *Crowley*, 113 U. S. 703, 104, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 18, 38 L. ed. 64, 14 Sup. Ct. Rep. 240. Unless an act is plainly unconstitutional upon its face, it is the duty of the courts to sustain and uphold the exercise of the legislative will. *Hoke* v. *Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677; *Sutton* v. *Phillips*, 116 N. C. 502, 21 S. E. 968; *McDonald* v. *Morrow*, 119 N. C. 670, 26 S. E. 132; *State* v. *Moore*, 104 N. C. 719, 10 S. E. 143. In granting the restraining order against the defendants' proceeding as authorized by the terms of said act, I think there was error.

Montgomery, J., dissents.

A petition for rehearing having been filed, **Douglas**, J., on June 14, 1900, handed down the following response:

This is a petition to rehear the case as reported in 124 N. C. 749, 33 S. E. 169. The difficulties of the case apparently arise from the fact that the concurring opinion, which, under the otherwise even division of opinion, had the peculiar effect of controlling the judgment of the court, did not fully concur in its opinion. The case as presented to us did not involve the abstract

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writ of *ad quod damnum*, so that a bridge consisting of an embankment across a small creek which may have previously been navigable by very small boats at certain periods of the tide will not be removed as an obstruction to navigation, but it will be presumed, where the obstruction has existed for a long period of time, that the right of navigation had been previously extinguished by some lawful mode.

Holroyd, J., states in that case that in Vooght v. Winch he had declared that a right of this description could only be determined by an act of Parliament, but that upon looking into the authorities he was satisfied that it might be done by a writ of *ad quod damnum*.

And it is settled that Parliament may make grants in derogation of the common right. People v. New York & S. I. Ferry Co. 68 N. Y. 71.

In the United States there seems to be no doubt that, so far as a mere question of obstructing a navigable stream, or even closing it against the public, is concerned, the proper authority may do so if it is necessary for the attainment of some end which will be of greater public good than will the continuance of the navigation right.

As said by the Massachusetts court, it sometimes happens that the full enjoyment of two public rights will, to some extent, interfere with each other; as where a highway or railroad crosses a navigable stream. It is then for the legislature to determine which shall yield, and to what extent, and whether wholly, or in part only, to the other. Com. v. Essex Co. 13 Gray, 239.

A limitation on this power has been suggested by Judge Sawyer, based upon the character of navigable streams. He says that the title of the state in the waters of its navigable streams is held in trust to protect, preserve, and improve for the purpose of navigation, and not otherwise. So that the legislature cannot authorize the beds of such streams to be filled up with mining *débris* to the destruction of the right of navigation. Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 778.

Also that the United States government has no such power over the navigable water of a state that it can authorize the unlimited discharge therein of mining *débris* to the destruction and great injury of their navigability. *Ibid.*

When, however, the question is merely as to the power to determine which shall yield the public right of navigation or some other public right, it is generally held that the determination of the proper legislative body is conclusive.

A water course is a condition of the earth's surface brought about by the processes of nature. It is this fact, the natural condition, that gives rise to the rights of the public in the natural water courses. The law undertakes to regulate these rights, and the government, in order to discharge its full duty to the public, to designate its instrumentalities, attempts to regulate and construct highways and bridges over and across them. Shelby County v. Castetter, 7 Ind. App. 313, 33 N. E. 986, 34 N. E. 687.

The state holds its title to lands under the navigable waters of a lake in trust for the people of the state that they may enjoy the navigation of the waters, carry on their commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves and piers therein for which purposes the state may grant parcels of the submerged land; and, so long as their disposition is made for such purpose no valid objections can be made to the grants. But it cannot make a grant which will abdicate its control over the entire harbor. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the land and water remaining. Shiras, Gray, and Brown, JJ., dissent. Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

So, tracks laid by a railroad upon land reclaimed from the water along the shore of a lake under authority of law and by a license from a municipal corporation which does not interfere with useful freedom in the use of the waters of the lake for commerce, foreign, in-

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right of the state to improve its floatable and navigable streams, and to charge such tolls as would fairly represent their increased value as public highways to those who had received the benefit of such improvement, but simply the right of the state to deprive the plaintiff of the use of his natural easement without some corresponding benefit in the nature of compensation. The dominating principle apparently controlling the judgment of the court is thus expressed in the concurring opinion on page 759, 124 N. C., and page 171, 33 S. E.: "The term 'floatable stream' implies an easement in someone to use the stream for purposes of transportation. Whether this easement belongs to the general public or is appurtenant to the riparian lands it is difficult to say. If it exists at all, it must belong to the riparian owner as a natural easement. Whether it vests in him solely or in common with others, it is needless now to discuss. If it is worth anything to anybody, it is a valuable appurtenance to his land, of which he cannot be deprived without adequate compensation. Whether this compensation must be in money, or may be in the increased conveniences afforded him by valuable improvements upon the stream, need not now be considered, as no compensation whatever appears to have been given to him, and no substantial improvements have been made which would increase the facility of transportation. I speak of the riparian owners as a class, each of whom has the easement, where it exists, as far as the floatability of the stream extends. If he owns the easement, then the state cannot charge him with the simple use of it. . . . I concede the right of the state to establish a highway on water or land. . . . I also admit that where the state has made, or caused to be made, valuable improvements of a local nature, it may charge a reasonable compensation for the use of the increased facilities and benefits

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terstate, or domestic, cannot be regarded as such an encroachment upon the domain of the state as to require the interposition of a court of equity for their removal or for any restraint in their use. Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

And a state holding the title to the lands covered by the waters of a navigable lake in trust for the people for the purpose of navigation and fishery does not repudiate that trust and transcend its powers by the enactment of a law authorizing a board of park commissioners to extend its boulevard over and upon a part of such lake, and to sell the submerged lands which might be reclaimed in extending the boulevard into the lake, to pay for the improvement, so long as such extension does not interfere with navigation, commerce, and the right of fishery. People *ex rel.* Moloney v. Kirk, 162 Ill. 138, 45 N. E. 830.

While the state owns the channel of the navigable rivers within its boundaries and the shores of its bays, harbors, and inlets between high and low water mark, its ownership is in trust for the public. It has no such proprietorship in them as it has in its property and public buildings. It cannot sell them so as to deprive the public of their enjoyment, nor can it take away riparian rights except for public use and by giving just compensation. Wilson v. Welch, 12 Or. 353, 7 Pac. 341.

In Bedlow v. New York Floating Dry Dock Co. 112 N. Y. 263, 2 L. R. A. 629, 19 N. E. 800, there is a *dictum* to the effect that the right of the people to use the natural public highways of the state is *jus publicum* and cannot be taken away or seriously impaired by any legislation whatever.

But in the subsequent case of People v. Baltimore & O. R. Co. 117 N. Y. 150, 22 N. E. 1026, it was said that the power to interfere with the *jus publicum* in public water for the public utility is recognized in Bedlow v. New York Floating Dry Dock Co. 112 N. Y. 274, 2 L. R. A. 629, 19 N. E. 800.

The sovereign has the absolute control of the right of navigation in and out of tidal bays, and may destroy it as may seem best for the whole public, without making or providing any compensation to such individuals as may be inconvenienced or damaged thereby under a constitutional provision for compensation for property taken for public use. Frost v. Washington County R. Co. 96 Me. 76, 51 Atl. 806.

Under an act of Congress appropriating money to protect the falls in a river as necessary to secure its future navigation and to facilitate commerce, a temporary suspension of navigation or of the passage of logs is justifiable and lawful when rendered necessary by the mode of improvement adopted. United States v. Rum River & M. Boom Co. 1 McCrary, 397, Fed. Cas. No. 16,206.

A bridge constructed over a navigable river in accordance with the legislature of both the state and Federal governments may be deemed a lawful structure, however much it may interfere with the public right of navigation. Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228, Affirming 18 Blatchf. 212, 10 Fed. 513.

Congress may authorize the erection of bridges over navigable waters,—at least where a draw is provided for the accommodation of navigation. The Clinton Bridge, 10 Wall. 454, *sub nom.* Gray v. Chicago, I. & N. R. Co. 19 L. ed. 969.

Though the same will to some extent interfere with navigation. People *ex rel.* Murphy v. Kelly, 76 N. Y. 475, 5 Abb. N. C. 383.

In Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co. 32 Ohio St. 116, the right is recognized to obstruct the Ohio river, a navigable stream, in the erection of a bridge over it under authority of Congress, in so far as its erection occasioned a reasonable necessity therefor.

The erection of a bridge across a navigable river will not be enjoined as a public nuisance where it is being built in accordance with the acts of Congress, the requirements of which have been approved by subsequent state legislation. Miller v. New York, 13 Blatchf. 469.

A bridge across a navigable river of the United States, built in conformity to an act of Congress, is a lawful structure; but there must be no exercise of any power in excess of that granted to the impairment of navigation. Silver v. Missouri P. R. Co. 101 Mo. 79, 13 S. W. 410.

A preliminary injunction restraining, as an impediment to navigation, a railroad company from erecting a drawbridge across the Connecticut river in pursuance of authority conferred by a state statute, will be dissolved upon the passage of an act of Congress legalizing the construction of the bridge in the mode and manner prescribed by the legislature of the state. Baird v. Shore Line R. Co. 6 Blatchf. 461, Fed. Cas. No. 759.

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afforded by such improvements. But this is in the nature of a toll, and not a tax, and presupposes some corresponding benefit to him who pays the toll. Where there is an utter failure of consideration, why should the toll be paid? But it is said to be in the nature of a special tax levied upon the property to be benefited. But on what property is it levied? Not on the logs; for they have not been benefited, nor even assisted, in their journey. Moreover, a tax must possess some element of uniformity, and, if levied locally for a special purpose, its disbursement must be confined to its creative objects." This we understand to be the general tenor of the opinion of the court, which says on page 751, 124 N. C., and page 169, 33 S. E.: "It is true that the legislature may by proper enactment provide for the improvement of such water way for the benefit of navigation. But the legislature cannot impose duties upon the commerce upon such waters for the purpose of 'building public bridges, and of cleaning out the fords, public and private, across' such water courses." The plain meaning of this is that such duties, whose imposition upon commerce can be justified only by their reciprocal benefits, cannot lawfully be diverted to a purpose, public or private, utterly foreign to their original object, nor can we give our approval to any law which permits such unjust diversion. As the purpose of a special tax or toll is the only justification for its imposition, it cannot lawfully be imposed where such diversion is permitted. We presume that a city can impose general taxes for the improvement of its streets, even if the bulk of it is spent in some one locality. It seems equally true that it can levy special assessments in different localities for the purpose of making special improvements within those localities. This is permitted upon the principle that, where money is spent for the benefit of those who paid it, they are

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It seems that the navigable streams within the state of Texas are public highways subject to the exclusive control of the state; and that the legislature has authority to obstruct them wholly or partly, if the public interest will be promoted thereby. Selman v. Wolfe, 27 Tex. 68.

The state, or a corporation to which its power is delegated, is exclusively to judge of the time, place, and circumstances, where the interests of the community require the construction of a bridge across a navigable river, and in general no third party can question the propriety of the exercise of such power. Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3,046.

The sovereign authority may authorize the construction of bridges or other obstructions in navigable waters, and when such obstructions are not obnoxious to the regulations of Congress, and do not come in conflict with the paramount authority of the United States, they are not nuisances. People *ex rel.* Howell v. Jessup, 160 N. Y. 249, 54 N. E. 682.

The state has the unrestricted right of a proprietor over the waters of rivers, navigable only within its boundaries, and may obstruct or close the same if the public interest or convenience requires it. As a public highway, it is free to all citizens for navigation; but, when the legislature deems it more beneficial to the public to close such highways by a permanent bridge, it is a question only of public expediency, and furnishes no just ground of complaint from individuals who have theretofore enjoyed benefits and advantages which may be abridged or cut off by the improvement. Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593.

A state may draw water from one public river in improving the navigation of another, and any injury caused thereby will be merely consequential. McKeen v. Delaware Div. Canal Co. 49 Pa. 424.

In the absence of any intimation by Congress to the contrary, a state may authorize a bridge over tidal water within its limits, although the effect is to cut off access along an entire water course from wharves to the sea. Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

The states within which navigable rivers lie may authorize the construction of bridges over them until Congress interferes and supersedes their authority. Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423.

The legislature has power to authorize the erection of bridges over streams declared public highways, either by a general act or a special one. Smithfield Creek Bridge, 6 Whart. 363.

The legislature may authorize the construction of a bridge which will interfere with the public right of navigation, without providing compensation for injuries which individuals will receive therefrom. Matthiessen & W. Sugar Ref. Co. v. Jersey City, 26 N. J. Eq. 247.

The authority of a territorial legislature extending to all "rightful subjects of legislation" clearly includes the right to authorize the erection of a particular dam at a certain place and specified height, so far as the public or state is concerned. Stoughton v. State, 5 Wis. 291.

The obstruction of a tidal river under license from the state cannot be held a nuisance without proof of the fact that the resulting public damage and injury greatly exceed the public benefits of the erection, and perhaps not upon proof of entire destruction of the *jus publicum*. People v. Vanderbilt, 38 Barb. 282.

The legislature may, as against the rights of public navigation, permit the bridging of navigable waters. Charles River Bridge v. Warren Bridge, 7 Pick. 344.

Although in an earlier case it has been held that if a highway is located over a water course, either natural or artificial, the public cannot shut it up, but may make a road over it by way of bridges. Perley v. Chandler, 6 Mass. 454, 4 Am. Dec. 159.

A causeway or bridge may be erected across navigable or tide waters, under legislative authority, and, if navigation is impaired or injured thereby, it will be *damnum absque injuria*, unless there is a statutory provision for the recovery of damages. Rogers v. Kennebec & P. R. Co. 35 Me. 319.

The legislature has power to regulate and control the navigable waters within the limits of the state, and it cannot be prevented from authorizing the erection of a bridge over a navigable river on the ground that the river is a public highway which every citizen has a right to use without interruption or obstruction. Com. v. Breed, 4 Pick. 460.

It may determine whether or not a bridge will be of sufficient convenience to warrant the infliction of incidental inconvenience upon the

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not injured, as the nature of the improvement is supposed to be worth its cost. But can a city levy special taxes in one particular section to be spent in an entirely different section? Or can it impose a special assessment upon one piece of property for the exclusive benefit of another? Surely not. And yet this has been done in the case at bar. A heavy assessment has been levied on these logs without any corresponding benefit to them or their owner. No improvement has been made in the floatability of the stream of which they have had any advantage. At best, the money which they paid would be devoted to the future improvement of the stream, even if none were used in building bridges or cleaning out private fords. Their owner may not have any more logs to float down, and, if he did, he would probably be called on to pay toll for the floatage. This right of floatage he already possessed, as we have held this to be a floatable stream. It did not come to him by grant from the state, nor was it created by the decision of this court. All that this court did or could do was to declare its existence as a natural easement,—the right inherent in the general public to use a natural highway. It was said that this right belonged to the riparian owner, but it was not said that he was its exclusive owner. If it exists, it certainly belongs to him in some capacity and to some extent. If it is a local highway, he is entitled to its use by virtue of his riparian ownership; and, if it is a public highway in its broadest sense, he is equally entitled thereto as one of the general public. This right cannot be taken from him without just compensation in some form or other, and this is the essence of our decision.

There seems to be an idea that an easement can exist in the general public without belonging to the individual. The general public, in such a sense, is a pure abstraction. As an artificial entity, it can-

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navigation of the stream by its construction. *Ibid.*

The authority of the legislature to empower the erection of bridges over navigable waters, and thereby obstruct in a greater or less degree the free passage of vessels and boats over and through the same, is clear and unquestionable. Com. v. Taunton, 7 Allen, 309.

Subject to the powers of Congress to regulate navigation, a state may authorize the building of bridges over navigable waters, though there may result some impediment to navigation. Carvalho v. Brooklyn & J. B. Turnp. Co. 76 N. Y. Supp. 859.

In Charlestown v. Middlesex County, 8 Met. 202, it is said: "We cannot doubt that a navigable stream may cease to be such by the appropriation of the soil, under legislative authority, to other purposes." But this was said with reference to the right to lay out highways across streams, and not with the right of riparian owners in view.

The construction of a new channel by the Federal government between adjacent bodies of water to afford increased facilities for navigation will not be enjoined on the ground that the old outlet will be closed by sand blown into it, where it has been kept open only by dredging, nor because a diminution of the current will cause delay or inconvenience to mill owners on the old outlet. Avery v. Fox, 1 Abb. (U. S.) 246, Fed. Cas. No. 674.

The course of a non-tidal fresh-water stream may be altered in the discretion of the legislature, if the river is of public use for transportation purposes, notwithstanding that such a river is prima facie private in point of property, it being in the nature of a public highway. Spring v. Russell, 7 Me. 273.

It is *damnum absque injuria* where, by reason of a lawful alteration of the course of a river, a loss occurs by reason of inability to float logs to a desired destination. Spring v. Russell, 7 Me. 273.

The legislature may grant the right to erect a dam across a stream which is a public highway. Crittenden v. Wilson, 5 Cow. 165, 15 Am. Dec. 462.

The state may grant a franchise to erect a dam across a public river for the improvement thereof, and said dam cannot be abated as a nuisance as the statute modified the common law and suspended the privileges previously enjoyed which are inconsistent therewith. State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382.

A dam in a navigable river first erected without compliance with the requirements of law, when altered by public officers so as to conform thereto, is a lawful structure while it remains as left by them. Ensworth v. Com. 52 Pa. 320.

A dam erected in a public stream by authority of the legislature is not a nuisance. Woodward v. Webb, 65 Pa. 254.

In the absence of any act of Congress which bears upon the case, the legislature of a state may authorize the erection of a dam across a tidal stream within its boundaries for the purpose of draining a marsh and improving the health of the community. Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412.

The state may grant a franchise for the erection of a dam across the head of a river harbor where the tide ebbs and flows. Parker v. Cutler Milldam Co. 20 Me. 353, 37 Am. Dec. 56.

One accustomed to float timber in a river cannot complain of an obstruction of the stream by the erection of a dam in conformity with law and with the consent of the proper authorities. Such obstruction can only be a grievance when beyond that which is legally permitted. Wood v. Rice, 24 Mich. 423.

The public right of floatage on the stream is not such as to prevent the erection of dams, drags, and flumes, which do not prevent a reasonable chance for public passage. Pearson v. Rolfe, 76 Me. 380.

The state may authorize the obstruction of a floatable stream. State v. Elk Island Boom Co. 41 W. Va. 796, 24 S. E. 590.

A municipal corporation may, for the purpose of preserving the health of its citizens, fill up a tidal creek which has become a nuisance because of the offal cast into it, although the result is to destroy the navigation upon it, where it does not appear that the riparian owners have acquired any right to such navigation. Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421.

If the stream may be completely closed, of course it may be only partially obstructed.

The doctrine that the state has the power to require one public easement to yield to another more important, and that an intention to grant such power may appear by necessary implication, is recognized in Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255, as affecting the construction of a bridge as part of a public highway over a navigable river, subject to the limitation, however, that it can be extended no further than the necessities of the case require.

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not use the highway, as it can neither ride nor walk, having neither feet nor hands. The easement is available only to the individual, and, if he has the right to use it, then he has the easement.

Again, it is suggested that the state owns the highway separate and apart from the individual, to whom it may forbid its use without any form of compensation. This is probably a survival of the old idea that the highways belonged to the King, in whom in fact was vested the ultimate fee to all land. While, for purposes of government, we must still regard the state as an artificial entity, apart from the individual citizen, and while certain kinds of property must be reserved by the state to be used in a certain manner and for certain specific purposes free from all private interference, yet after all the state is but the trustee for its people, and, within the necessary limitations of the trust, the privileges of the citizen are inherent and of common right. Thus the right of the individual to use the highway does not come from the permission of the state, but rests upon the primary object for which the highway was established, —the use of the public. The power of the state to regulate the highway is an entirely different matter, but rests upon the same general principle,—the ultimate welfare of the people. Suitable highways are absolutely necessary to all people, and the more free, intelligent, and progressive a people become, the greater will be their demand for highways suitable to their development and commensurate with their advancement. Such highways it is the duty of the state to establish, and with this duty go the corresponding powers necessary to its performance. Such powers, however, although ample and largely within the discretion of the legislative body, cannot ignore the vested right of the citizen. Such rights, on the other hand, are not permitted to lie "in cold obstruction across the pathway" of the

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And the doctrine is stated, on the authority of this decision, to be a principle, well established, in the case of Commissioners v. Board of Public Works, 39 Ohio St. 628.

A state may, subject to the powers of Congress to regulate navigation, authorize the building of bridges over navigable waters though there may result some impediment to navigation, and such power may be delegated to a corporation. Carvalho v. Brooklyn & J. B. Turnp. Co. 36 App. Div. 522, 67 N. Y. Supp. 539.

A bridge over a public stream, if imperatively demanded for public convenience, cannot be called a public nuisance because it causes some inconvenience or affects the private interests of a few individuals in the navigation of the stream. Milnor v. New Jersey R. Co. 6 Am. L. Reg. 6, Fed. Cas. No. 9,620.

In Silliman v. Hudson River Bridge Co. 4 Blatchf. 395, Fed. Cas. No. 12,852, Hall, J., said that it is a legislative, and not a judicial, power to determine between the conflicting interests of river navigation and of transportation across navigable rivers by permanent structures.

c. *As against riparian owners.*

HUTTON v. WEBB presents a phase of the general question of the right to obstruct or destroy rights of navigation which has not been adequately considered by the courts. According to sound principle, one of the rights of a riparian owner is that of access from his land to the water adjoining it. *Note* to State *ex rel.* Denny v. Bridges (Wash.) 40 L. R. A. 593. Of what value is that right if the state can, at any point between his land and the highways of the nations, place an obstruction which will prevent his reaching such highways? It would seem that wherever the Constitution requires compensation in case private property is injured for public use, the riparian owner cannot be shut off from access to such highways unless he is compensated for the resulting injury. Even where the Constitution protects property only, and does not provide compensation for injury, it would seem that the destruction of a natural highway shutting an abutting owner off from communication with the outside world, which communication may have been the element which made the property valuable, is an injury so direct that compensation should be made for it. Few of the cases have required such compensation, but in most of them the discussion has turned on the conflicting rights of Congress and the legislatures, and the constitutional rights of the riparian owners have received scant consideration. If the use of the stream is not wholly destroyed, but merely rendered more difficult, the riparian owner cannot complain.

The question arose before the English House of Lords in a case originating in Canada, and the attempt was made to extend the right of access to prevent interference by a bridge below the plaintiff's property. The case was Bell v. Quebec, L. R. 5 App. Cas. 84, 49 L. J. P. C. N. S. 1, 41 L. T. N. S. 451, which was a case of a bridge erected on the river lower down than plaintiff's land so as to interfere with navigation. The court said that while, in Lyon v. Fishmongers' Co. L. R. 1 App. Cas. 662, 46 L. J. Ch. N. S. 68, 35 L. T. N. S. 569, 25 Week. Rep. 165, the House of Lords undoubtedly decided that a riparian owner has a right of access to the water which cannot be interfered with without invading his rights, it did not go to the extent which counsel in the Bell Case argued that it did, that the riparian proprietor has a right to the free and uninterrupted navigation of the river beyond his right as one of the public: and it was held that the Lyon Case determined his right of access to the river only, and did not deal with his right of navigation when upon the river.

The right of the legislature, as against the rights of owners of landing places along the stream, to authorize the erection of bridges over tidal rivers, the effect of which will be to interfere somewhat with the ease of navigation, is beyond dispute. Atty. Gen. *ex rel.* Pettee v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526.

In Lansing v. Smith, 8 Cow. 146, improvements in the bed of the Hudson river, made under authority of the legislature, were made the basis of an action by a riparian owner on the ground that they impaired the use of his wharf. But the court said the right of plaintiff to navigate to and from his wharf is not denied. All that is contended for on the part of defendants is that the mode in which his right shall be exercised is subject to be controlled and regulated by the legislature, as in their judgment the interest and convenience of the public may require. And it was further held that plaintiff could not maintain an action because the injury for which he sought re-

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state, but are subordinate to the paramount right of eminent domain. By condemnation, with compensation, any right of property can be taken for a public purpose.

We do not deny the right of the state to improve floatable streams, including the one in question, and to regulate their use, even if it interferes with the natural easement hitherto enjoyed by the public. When, however, one is deprived of his vested easement, which is the result, *pro tanto*, if he is made to pay for its use, he must be given some compensation in money or in kind. This compensation must be actual and present, and not merely speculative and prospective. Where the easement is in the nature of a toll, the benefit must be contemporaneous and reasonably coextensive with the payment. When we say that the state can do this, we mean it can do so directly, or by means of such agencies as it may deem best suited to accomplish its public purposes. We do not deny the power of the state to intrust such work to a private individual or corporation, nor the right of such private party to charge such reasonable tolls as would return a fair profit; but there may be some doubt whether public agencies would be entitled to any profit beyond the interest on the investment, and the cost of maintenance, operation, and repair. On this point we express no opinion, as it is not before us, in our view of the case. All that is now before us is the judgment of the court below continuing until the trial of the action the injunction restraining the sheriff and tax collector "from proceeding in any way under the assessment against the plaintiffs mentioned in the pleadings, and also from interfering with the floatage of logs by the plaintiffs down said Catawba and Johns rivers, by the assessment or imposition of toll, or the levying or collecting of any tax or toll on the property of the plaintiffs, or by the sale of any property of

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muneration was not peculiar to himself. It has been equally felt by a hundred others whose property is similarly situated.

So, the Mississippi court has held that the state, by virtue of her right of eminent domain, has the paramount right to control and dispose of everything within the limits which is not absolute and exclusive private property to the promotion of the public good. The riparian owner has only a qualified right in the water flowing in the stream, and the state may, without violating the constitutional provisions against taking property, divert the water from its channel for the purpose of improving navigation, although it deprives the riparian owner of all benefit of it. The rights of the owners of land bounded by public rivers used for navigation are subservient to the right and power of the state to use and appropriate them to the public good in promotion of navigation. Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec. 126.

Every public improvement, while adding to the convenience of the people at large, affects more or less injuriously the interests of some. It would be no more absurd for the owners of stage coaches and taverns to complain of and object to the construction of railroads, than for persons on the banks of navigable rivers to complain of and object to the construction of bridges. Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228.

With respect to the right to destroy the riparian owner's right of navigation, a case came before the Supreme Court of the United States in which by the building of a bridge the approach of masted vessels to plaintiff's wharf was entirely cut off. The court held that, in the absence of an intimation by Congress to the contrary, a state may authorize a bridge over tidal water within its limits although its effect is to cut off navigation along an ancient water course from wharves thereon to the sea. Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

But the court dismissed the question of the rights of the riparian owner with the remark that the injury to them was consequential. The contention considered was that "such an obstruction to the navigation of the river was repugnant" to the United States Constitution. And the court says the case "stands before us as if the parties were" the state and the United States. Justices Clifford, Wayne, and Davis dissented on the ground that Congress had regulated the navigation of the river. It is very evident that the rights of the riparian owner received no adequate consideration.

There is a *dictum* of Justice Grier in The Passaic Bridges, 3 Wall. 782, and *sub nom.* Milnor v. New Jersey R. & Transp. Co. 16 L. ed. 799, which seems to imply a right to destroy the rights of riparian owners. The judge says: I see no reason why the state of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves at the mouth of the river.

But when read in its true connection it has no such force. In that case the stream was not wholly obstructed because draws were to be left in the bridges. The action was to enjoin them as public nuisances, but it was held this could not be done since they were authorized by the legislature. The court, however, remarks: "If special damage occurs to an individual the law gives him a remedy: but he cannot recover, either in a court of law or equity, special damage as for a common nuisance if the erection complained of be not a nuisance." This decision was affirmed by a divided court. It is evident that it decides nothing as to the rights of the individual.

In Whitehead v. Jessup, 53 Fed. 707, it was held that a riparian owner who has free access to the channel in front of his land does not show special injury, and is not entitled to maintain a suit to compel the removal of a bridge over the channel at a point ½ mile distant, although it obstructs the navigation of his boats to and from adjacent waters.

The legislature has the power to authorize a railroad company to build a permanent bridge over a river navigable only within the boundary of the state, without giving any right of action to riparian owners above though damages result to them from the loss of navigation and obstructing the flowage of water, as they hold their lands subject to the right of the public to use the stream at the will of the legislature, and the damages sustained are not only without remedy, but are without right to a remedy. Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593.

The inhabitants of a town situated above a toll bridge across a navigable river are not entitled to compensation for a consequential injury to their shipping interests, whether they receive any benefit from the bridge or not. Dover v. Portsmouth Bridge, 17 N. H. 200.

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the plaintiffs under any assessment or otherwise."

The learned counsel for the defendant is mistaken in supposing that we overlooked the case of *Burke County* v. *Catawba Lumber Co.* 116 N. C. 731, 21 S. E. 941, to which we presume he refers. That case was cited in the dissenting opinion, and referred to in the concurring opinion, but is not involved in the decision of this case. The act under consideration does not affect "the principle that the right of floatage in the public is superior to any right of riparian proprietors," but attempts to deprive both the public and the riparian owners of their free right of floatage without compensation to either. Nor do we deny "the power of the legislature to provide for levying tolls or assessments for keeping in order public highways used for floatage." "Keeping in order" implies that the highway has previously been put in order; that is, that substantial improvements have already been made, from which the user has derived a substantial benefit. In such cases, the toll is regarded as the equivalent of the benefit already received. Our opinion not only recognizes the right of floatage as existing in the public, but protects that right against the encroachment of the state. At the same time, we admit the right of the state, directly or through proper agencies, to improve the stream whenever it sees fit to do so, and to charge a just equivalent for the benefit enjoyed as the result of such improvement. Upon the facts of the case as presented to us, and the legal principles above set forth, we think the judgment should be affirmed.

The petition to rehear is therefore dismissed.

Clark, J., dissenting:

We are saved any discussion whether this is a floatable stream or not; for it was held in *Burke County* v. *Catawba Lumber Co.*

In one case in the lower courts of Illinois it was held that the state may reclaim the submerged land under an inland sea for park purposes without paying compensation to an abutting owner for deprivation of his right of access to the water. The court says no court has yet gone so far as to hold that the owner of a natural shore is entitled to riparian rights as against the sovereign. When one man buys a lot whose boundaries are certain and defined, it is his privilege to permit it to remain open, uncultivated, and unproductive so long as he pleases. Until he improves it the owner of the adjoining lot has an implied license to pass over it, to enjoy the benefits of the light and air and other incidental advantages which it affords him, but the former may cut off these advantages by building upon his lot without being liable in damages to the person who hitherto enjoyed them. And the same rule applies in favor of the government in respect to its public waters. People *ex rel.* Atty. Gen. v. Revell, 29 Chicago Legal News, 345.

Those decisions are hardly supported by sound principle, and have not received the assent of other courts.

Although an obstruction in a river would amount to a public nuisance, the owner of a wharf much frequented by vessels is injured in a manner distinct from the rest of the public by an obstruction that would exclude vessels from his wharf, and is entitled to an injunction. Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

In Chicago & P. R. Co. v. Stein, 75 Ill. 41, where the claim was made that access to plaintiff's property had been injured by the erection of a bridge over the river, there seems to be no question on the part of the court that in case of injury compensation must be made; but it was held that no injury was shown in that case.

Most of the cases in which this question has been considered have been decided against the riparian owner for the reason that he was held to have no interest distinct from the general public, and therefore could not maintain the action. As shown *infra*, V., these rulings seem to involve a misconception of the principle involved.

That a portion of a public river is cut off from the main channel by improvements placed in the river, does not make the injury to the wharves upon that portion peculiar to the owners of them, but the right to navigate is common to all the citizens of the state, so that the improvement, if unauthorized and a nuisance, will give no private right of action, but must be abated by a proceeding on the part of the public,—at least, where the ground of complaint is merely the depreciation in value of the property by the improvement, and not loss by special instances of inability to approach the wharf by persons desiring to do so. Lansing v. Smith, 8 Cow. 146.

The fact that wharf owners will suffer injury in a much greater degree than that which is sustained by others will give them no right to maintain a bill in equity to prevent the construction of a railroad over navigable water. Fall River Iron Works Co. v. Old Colony & F. River R. Co. 5 Allen, 221.

The owner of a wharf cannot maintain an action for illegally filling up public navigable waters and thereby cutting off access to the wharf. This is upon application of the rule that for an injury common to all, arising from a public nuisance, the remedy is by indictment or public prosecution. Harvard College v. Stearns, 15 Gray, 1.

A private owner upon the shore of a bay opening into a tidal river is not entitled to maintain an action to enforce the statutory duty of a railroad company which builds its road along the bed of the stream to construct a drawbridge to permit access to the bay. Getty v. Hudson River R. Co. 21 Barb. 617.

An injunction will not be granted at the instance of a riparian owner to restrain the erection of a bridge over a navigable stream the effect of which will be to cut his wharves off from access to the sea. The Passaic Bridges, 3 Wall. 782, and *sub nom.* Milnor v. New Jersey R. & Transp. Co. 16 L. ed. 799.

But it has also been held that a riparian owner on a navigable stream is entitled to an injunction restraining the construction of a bridge below his lands in such a manner as to interfere with navigation, where he will be specially injured thereby in the use and profitableness of a landing and warehouse upon his premises in connection with the navigation of such stream. Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

A ditch or canal leading from a harbor past the land of several private owners, which is filled with water from the harbor, and is not of itself a water course, is subject to condemnation by a railroad for a right of way for its tracks, or may be required to be filled up by

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116 N. C. 731, 21 S. E. 941, that the Catawba river, at that part of it which is embraced in the statute now before us, was a floatable stream. This act (Acts 1897, chap. 388) recites that decision, and provides for the regulation of the use of the stream for floatage purposes. In *State* v. *Glen*, 52 N. C. (7 Jones L.) 321, it was held that floatable streams are "public highways by water," like navigable streams; the only difference being that in floatable streams the bed of the stream is capable of grant to the riparian owners for such uses as will not conflict with the paramount public right to the use of the stream for floatage. The riparian owner, as such, can have no rights not common to all others, except over the bed of the stream, to the center, within his boundaries. He can have no possible rights, as riparian owner, above or below his line; for there the riparian rights of the other owners come in. Consequently, as riparian owner he has no right whatever above or below his line to the use of the stream for floatage, any more than a landowner over whose land a toll road or canal or other highway runs. The riparian owner has rights of floatage, but not as a riparian owner, and only as any other citizen has the right to the use of a public highway, and on the same terms as is granted to all others, whether that be free or on payment of toll. By the accident of location, a riparian owner may have greater need to use the stream for floatage or for navigation (when it is navigable) and greater ease of access. But anyone else, who can get his logs to the stream either by the use of public roads crossing the stream or by permission of some riparian owner to cross his land, when he places his logs in the stream, has the same right to use the stream. The stream being a public highway (*State* v. *Glen*), he owes no duties or tolls to any riparian owner, and no riparian owner has any superior rights to his, any more than landowners ad-

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the municipality. Ligare v. Chicago, M. & N. R. Co. 166 Ill. 249, 46 N. E. 803.

II. *Injury by individual.*

a. *As riparian owner.*

The rights of a riparian owner do not extend to the doing of anything in the water which will interfere with the public right of navigation. The navigation right is paramount, and must be observed.

The fact that the title to the soil of a navigable river is in the adjoining proprietor by a grant from the Crown will not justify him in the erection of a structure which interferes with the navigation. Atty. Gen. v. Lonsdale, L. R. 7 Eq. 377, 38 L. J. Ch. N. S. 335, 20 L. T. N. S. 64, 17 Week. Rep. 219.

But a riparian owner as appurtenant to the ownership of the bank has a right without license to construct a dam across a stream which does not obstruct or interfere with the navigation of the stream for the purposes for which it is navigable. Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41.

The public right of navigation is not destroyed by a conveyance by the state of the basin or bed in which the navigable waters rest or through which they flow, and an express reservation of such common easement is unnecessary. Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 18 L. R. A. 826, 21 Atl. 1090.

The owner of the banks of a navigable river, whether his title extends to its center thread or is confined to its margin, has no right to occupy and use the stream so as to obstruct its free navigation by the public. Cox v. State, 3 Blackf. 193.

A wharf is a nuisance if it occasions any hindrance or impediment whatever to the navigation of the river by any destruction of vessels or boats. And the circumstance that a benefit results to general navigation from it is immaterial. Reg. v. Randall, Car. & M. 496.

The obstruction of a navigable stream cannot, in view of the ordinance of 1787, be maintained to promote private interests, even if it might be so maintained by the sovereignty of the state for the promotion of a system of public works. Hubbard v. Toledo, 21 Ohio St. 379.

But the unauthorized enclosure of a part of a highway whether by land or water may be a purpresture and a public wrong, but it is not a public nuisance unless it subjects the public to some degree of inconvenience or annoyance. The private appropriation for dam purposes of a part of the bed of a river navigable only for floatage is not necessarily either a purpresture or a nuisance. Atty. Gen. *ex rel.* Muskegon Boom. Co. v. Evart Boom. Co. 84 Mich. 462.

A dam may be erected by the owner of the bed of a stream. Although the stream be declared a public highway after he obtain his title, he still may exercise that right without license from the state if navigation and the passage of fish be not impeded. Barclay R. & Coal Co. v. Ingham, 36 Pa. 194.

A riparian proprietor upon a stream navigable only for the purpose of floating logs has, as appurtenant to such ownership of the bank, the exclusive right to dam the stream upon his premises, provided the floatage of logs is not obstructed thereby. Hallock v. Suitor, 37 Or. 9, 60 Pac. 384.

It seems, that there may be a dam legally constructed in a stream without order of court by grant or prescription, and also that a riparian proprietor may erect a mill under his right of dominion over his property without order of court, even though the stream be floatable. Watts v. Norfolk & W. R. Co. 39 W. Va. 196, 23 L. R. A. 674, 19 S. E. 521.

The owners of dams erected in a navigable stream must provide a chute properly constructed and adapted to the stream and dam, to enable the navigator to pass safely by ordinary care and diligence in running it, and having his raft or float constructed with the usual skill and care. Newbold v. Mead, 57 Pa. 487.

A right to erect a dam across a cove on tidal waters is not necessarily void as the private estate may be enjoyed to the full extent practicable consistently with the public right in such waters. Dyer v. Curtis, 72 Me. 181.

The erection of mills and dams upon a floatable stream does not necessarily interfere with the public easement, if suitable means are provided for a continuance thereof, so that the public and private rights can both be enjoyed without conflict. Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298.

The right of a citizen to take up his abode permanently upon a boat for purposes of business or as a residence upon a navigable river rests upon the will of the state having jurisdiction thereof, and is subject to such conditions

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jacent to any other public highway have superior rights to the use of the highway. All public highways are alike in this: that their regulation, and the terms on which they may be used, rest with the people at large, who express, and can express, their will only through their representatives in the legislature, unless when some question is presented direct to them at the ballot box by what is now termed a "referendum." Whether this or any highway shall be free, or whether tolls shall be paid, and, if so, what tolls, is a matter for the legislature, not for the courts, to decide. The riparian owner loses no property rights. He has none beyond his upper and lower lines and to the thread of the stream, and within those limits he has the bed of the stream for such use as he can make of it, but subject to the superior right of the sovereign to the use and regulation of the stream for all its citizens alike. The lawmaking power is confided by the Constitution to the general assembly, and no act of theirs can be held invalid unless it plainly and palpably violates some provision of the state or Federal Constitution. No provision of either can be pointed out that restricts the power of the general assembly to regulate the use of public highways or to exact tolls for the use of them. There is no requirement of either instrument that work must be done by the sovereign on public highways by water before tolls can be exacted, and that thereafter tolls can be exacted only to the precise amount of public funds so expended. Whether or not this would be a desirable restriction upon the power of the lawmaking body intrusted with general legislation, the people have not seen fit to place it in the Constitution, and no one else can place such restriction there. The Supreme Court of the United States has uniformly held that the power of a state legislature to reg-

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as may be imposed by such state. A statute, therefore, requiring such persons to obtain a license from the proper officer of the county in which such boat is to lie or ply and to pay a license fee therefor before being allowed to take up a residence on any navigable waters lying within or bounding a state, is a proper exercise of the police power of a state, and is not unconstitutional as infringing upon the inalienable rights of citizens to live where they choose, of which right they cannot be deprived by taxation, or as being in violation of the provisions of the Federal Constitution regarding commerce among the states. Robertson v. Com. 101 Ky. 286, 40 S. W. 920.

NORTHERN PACIFIC R. CO. v. UNITED STATES presents a unique example of obstruction of a water course. A somewhat analogous case, to which attention is called, is Herbert v. Pennsylvania R. Co. 43 N. J. Eq. 21, 10 Atl. 872, where it was held that a mandatory injunction cannot be issued interlocutorily against a railroad company who by filling in a bed of mud and silt of considerable depth disturbs the surface of adjoining property to the damage thereof.

The riparian rights of owners of land bordering upon a navigable river do not extend to the right to infringe upon the public easement of navigation, or to obstruct one of the two channels into which the river is divided by an island, which is in fact navigable, although the other channel is the main one, and the effect of the obstruction of the former might result in great public good. It is not for them, but for the state, to judge whether the whole of a public highway is necessary for the public accommodation. People v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339.

One who claims the right to impair or obstruct the public right of navigation must show a grant of such right in clear terms. Thompson v. Paterson & H. R. R. Co. 9 N. J. Eq. 526.

Permitting wharves in a port to decay, or building out into the water, is a nuisance. Hale, de Portibus, chap. 6.

A wall built through the water of Lake Michigan is a purpresture and liable to be abated by the state. Shortall v. Fitzsimons & C. Co. 93 Ill. App. 231.

Without legislative grant, no person can place below low-water mark in a public harbor any obstruction or impediment to the full enjoyment of the right of navigation, and a person specially damnified thereby may remove such obstruction. Wood v. Esson, 9 Can. Sup. Ct. 239.

A crib or pier erected in the waters of the harbor of New York is a public nuisance, unless erected under authority of a power competent to confer it. People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351.

A mere purpresture is liable to abatement in an action in equity at the suit of the attorney general irrespective of the question whether or not it was actually a nuisance. Atty. Gen. *ex rel.* Askew v. Smith, 109 Wis. 532, 85 N. W. 512.

The provisions of Magna Charta for the abatement of weirs applies only to open weirs for taking fish, and does not extend to abating mills or mill stanks and causeways. The first statute providing for their abatement being the statute of 25 Edw. III. chap. 4, which statute provides for the abatement of those which were levied in or erected in or since the reign of King Edward I. Hence the commission of sewers is without authority to abate causeys erected before the reign of Edward I., and which have not been raised or enhanced beyond their former height since that time. Case of Chester Mill, 10 Coke, 137*a*.

The public may, by user, have a right to navigate a stream at a point above the action of the tide, and riparian proprietors will not be permitted to construct bridges or other structures where they interfere with the navigation. Ewing v. Colquhoun, L. R. 2 App. Cas. 839.

A lease from the owner of flats in a cove on tidal waters is void which authorizes the lessee to dam up, without legislative sanction, the mouth of the cove during winter months, let it fill with fresh water, and cut the ice that forms thereon, as it authorizes an illegal act. Dyer v. Curtis, 72 Me. 181.

Whatever the construction of the deeds held by a mill owner, he cannot be permitted unreasonably to interfere with the right of any citizen to use a navigable creek upon which his dam may be erected as a highway to float his boats, rafts, or logs. Parks v. Morse, 52 Me. 260.

The riparian owner cannot use his land between high and low water mark for permanent structures which will interfere with the public right of navigation. Com. *ex rel.* Hensel v. Young Men's Christian Asso. 169 Pa. 24, 32 Atl. 121.

But the fact that the ordinary and usual course of a ferryboat will bring her within 10

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ulate the use of floatable streams and prescribe tolls upon logs is unlimited by the United States Constitution, save when such stream lies in two states, and even then the lower state can place tolls upon logs beween any two points in it, and also as well upon logs coming from a state higher up, unless Congress has legislated on the latter subject. In a very recent decision in the United States (*Lindsay & P. Co.* v. *Mullen*, 176 U. S. 126, 44 L. ed. 400, 20 Sup. Ct. Rep. 325), it is said, speaking of the Manistee river: "The state, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the state to another. The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways. . . . And, to meet the cost of such improvements the states may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. . . . Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the state." What the improvements shall be, and what the rate of toll; whether the tolls shall be greater or less than the cost of the improvement; and whether the agency shall be directly by the state through special commissioners, or, as here, by the agency of the boards of commissioners of the riparian counties; or whether the agency shall be by means of chartered "navigation companies" or contractors (for all these methods have been tried); and whether the state shall raise a fund by tolls to be applied, when raised, to making the improve-

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or 20 feet of the corner of a pier, not itself the boundary of her slip, keeping as closely as she can, does not give any exclusive or superior rights to the occupation of so much of the water area surrounding the pier as may be required for the uses for which it was erected. Conover v. The John S. Darcy, 38 Fed. 619.

The owner of the beds of sloughs tributary to a navigable river and over which the tide ebbs and flows has no right, as against the public, to dam the sloughs and keep the tide waters out, if, by thus reducing the tidal area of the river, and reducing the amount of water flowing in and out, he causes the mouth of the river to become obstructed by sediment, to the injury of navigation. People *ex rel.* Robarts v. Russ, 132 Cal. 102, 64 Pac. 111.

A riparian owner may maintain an action to enjoin the obstruction of the public stream by a private owner in such a way that access to his property is cut off. Blanc v. Klumpke, 29 Cal. 156.

A riparian owner on a navigable stream must, in removing obstructions lodging on his banks, exercise a cautious regard, so as to create no obstruction to navigation. Porter v. Allen, 8 Ind. 1, 65 Am. Dec. 750.

In the absence of statutory authority, there is no right to blockade a navigable stream by booms. Enos v. Hamilton, 24 Wis. 658.

If a river is a public highway all impediments to its use, such as booms, are nuisances. But if it can be used only for certain purposes the riparian owner is bound only to abstain from obstructing its use for such purpose. Morgan v. King, 18 Barb. 277.

A pier erected by a riparian owner in the navigable water of the Mississippi river as part of a boom for his logs is unlawful, and he will be liable for loss occasioned by a collision of a boat with it. Such structure differs from a wharf made to facilitate commerce. Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619.

Riparian proprietors have no right to erect wharves between high and low water mark if thereby the passage of vessels and boats will be materially straitened and injured. Kean v. Stetson, 5 Pick. 492.

Upon the general question of wharfage rights see *note* to Madison v. Mayers, 40 L. R. A. 635.

Navigation must not be obstructed, nor the passage of fish into bays, creeks, or up the course of navigable rivers, without legislative authority, and any such obstruction will constitute a common nuisance. Dyer v. Curtis, 72 Me. 181.

The navigable waters of the country are a common privilege for passing upon them, and the right cannot be interrupted by a dam. Dunbar v. Vinal, Sullivan, 286, in 2 Dane, Abr. 695.

A dam cannot be placed across a stream which in its natural state is capable of floating logs without authority of the legislature. Knox v. Chaloner, 42 Me. 150, 157.

The owner of a mill site cannot maintain a dam so as to interfere with the public use of the river as a stream navigable for rafts and logs. Dwinel v. Veazie, 44 Me. 167, 69 Am. Dec. 94; Veazie v. Dwinel, 50 Me. 484.

A dam constructed across a floatable stream constitutes a public nuisance, unless the dam owner has provided suitable sluices to allow logs floated down the creek to pass around or through the dam. Gastin v. Mace, 33 W. Va. 14, 5 L. R. A. 892, 10 S. E. 60.

The owner of a millidam cannot interfere with the right of the public to float logs on the stream. Parks v. Morse, 52 Me. 260; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561.

Maintaining a permanent float in a navigable stream is a nuisance *per se*. De Laney v. Blizzard, 7 Hun, 7.

A municipal corporation which has jurisdiction over a harbor may treat a floating warehouse maintained in the harbor in violation of its ordinances as a public nuisance, and proceed summarily to abate it. Hart v. Albany, 9 Wend. 571, 24 Am. Dec. 165.

The placing of a floating dock in a public river is a nuisance, although beneficial to the repairing of ships. Anonymous, 1 Russell, Crimes, 379, citing Reg. v. Randall, Car. & M. 496.

A shanty boat or Jo-boat kept below low-water mark for residence purposes is a public nuisance *per se*, subject to summary abatement after notice. Dzik v. Bigelow, 27 Pittsb. L. J. N. S. 360.

One permanently mooring a dummy to a quay in such a position as to prevent the approach of boats which otherwise would be able to reach the quay thereby creates a public nuisance, and persons attempting to land are justified in passing over the dummy, doing no unnecessary damage; but it is otherwise where such passengers attempt to land at a time when the tide is out, and where, if the dummy were not there, they would be unable to reach the quay by reason

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ments, or shall first advance the necessary funds out of money raised by general taxation; and, further, if the tolls prove insufficient, whether the deficiency shall be made good out of the public treasury; or whether, if the tolls shall be more than sufficient, the surplus receipts (like the receipts of the Federal government from port dues and the like) shall go into the general treasury; or whether such surplus shall go, as directed by this act, to building bridges over the stream to take the place of the fords deepened for floatage,—all these matters rest with the representatives of a self-governing people, who, from time to time, will change the tolls and regulations as experience may dictate. There is no hint in the Constitution (state or Federal) that the general assembly is restricted from legislating as to the regulations and tolls upon public highways by water. Still less is there any indication that the wisdom of the courts is so far superior to the will of the people, expressed through the lawmaking body, that the judiciary shall *virtute officii* supervise and correct legislation, whether wise or unwise (in its estimation), when such legislation is enacted within the limits not forbidden to the general assembly by the Constitution.

Montgomery, J., dissents:

He doubts the power of the general assembly to enact that part of chapter 388 of the Acts of 1897 which has given rise to this litigation, but its unconstitutionality does not clearly appear to his mind, and therefore he does not concur in the opinion of the court.

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of the lowness of the tide. Eastern Counties R. Co. v. Dorling, 5 C. B. N. S. 821.

The board of public works of a municipal corporation having the jurisdiction and control over a navigable river within its corporate limits may remove a boat so moored in the river as to be an obstruction to the free navigation thereof. McLean v. Mathews, 7 Ill. App. 599.

But a floating bath house may be moored in a slip in the East river with the consent of the dock commissioners and of the occupant of the adjacent wharf, against the protest of the harbor masters, where the structure does not obstruct commerce. Hoeft v. Seaman, 6 Jones & S. 62, 46 How. Pr. 24.

The requirement of Wash. Pen. Code, § 284, that a light must be maintained on fish traps from sunset to sunrise, imposes a duty to use reasonable care to keep such light burning, and if extinguished from causes which could not be guarded against, reasonable diligence must be used to restore it. McGowan v. Larsen, 14 C. C. A. 178, 29 U. S. App. 554, 66 Fed. 910.

Land over which flows a navigable river which is used for navigation cannot be dedicated to the public as a highway by an individual. He has no power by such dedication to intercept and destroy navigation. Simmons v. Mumford, 2 R. I. 172.

Riparian owners on a navigable stream have no right to interfere with the natural flow of the water, except so far as licensed by statute. Dubois v. Glaub, 52 Pa. 238.

When navigation is injured by the pumping of water for manufacturing purposes, the expense of maintaining his boatmen and mules, and damages for the detention of his boat, constitute special damages which can be recovered by the owner by private suit. Gallagher v. Philadelphia, 4 Pa. Super. Ct. 60.

A boom company accustomed to pass its logs over the falls in a navigable river has, by its charter, no right to do so superior to the power of Congress to improve navigation at the falls, and such company will be restrained at the suit of the government from running logs to the injury of the improvement constructed. United States v. Rum River & M. Boom Co. 1 McCrary, 397, Fed. Cas. No. 16,206.

Sand and gravel arising from hydraulic mining and discharged into navigable rivers in such quantities as to destroy their navigability, bury farming lands, contribute to the injury and destruction of a city, and compel property owners at large expense to erect and maintain levees for their protection, constitute a public nuisance of an aggravated character. Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 753.

b. *By attempted navigation.*

1. *In general.*

An individual has no right to make such use of his rights of navigation as practically to monopolize the water and deprive others of the exercise of equal rights.

The rule that secures to vessels under way the track they are rightfully pursuing, and makes it cause of damage for others to molest or crowd upon them, does not allow the leading boat to unnecessarily obstruct the navigation, or to manœuver with a view to embarrass the boat following. The W. H. Clark, 5 Biss. 295, Fed. Cas. No. 17,482.

The right to use a stream as a public highway includes the right of temporarily obstructing portions of the river while preparing materials for transportation thereon, or in securing them at the termination of their transit. Gerrish v. Brown, 51 Me. 256, 81 Am. Dec. 569.

One about to launch a ship in a navigable river must give notice as to the time when the launching will take place, as he cannot stop the navigation of the river for a whole day on account of it. The Vianna, Swabey Adm. 405.

The party launching must give adequate notice to those navigating the river, and the burden of proving that proper notice has been given is upon him. *Ibid.*

A vessel may properly enter a narrow channel in which another is grounded, but in such a situation as to admit of passing her in safety, and the grounded vessel should, upon the approach of the other, cease her efforts to get off until the approaching vessel has passed. To require other vessels to await the results of such efforts would tend to serious hindrance to navigation, and would often occasion serious detriment to vessel owners who are in no manner in fault for the obstruction of the channel. The Thomas A. Scott, 1 Brown Adm. 503, Fed. Cas. No. 13,921.

A line temporarily stretched across a creek in accordance with custom for the purpose of handling and moving vessels in the narrow channel way is not necessarily unlawful. The Echo, 19 Fed. 453.

Vessels have a right to use a warp in getting in and out of the harbor of a navigable river, and to extend it across the entire channel; but on the approach of another vessel, it is the duty of the vessel using the warp to take

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NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire *et al.* *v.* SUNAPEE DAM COMPANY.

(70 N. H. 458.)

1. **The legislature may authorize the level of the water of a public lake to be drawn down** for manufacturing purposes, although public rights of navigation are thereby impaired, and the shore line in front of private riparian property is changed.
2. **The inconvenience to owners of land on the shore of a public lake** in reaching the water because of the act of the state in authorizing a lowering of the water level, and the lessening thereby of the enjoyment of residences upon or near the shore, furnish no legal ground of complaint, being *damnum absque injuria*.
3. **A corporation empowered by its charter to lower the water level of a public lake** for manufacturing purposes must exercise the right in a reasonable manner, so as to cause no unnecessary injury to rights of navigation or of the owners of lands upon the shore.
4. **Injunction will not be granted against the unlawful raising of the height of the water** of a public lake, where, upon complaint, it was drawn down, and repetition of the act is improbable, while the one responsible therefor is of unquestioned ability to respond for the damages.

(March 15, 1901.)

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notice of such approach, and so to lower it as to give a free passage through the ordinary traveled part of the channel, and to indicate to the approaching vessel the point intended for her passage. Potter v. Pettis, 2 R. I. 483.

A pilot in charge of a raft of lumber, and injured by a rope stretched across the channel from a grounded steamboat to the shore, may sue the party obstructing the stream, either at law or in admiralty; and, if suit is instituted in admiralty, neither party can thereafter invoke the rules of the common law. McCord v. The Tiber, 6 Biss. 409, Fed. Cas. No. 8,715.

A vessel which, after dark, and with knowledge that tugs may enter a slip, obstructs the entrance by a hawser, to aid her in the work of breasting off, and neither places a signal light nor gives notice of the obstruction, is at fault, as, also, is a tug which, with knowledge of such custom, runs into the slip at considerable speed, and is damaged by collision with the hawser. The Fulda, 31 Fed. 351.

A rope stretched across the archway of a bridge to prevent a canal-boat from settling at low water upon sunken spiles, which line is left in such position for twenty-four hours, is an obstruction to navigation which a passing vessel may cut for its own safety without liability for the subsequent settling of the canal-boat upon the spiles, where it had plenty of time to avoid them. The Swan, 19 Fed. 455.

A steamboat, although grounded, has no right to obstruct the channel by stretching a line across it to the shore, and is liable to a passing vessel or raft for the damages sustained thereby. McCord v. The Tiber, 6 Biss. 409, Fed. Cas. No. 8,715.

The floating of logs or rafts upon a navigable river does not constitute an obstruction within the river and harbor appropriation act of September 19, 1890, making it an offense to obstruct a navigable stream; but the statute is directed against the extending into, or constructing upon, the beds of such streams anything which may create obstructions more or less permanent in character diminishing the navigable capacity of the streams. United States v. Marthinson, 58 Fed. 765.

The provisions of the act of Congress of September 19, 1890, § 10, forbidding the creation of unauthorized obstructions in navigable waters, does not prohibit the floating of rafts, logs, timber, boats, and vessels loose and adrift,—especially upon a river improved for such purpose, where toll is paid a navigation company for the privilege of floating such articles through its locks. The obstructions forbidden are those permanent in their nature. United States v. Burns, 54 Fed. 351.

Anyone has a right to use an eddy in a navigable river for the purpose of making up a raft, but he cannot remain longer than is necessary for that purpose to the exclusion of others. Dalrymple v. Mead, 1 Grant Cas. 197.

One who needlessly obstructs a navigable stream with logs is liable to another who is thereby prevented from prosecuting his business as a tug owner. Gifford v. McArthur, 55 Mich. 535, 22 N. W. 28.

The total obstruction of a navigable river with logs and timber for six weeks, at a season when it should have been otherwise free and open, must be presumed to have been unlawful and unreasonable. Enos v. Hamilton, 27 Wis. 256.

In order that one may recover damages for the obstruction by a log jam on the free passage of his logs, it is necessary that the defendant's conduct should be negligent, or otherwise wrongful. Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109.

If a man turns a part of his logs into a stream and leaves them to themselves so that the next drive be embarrassed or hindered by them, he becomes liable at common law for obstructing the common way. Bearce v. Dudley, 88 Me. 410, 34 Atl. 260.

The owners of logs are liable to the owner of a tannery for the obstruction of a stream by such logs by its servants in charge of the drive, whereby injury is occasioned to the owner by reason of his inability to pass up the stream to procure the bark necessary for the operation of his tannery, although the stream was so obstructed under the direction of the boom master of a boom company, which, however, had no right to obstruct the navigation of the stream. Enos v. Hamilton, 24 Wis. 658.

That a large quantity of logs placed in the river by the plaintiff, at the season of natural floods, prevented defendant from getting out his logs, does not absolve him from payment of the statutory compensation for the removal of such of his logs as obstruct the channel during the season at which artificial floods are resorted to by the plaintiff. Crane Lumber Co. v. Bellows, 117 Mich. 482, 76 N. W. 67.

The provisions of 3 How. Anno. Stat. § 2035, giving a log owner who is compelled to remove the obstructing logs of another the right to reasonable compensation, does not unconstitutionally deprive the owner of the obstructing logs of his property without due process of law. Crane Lumber Co. v. Bellows, 117 Mich. 482, 76 N. W. 67.

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SUIT to enjoin defendant from interfering with the rights of the public and the riparian owners in a public lake. *Case discharged.*

The facts are stated in the opinion.

Messrs. **Sargent & Niles,** for plaintiffs:

A claim of a right to flow another's premises to a depth of 3 feet, coupled with the possession of a dam by which such flowing could be accomplished, but accompanied by no actual flowing, extending, either continuously or with such regularity as is consistent with the circumstances, through the entire period of twenty years, would give rise to no easement whatever. Landowners are not obliged to anticipate an unlawful invasion of their property. They are called upon to protect themselves only when the threatened invasion becomes actual.

Gilford v. *Winnipiseogee Lake Co.* 52 N. H. 262; *Griffin* v. *Bartlett*, 55 N. H. 119; *Odiorne* v. *Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Sargent* v. *Stark*, 12 N. H. 332.

No rights can be obtained by prescription against the state.

Collins v. *Howard*, 65 N. H. 190, 18 Atl. 794; *Concord Mfg. Co.* v. *Robertson*, 66 N. H. 1, 18 L. R. A. 679, 25 Atl. 718; *State* v. *Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513.

The state holds the public waters in trust to preserve the public rights of navigation, boating, and fishing; and cannot make to individuals any grant in derogation of those rights.

Concord Mfg. Co. v. *Robertson*, 66 N. H. 1, 18 L. R. A. 679, 25 Atl. 718; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup.

That a log owner finds it more convenient or economical to move his logs at the seasons of natural floods does not entitle him to obstruct the channel to the detriment of other log owners who desire to use artificial floods; and the legislature may lawfully protect the latter by requiring the former to remove the obstructing logs, and impose upon him a liability for reasonable compensation in case he fails to do so. *Ibid.*

If the logs of A are in the way of the logs of B, so that B cannot drive his until A's are out of the way, B is hindered or obstructed within the meaning of Minn. Gen. Stat. 1787, chap. 32, § 78, authorizing one who is hindered or obstructed in driving logs, by the logs of another, to drive the obstructing logs to some point where his can be separated from them, and recover compensation therefor from their owner. To constitute such hindrance or obstruction it is not necessary that the logs of B should come in actual contact with those of A. Anderson v. Maloy, 32 Minn. 76, 19 N. W. 387.

One who threatens to open a dam containing logs, and permit them to float down the river for the purpose of clearing the way for his own drive, may be enjoined from so doing, in order to prevent an irreparable injury, when he is insolvent. Milan Steam Mills v. Hickey, 59 N. H. 241.

The owner of logs is not liable for damages caused by the obstruction of navigation by the driving thereof, whereby another was compelled to remove his logs above such obstruction and ship them by rail at a greater expense, where the logs were not under his control, but were being driven by another under contract to drive and saw them. Bearrs v. Sherman, 56 Wis. 55, 13 N. W. 869.

2. *Anchorage.*

The right to navigate includes the right to anchor, but this right must be exercised in such a way as not unnecessarily to obstruct the rights of navigation.

The right of moorage is included in the right of navigation, and this right is protected by requiring vessels in motion to steer clear of those that are at rest so as neither to strike them nor to injure them by their swell. Brown v. Stone, 5 Clark (Pa.) 75, 1 Phila. 241.

The mooring of vessels at public wharves is a well-recognized right, but it must be exercised with due regard to the rights of passing vessels. The St. Lawrence, 19 Fed. 328.

The right of a riparian owner to moor vessels adjacent to his property is a right incident to, and inseparable from, that of navigation, and no liability will attach for its exercise unless navigation is unduly obstructed. Baker v. Lewis, 1 Pittsb. 382; Baker v. Lewis, 33 Pa. 301, 75 Am. Dec. 598.

But he who moors his craft at an accustomed landing must be careful to leave sufficient room for the passer-by. The laws of nevigation require no more of him. Maker v. Lewis, 33 Pa. 301, 75 Am. Dec. 598.

The master of a schooner, in seeking an anchorage, will be liable for damages resulting from anchoring in the path of navigation, if, in the exercise of reasonable care and skill, and under the particular circumstances, he should have anchored elsewhere. A jury in such a case will not be required to determine if he could have anchored elsewhere. Knowlton v. Sanford, 32 Me. 149, 52 Am. Dec. 649.

A vessel is not negligent, and does not obstruct navigation, when, after passing through the St. Mary's canal, and while awaiting towage, she moors, under direction of the superintendent of the canal, at a pier where the canal is 300 feet wide. The Michigan, 52 Fed. 501.

A floating elevator used in a canal 160 feet wide is not unlawful where when in use the elevator and boats from and to which the transfer is being made only occupy 80 feet of the canal and the transfer is made in a few hours while when not in use the elevator is moored in front of property of the owner. People v. Horton, 64 N. Y. 610, Affirming 5 Hun, 516, where it was held that since the harbor commissioners having full power in the premises did not interfere, equity would not grant an injunction.

A vessel has a legal right to anchor in the channel where other vessels pass and repass, provided there is room left for them to pass in safety by the exercise of due care and diligence; but a vigilant anchor watch is essential under such circumstances. The Masters, 1 Brown, Adm. 342, Fed. Cas. No. 9,267.

A vessel cannot be anchored in a navigable channel longer than necessity requires. As soon as possible it must be removed so as not to injure the safety of other vessels seeking to use the channel. The Scioto, 2 Ware, 360, Fed. Cas. No. 12,508.

One vessel has no right to anchor in the channel of a harbor if a like act on the part of 100 vessels would constitute an obstruction to navigation. Mercer v. The Florida, 3 Hughes, 488, Fed. Cas. No. 9,433.

A vessel which lies with her bows projecting across the entrance of a slip, or at the entrance of a narrow canal frequented by other craft,

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Ct. Rep. 548; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Smith* v. *Maryland*, 18 How. 71, 15 L. ed. 269; *Providence Steam Engine Co.* v. *Providence & S. S. S. Co.* 12 R. I. 348, 34 Am. Rep. 652; Black's Pom. Water Rights, 506.

The grant cannot be construed as authorizing the defendant to interfere with the public rights in Lake Sunapee.

State v. *Kinne*, 41 N. H. 238.

On motion for rehearing.

Messrs. **Sargent, Niles, & Morrill,** for plaintiffs:

Assuming that the legislature had power to grant to the defendant, for manufacturing purposes, a right to impair to some extent the public use of the waters of the lake, the right so granted must nevertheless be used in a reasonable manner.

Connecticut River Lumber Co. v. *Olcott Falls Co.* 65 N. H. 378, 13 L. R. A. 826, 21 Atl. 1090.

There are still property rights in the shore owners, an injury to and the destruction of which in the course of improvements in the public use of the waters of the lake are a taking of private property for public use, demanding compensation.

Black's Pom. Water Rights, 524; *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643; *St. Louis* v. *Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Van Dolsen* v. *New York*, 21 Blatchf. 454, 17 Fed. 817; *Tuck* v. *Olds*, 29 Fed. 738; *Case* v. *Loftus*, 5 L. R. A. 684, 39 Fed. 730; *Bowman* v. *Walthen*, 2 McLean, 376, Fed. Cas. No. 1,740; Gould, Waters, 2d ed. 167; *Potter* v. *Howe*, 141 Mass. 357, 6 N. E. 233; *Tyler* v. *Hudson*, 147 Mass.

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obstructs rightful navigation, and in case of collision is not free from fault. The Margaret J. Sanford, 30 Fed. 714.

A vessel moored in a slip with her bowsprit extending beyond the end of the pier, in violation of the rules of the harbor masters, and in the path of a ferry-boat, is chargeable with fault contributing to a collision with the latter. The Fort Lee, 31 Fed. 570.

The owners of a vessel, who permit it to lie, apparently at anchor, opposite a pier to which it is in fact fastened by a line dipping into the water from the pier and the bow of the boat, but who keep no one on deck to warn other vessels of the obstruction, are chargeable with negligence rendering them liable for damages sustained by a steamer which encounters the rope while following her usual course next to the pier. Annett v. Foster, 1 Daly, 502.

While the abuse of a right of moorage in a public stream is a public nuisance, a riparian proprietor may maintain an action for the special injury he may sustain. Reynolds v. Clarke, 1 Pittsb. 9.

One is liable to a riparian proprietor for the special nuisance created by the abuse of his right of moorage (1) for nominal damages if committed through ignorance of the injury inflicted, or inadvertence, and if his boats were removed on complaint being made; (2) for compensatory damages if he was in the exercise of what he believed to be a right without any hostile intention, although knowing of plaintiff's injury; (3) but if the boats were moored there with wanton intent to injure the plaintiff, and do him malicious annoyance, the damages may be enhanced. *Ibid.*

The use of navigable waters for the storing of logs is unreasonable, and their owner is liable for damage done thereby. Drake v. Sault Ste. Marie Pulp & Paper Co. 25 Ont. App. Rep. 251.

The mooring of cribs of logs in a public stream constitutes an unlawful obstruction and a public nuisance. For such use of the stream the riparian owner cannot claim compensation. Moore v. Jackson, 2 Abb. N. C. 211.

Riparian owners of piers and booms upon a navigable stream may enjoin the placing of obstructions in the stream for the purpose of aiding the running of logs which will interfere with their use of the stream. Stevens Point Boom Co. v. Reilly, 44 Wis. 295.

But rafts of logs may be moored to the shore for a reasonable time and in a reasonable place and manner. Hayward v. Knapp, 23 Minn. 430.

Those engaged in driving logs upon a river may secure their logs in side booms in a reasonable manner, put in piling and boom sticks, erect piers and dams, or maintain side booms for storage, but these may not be so constructed or used or a sorting gap be so managed as to unreasonably or oppressively obstruct or blockade the way. Page v. Mille Lacs Lumber Co. 53 Minn. 492, 55 N. W. 608, 1119.

One is entitled to confine logs temporarily in the Mississippi river, that is, until he finds a market for them or can raft them to the lower country. For this purpose he has the same rights in the navigable waters as are enjoyed by the owner of a steamboat. Castner v. The Dr. Franklin, 1 Minn. 73, Gil. 51.

But the owner of logs is not guilty of a nuisance in booming them in a slough leading off from a navigable river which at times is dry, although at times of high water there is water enough there to admit of the passage of steamboats, and the owner can recover for the wrongful act of a steamboat owner in running against the boom and releasing the logs. Castner v. The Dr. Franklin, 1 Minn. 73, Gil. 51.

A log-driving company has no right to throw a boom across the river and use it for the storing of logs for a season in such a way as to prevent the use of the river by other persons wishing to drive logs therein. McPheters v. Moose River Log Driving Co. 78 Me. 329, 5 Atl. 270.

An action may be maintained by one having a special private interest in having the obstruction removed so that he can float his logs down a navigable stream, for the removal of log booms therein constructed and maintained by a corporation organized under a statute authorizing the same, although the nuisance may be a public one. Carl v. West Aberdeen Land & Improv. Co. 13 Wash. 616, 43 Pac. 890.

Where one using a river for driving logs maintains a dam, booms, and sorting gaps, and uses them in such a way as to unreasonably and unnecessarily obstruct and delay the logs of another owner which must pass through its works, the owner whose logs are thus delayed suffers injuries differing in kind, not merely in degree or extent, from those suffered by the general public, for the redress of which he may maintain a private action. Page v. Mille Lacs Lumber Co. 53 Minn. 492, 55 N. W. 608, 1119.

A riparian owner maintaining a mill and dam on a small stream navigable for the floatage of logs loose but not in rafts has the right to erect suitable dividing piers to separate his logs from the common mass caused by the intermingling thereof by being driven loose, but it is his duty to make reasonable provisions for

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609, 18 N. E. 582; Cooley, Const. Lim. 6th ed. 670, note 1; *Davenport & N. W. R. Co.* v. *Renwick*, 102 U. S. 180, 26 L. ed. 51; *Providence Steam-Engine Co.* v. *Providence & S. S. S. Co.* 12 R. I. 348, 34 Am. Rep. 652; *Clark* v. *Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *Clement* v. *Burns*, 43 N. H. 609; *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, 1 L. R. A. 466, 18 N. E. 465; *Concord Mfg. Co.* v. *Robertson*, 66 N. H. 29, 18 L. R. A. 679, 25 Atl. 718.

This private right of property has been substantially impaired by the drawing down of the water by the defendant corporation, and would necessarily be substantially impaired by the exercise of the rights conferred upon it by its charter. It is not necessary to constitute a taking of this right that all possibility of getting to the water under any circumstances should be taken away. A taking of property, within the meaning of the Constitution, is defined in Boone on Corporations, 128, § 97, as "a serious interruption to the common and necessary use of property."

Eaton v. *Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147.

Messrs. **Eastman & Hollis, George R. Brown,** and **Streeter, Walker & Hollis** also for plaintiffs.

Messrs. **A. S. Wait** and **Ira Colby,** for defendant:

From the organization of the defendant corporation, on June 26, 1821, it has claimed the right to draw the waters of the lake as low as they have at any time been drawn, and has had possession and control, during all that time, of appliances enabling it to do so. This has been an adverse claim, openly made, exercised as it found occasion,

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the passage of other logs through the pond created by his dam and without unreasonable expense, hindrance, or delay, and to so erect his dividing piers as not to unnecessarily hinder or delay the passage of such other logs or create obstructions in the stream not necessarily incident to the existence of dividing piers. A. C. Conn Co. v. Little Suamico Lumber Mfg. Co. 74 Wis. 652, 43 N. W. 660.

Act of Congress of March 3, 1899, § 15 (30 Stat. at L. 1152, chap. 425, U. S. Comp. Stat. 1901, p. 3543), providing that "it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft," does not apply where two vessels lashed together were anchored during a dense fog in the usual sailing course of vessels, which was from ¼ to ½ mile in width, the navigable channel at that point being about 4 miles wide. The Northern Queen, 117 Fed. 906.

In Harold v. Jones, 86 Ala. 274, 3 L. R. A. 406, 5 So. 438, it is said that in a stream navigable for the floating of timber, temporary obstructions for the purpose of preparing and securing timber for future transportation and necessary for the useful navigation of the stream at suitable seasons do not violate the rights of others if they are in the customary and contemplated mode and are not unnecessarily and unduly continued. If a boom is indispensable to a reasonable enjoyment of the stream as a public highway, and it is discontinued or removed in a reasonable time after the necessity for it ceases, its erection during a low stage of the water, when the stream cannot be used for floating or rafting, is not unlawful.

A vessel in ordinary anchorage ground need not buoy its anchor to prevent collision, in the absence of knowledge of any displacement of the anchor or embedding of the chain. Baxter v. International Contracting Co. 65 Fed. 250.

A boat which rests her anchor in the shallow waters of a broad slip or basin where vessels are coming and going without placing a buoy or other warning of danger is liable for the damages sustained by a vessel which runs foul of the anchor. The Alabama, 18 Fed. 831; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 16 L. ed. 433.

A dredge is liable for the damages sustained by a vessel which struck an anchor left in the channel by the dredge, although there was a buoy attached to it. Inland & S. B. Coasting Co. v. The Commodore, 40 Fed. 258.

A public board properly constructing a pier landing stage and placing in a navigable stream an anchor attached to it, although in a manner authorized by statute, is guilty of negligence in not placing a buoy of sufficient size and dimensions to resist the action of the tides so as to properly indicate the position of the anchor. Jolliffe v. Wallasey Local Board, L. R. 9 C. P. 62, 29 L. T. N. S. 582, 43 L. J. C. P. N. S. 41.

The owner of a mooring anchor is not liable for an injury inflicted on a vessel by running against it after it had been removed by another person to the place where the injury was inflicted, unless such owner participated in its removal, as the mere fact that he was the owner of the anchor would not make him liable. Hancock v. York, N. & B. R. Co. 10 C. B. 348.

3. *Wrecks.*

The question whether or not the former owner of a vessel is liable for obstruction of navigation in case it sinks in navigable water seems to depend on whether or not he retains possession of it. If he abandons it, and no statute requires him to protect it, his liability ceases.

The owner of a vessel sunk by unavoidable accident in a navigable river, whether in the usual track of navigation or not, is bound to take due precaution to prevent injury to other vessels by their striking against it so long as it remains in his possession and control, and this obligation passes to the transferee of its possession and control; but either of them, by abandoning the wreck, may put an end to his liability. White v. Crisp, 10 Exch. 312, 2 C. L. Rep. 1215, 23 L. J. Exch. N. S. 317.

The owner of a vessel burned by accident and sunk to the bottom of a slip in such a manner as to obstruct vessels from entering in is not liable to the dock owner for loss of wharfage unless it is shown that the wreck could be removed, nor is he liable for further obstruction of the slip by the sinking of hulks, machinery and fixtures employed in an effort to raise the wreck, in the absence of negligence or want of skill in their use, or unless they were not appropriate instrumentalities for the removal of the wreck. Taylor v. Atlantic Mut. Ins. Co. 2 Bosw. 106.

In Brown v. Mallett, 5 C. B. 599, 17 L. J. C. P. N. S. 227, 12 Jur. 204, an action against the owner of a barge which, through an unavoidable accident, was sunk in a navigable river, to recover for injuries to the vessel growing out of the collision with such obstruction, the court held that the declaration failed to state a cause

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and well known to the public at large. The exercise of this use of the lake by it has been open, adverse, and continuous for this whole length of time.

Gilford v. *Winnipiseogee Lake Co.* 52 N. H. 262; *Shepardson* v. *Perkins*, 58 N. H. 354; *Smith* v. *Putnam*, 62 N. H. 369.

No exercise of rights under a legislative grant is unlawful, or can be forbidden, merely because it interferes with the public enjoyment.

Connecticut River Lumber Co. v. *Olcott Falls Co.* 65 N. H. 378, 13 L. R. A. 826, 21 Atl. 1090.

Ownership in public waters, and in the soil thereof below the line of high-water mark, is in the state.

Hale, De Jure Maris, chap. 4, Hargraves, Law Tracts, 12; *Atty. Gen.* v. *Chambers*, 4 De G. M. & G. 206; *Blundell* v. *Catterall*, 5 Barn. & Ald. 268; *Lowe* v. *Govett*, 3 Barn. & Ad. 863; Houck, Nav. Rivers, §§ 121, 122, 262, 263; *Connecticut River Lumber Co.* v. *Olcott Falls Co.* 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090; *Concord Mfg. Co.* v. *Robertson*, 66 N. H. 1, 18 L. R. A. 679, 25 Atl. 718.

There is a difference between the Crown, which is only one branch of the sovereignty of the Kingdom, and the King and Parliament combined, which are the embodied sovereignty of the realm.

Blundell v. *Catterall*, 5 Barn. & Ald. 268.

Parliament represents the beneficiaries of the trust, and may deal with it as it judges for the public interest and welfare.

Gould, Waters, § 21; *Martin* v. *Waddell*, 10 Pet. 367, 10 L. ed. 997; *Brown* v. *De Groff*, 50 N. J. L. 409, 14 Atl. 219; *Com.* v. *Vincent*, 108 Mass. 441; *Com.* v. *Weather-*

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of action, as it failed to allege that the defendant was in possession and control of a sunken barge at the time of the collision, the court holding that the rule that one in possession and control of a vessel is liable for failure to use due care applies as well where the ship is sunk as when it is afloat, and that where he has relinquished possession or control his liability ceases unless the relinquishment was unlawful; although the court stated that there might possibly exist a state of facts that would cause the continuance of the owner's duty for some time after the relinquishment. The court further argued that where the navigation of the river has been obstructed by a vessel which has been sunk and lost to the owner, without any fault of him, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity, in addition to his share of the public inconvenience; and this difference does not appear to be any reason for throwing on him the onus of remedying or mitigating the evil. The court further said that all the authorities cited, where the owner of a certain vessel had been held liable, were cases where he had retained possession and control of it.

The owner of a vessel sunk in a navigable river is not liable for leaving it without exhibiting lights or warning of any sort, whereby a vessel ran into it and was injured, where at the time of leaving it the harbor master was notified and promised to light the wreck, which he had power to do. The Douglas, L. R. 7 Prob. Div. 151, 51 L. J. Adm. N. S. 89, 47 L. T. N. S. 502.

In that case the cases of Brown v. Mallett and White v. Crisp, which held that where those in possession and control of a sunken vessel abandon it the owner is not liable for injuries to vessels running into it, were cited. But as, in the case of The Douglas, possession had not been abandoned, the court considered it unnecessary to discuss the two cases.

An indictment cannot be maintained against the owner of a vessel sunk in a navigable river for permitting it to remain there to the obstruction of navigation, where it was sunk by accident and misfortune. Rex v. Watts, 2 Esp. 675.

The owner of a vessel, sunk in the fairway of a navigable river so as to be dangerous to passing vessels, who retains possession, management, and control of the wreck, must exercise reasonable care to warn other vessels of its position, and is liable for damages occasioned to another vessel by his neglect so to do. The Snark, 68 L. J. Adm. N. S. 22 [1899] P. 74.

The owner of a sunken vessel does not abandon it or transfer the possession, management, and control, so as to avoid responsibility to approaching vessels which are injured by contact with it, by employing an independent contractor to raise it, and placing such person in actual physical custody of the wreck. *Ibid.*

While the owner of a vessel sunk in a river by accident and without neglect or fault is not bound, after abandonment, to remove it as a nuisance, yet he may be compelled to do so where the boat, after injury by fire, was still afloat and might easily have been removed, but subsequently sank because water-logged and abandoned. Detroit Water Comrs. v. Detroit, 117 Mich. 458, 76 N. W. 70.

The owner of a coal barge which sinks in a public river is not bound, in case he abandons it, to remove it as an obstruction to navigation. Winpenny v. Philadelphia, 65 Pa. 135.

The owners of a tug towing a canal boat which was sunk through the sole fault of a propeller which came in collision with her, are not liable for the loss of a vessel which a few hours later ran into the sunken canal boat and sank; nor is it their duty to remove the canal boat as an obstruction, or to mark its location with lights. The Swan, 3 Blatchf. 285, Fed. Cas. No. 13,667.

The owner of a vessel sunk by his negligence in navigable waters is liable for injury to another vessel which strikes upon it in the exercise of due care. Boston & H. S. B. Co. v. Munson, 117 Mass. 34.

Those navigating a river are under no obligation to remove wrecks which may be made in the ordinary and proper course of navigation; but one who, for his own benefit, and not for the purposes of navigation or commerce, uses any navigable part of a river, is liable in damages to the party injured if such use causes a change in the ordinary course of the channel of the river, and injury results from the consequent increase in the difficulty and danger of navigation. Missouri River Packet Co. v. Hannibal & St. J. R. Co. 1 McCrary, 281, 2 Fed. 285.

So, a city which has leased a steamer for the use of its board of health is responsible for the resulting nuisance, and will be required to abate it, where, after having the vessel in its possession for two years and pending a controversy with the lessor, the boat was partially burned, and thereafter allowed to become water logged so that it sank in the river opposite a

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head, 110 Mass. 175; *Com.* v. *Tiffany*, 119 Mass. 300.

The sovereign power is able, by express statutory enactment, to grant away the public waters of the state, and vest exclusive proprietary ownership therein in private individual grantees.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 605, 9 L. ed. 847.

Owners of land bordering upon great ponds have no ownership, by reason thereof, in the shores of the ponds.

Fay v. *Salem & D. Aqueduct Co.* 111 Mass. 27; *Livingston* v. *Van Ingen*, 9 Johns. 507; *Connecticut River Lumber Co.* v. *Olcott Falls Co.* 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090; *Concord Mfg. Co.* v. *Robertson*, 66 N. H. 1, 18 L. R. A. 679, 25 Atl. 718.

Blodgett, Ch. J., delivered the opinion of the court:

December 7, 1820, upon the petition of certain mill owners on Sugar river, which has its source in Sunapee lake, one of the public waters of the state, the defendants were incorporated and made a body politic "to sink the outlet of said lake at the source of said Sugar river to the depth of 10 feet below the low-water mark of said lake, and to erect and maintain a dam there with suitable gates and flumes to the height of said low-water mark, for the benefit of the mills and mill privileges aforesaid: provided said corporation shall make or tender reasonable compensation for all damages which may accrue to individuals by the erection of said dam and works." The corporation was organized the following year, and soon after its organization built a dam at said outlet at a height which has remained unchanged, and by means of such dam has since controlled the outflow of the lake. The present proceeding is to restrain an alleged infringement of public and private rights in and to

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public park. Detroit Water Comrs. v. Detroit, 117 Mich. 458, 76 N. W. 70.

The owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, and it is not enough to station a watchman near the spot or point of danger, even though he actually gives notice of the danger to those in charge of a barge brought to moor at the place. Lord Ellenborough said: "It is a peremptory law of navigation, that when any substance is sunk in a navigable river so as to create danger a buoy shall be placed over it for the safety of the public. . . . A verbal communication may easily be misunderstood, and it is very likely (as in the present case) to lead to confusion and mischief. But it is of the utmost importance to the property and the lives of His Majesty's subjects that such a warning should be given as will necessarily inform everyone engaged in the navigation of the river of the existence of the danger." Harmond v. Pearson, 1 Campb. 515.

A board of water commissioners having control of a park, and authorized to maintain actions, may sue to compel the removal, as a nuisance, from the river in front of the park, of a sunken vessel which not only obstructs navigation, but is an encumbrance upon the property. Detroit Water Comrs. v. Detroit, 117 Mich. 458, 76 N. W. 70.

The owner of a boat sunk in the harbor of New York without fault on his part, and abandoned by him, is not liable to the owner of a vessel damaged by running upon the wreck, since no duty to remove it is imposed upon him by law. N. Y. Laws 1860, chap. 522, only requires such removal after notice from the pilot commissioners that the wreck constitutes an obstruction to navigation. Ball v. Berwind, 29 Fed. 541.

Where the owners of a vessel sunk near the approach to a harbor abandon it, they cease to be owners of the ship within the meaning of the act of 1848 making the owners liable for the repayment of expenses incurred by the harbor authority in removing the wreck. Arrow Shipping Co. v. Tyne Improv. Comrs. [1894] A. C. 508.

The Dublin port and docks act, 32 & 33 Vict., making the owner of a vessel sunk in that port liable for the expense of removing it, being a local and personal act, does not increase the common-law liability of such owners in the absence of express provision to that effect, and therefore does not make such owner personally liable for the expense of removing a vessel sunk in the harbor without any fault on the part of the owner. The Edith, Ir. L. R. 11 Eq. 270.

The owners of a vessel which was scuttled while on fire in a harbor in order to save the rigging may be compelled to remove the wreck as an obstruction to navigation, under the act of Congress September 19, 1890, § 10. United States v. Hall, 11 C. C. A. 294, 21 U. S. App. 402, 426, 63 Fed. 472.

Under the Canadian statute, 37 Vict. chap. 29, as amended by 43 Vict. chap. 30, authorizing the removal of any wreck obstructing the navigation of a navigable river, and making the owners "of the vessel, craft, or other thing which caused such obstruction" liable for the expense of such removal, the owner of the ship at the time of its removal is liable, and not the owner at the time of the disaster. Queen v. Mississippi & D. S. S. Co. 4 Can. Exch. 298.

Under § 47 of the Aire & Calder navigation act 1889, providing that if the owners of a sunken vessel shall not forthwith remove the same it shall be lawful for the undertakers to do so and detain it until payment of all expenses relating thereto, the term "owners" refers to the owner at the time of the removal of the vessel by the undertakers, and not to the owners at the time of its sinking, and therefore where the owner of the sunken vessel abandons it to the underwriters, and receives payment as for a total loss, he is not liable for the expenses subsequently incurred by the undertakers attemping to remove it. Barraclough v. Brown, 66 L. J. Q. B. N. S. 672, 76 L. T. N. S. 797 [1897] A. C. 615, Affirming 65 L. J. Q. B. N. S. 338, 73 L. T. N. S. 630, 74 L. T. N. S. 86.

Under the marine act 1890 of the colony of Victoria relating to the removal of sunken or stranded wrecks, and imposing upon the owner of such ship the obligation of removing it, and further providing that upon his failure to remove it the court officer may do so and defray the expenses out of the proceeds of the sale of the wreck, and that the excess, if any, should be chargeable to the owner of the ship, the person who is the owner of a ship at the time of its stranding is the one liable for such excess of expenses of removing the wreck, although such owner had abandoned it to the underwriters and received payment on his policy of insurance. Smith v. Wilson, 65 L. J. P. C. N. S. 66, 75 L. T. N. S. 81 [1896] A. C. 579.

The court distinguished this case from that

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the waters of the lake through changes in the water level occasioned by the maintenance of the defendants' dam and works, and is instituted under the general equity powers of the court, and particularly under § 3, chap. 205, Pub. Stat., which provides that "any legal rights, public or private, infringed by a change in the water level of a natural lake or pond, . . . may be ascertained and enforced in a constitutional manner on a bill in equity without prior ascertainment of the right by a suit at law; and rights of boating, fishing, and navigation may be enforced on a bill in equity brought by the attorney general in the name of the state." The plaintiff the state of New Hampshire complains of an infringement of the public rights of navigation and fishing and of injury to its fish hatcheries. The plaintiff the Woodsum Steamboat Company complains of an infringement of the public right of navigation to its special damage, and of its rights as a littoral proprietor. The other plaintiffs are littoral proprietors upon the lake, and complain of an infringement of their rights as such. It being found that the defendants have not drawn down the waters of the lake to a point below that authorized by their charter without restrictions as to times or seasons when it might be done, all the plaintiffs are apparently remediless upon this branch of their case, if the legislature had authority to make the grant. While the question thus presented is both interesting and important, as well as one upon which there is more or less diversity of judicial opinion in different jurisdictions, extended discussion of it is not now deemed to be necessary in view of the recent decisions in *Connecticut River Lumber Co.* v. *Olcott Falls Co.* 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090, and *Concord Mfg. Co.* v. *Robertson*, 66 N. H. 1, 18 L. R. A. 679, 25 Atl. 718, in both of

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of The Crystal, 71 L. T. N. S. 346 [1894] A. C. 508, 63 L. J. Prob. N. S. 146, 7 Asp. Mar. L. Cas. 513, 6 Reports, 258, on the ground that in that case the statute did not refer to the owner of the ship, but used the term "wreck" and placed the liability on the owner of the wreck. The court also distinguished the case from that of Barraclough v. Brown, 65 L. J. Q. B. N. S. 333, 73 L. T. N. S. 630, 74 L. T. N. S. 86, on the ground that the statutes in the two cases were differently worded.

c. *Under statutory authority.*

1. *In general.*

When an individual interferes with rights of navigation under authority of a statute, the only questions that can arise are, Was the statute lawfully enacted? and, Is the individual acting within his authority? The answer to the first question will be determined by the principles discussed *supra*, I.

The legislature may authorize the erection of dams and booms in navigable rivers, and prescribe the modes in which those authorized shall be built. Morgan v. King, 18 Barb. 277.

In Michigan the damming of navigable streams although such dam is not provided with locks, is permitted by statute when, in the judgment and discretion of the board of supervisors of the proper county, it is deemed advisable. Valentine *ex rel.* Dudley v. Berrien Springs Water Power Co. (Mich.) 8 Det. L. N. 637, 87 N. W. 370.

A dam in a navigable river is not a nuisance when authorized by law although an obstruction to navigation. Ensworth v. Com. 52 Pa. 320.

An act granting conditional permission to erect a dam across any stream "declared by law a public highway," applies to any public stream so declared prior to the time of the erection of the dam,—especially if a later section giving a remedy for damages from such an erection shows that the intent was that those dams might be in streams thereafter declared highways. Brown v. Com. 3 Serg. & R. 273.

Legislative permission to construct a dam across a navigable stream will give a right which cannot be destroyed by the declaration of a municipal corporation that the dam is a public nuisance endangering the health of the city. Clark v. Syracuse, 13 Barb. 32.

A grant of the advantages of corporate organization to persons engaged in the improvement and use of the water power of a stream for manufacturing purposes does not show that a total or partial discontinuance of the way was intended by the legislature. Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090.

A corporation is not liable for damages incidental to the erection of a dam across a tidal-river harbor in accordance with its franchise from the state, by reason of the obstruction of navigation, or by altering the flux and reflux of the tide. Parker v. Cutler Milldam Co. 20 Me. 353, 37 Am. Dec. 56.

A mill owner who erects a dam on a navigable stream in compliance with law will not be liable for damages resulting from the use of the chute therein before he has had time to repair it after injury by flood or accident. Roush v. Walter, 10 Watts, 86.

An unrestricted grant of authority to construct a railroad from one designated point to another carries with it authority to cross a navigable stream if the railroad cannot reasonably be constructed without it. Fall River Iron Works Co. v. Old Colony & F. River R. Co. 5 Allen, 221.

The grant of a charter to construct a railroad between termini on opposite sides of a public stream includes the right to use the river in a reasonable manner by laying its tracks along the bed, and it is not bound to cross merely at right angles. Schofield v. Pennsylvania Schuylkill Valley R. Co. 2 Pa. Dist. R. 57.

A railroad company is authorized to construct a portion of its works in a part of the bed of a navigable river under a statute authorizing it to construct its railroad in, upon, or across roads, railroads, or rivers, as the word "rivers," as there used, includes both navigable and non-navigable ones,—especially as the statute gives it the same power to build upon or across roads in which the public have the same right as it has in navigable rivers. Abraham v. Great Northern R. Co. 16 Q. B. 586, 5 Eng. L. & Eq. Rep. 258.

The authority to construct an aqueduct over a navigable river is granted *ex necessitate* by a grant of authority to construct a canal the termini of which are on either side of the river. Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012.

Canal trustees are not liable for obstructing the navigation of a stream, not capable of or used for interstate navigation, by the construction of an aqueduct for a canal over the

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which public, private, and chartered rights were exhaustively argued by counsel and carefully considered by the court. An examination of those cases will show that the doctrine enunciated in both of them, so far as it is directly applicable to the present inquiry, is that while in this state lakes, large natural ponds, and navigable rivers are owned by the people, and held in trust by the state in its sovereign capacity for their use and benefit, such use and benefit are not limited to navigation and fishery, but include all useful and lawful purposes; and that the beneficiaries and the trustee, acting as a body politic and trustee, can authorize by their legislative agents even an extinguishment of the trust and an abandonment of the trust estate. *Connecticut River Lumber Co.* v. *Olcott Falls Co.* 65 N. H. 378, 384–388, 13 L. R. A. 831, 834–836, 21 Atl. 1091, 1093, 1095; *Concord Mfg. Co.* v. *Robertson*, 66 N. H. 6–8, 12, 19, 22, 18 L. R. A. 683, 684, 686, 689, 691, 25 Atl. 720, 721, 723, 727, 728. These decisions, in addition to the high source whence one of them came, commend themselves to our judgment by their intrinsic soundness; and we are accordingly constrained to hold that the defendants' charter was such a one as the legislature had the power to grant. If this be so, our duty is simply to construe the charter, not to rejudge it. It is for the legislature alone, "as the sole depository of the sovereignty of the state, . . . to judge of the public interests and welfare in the disposition and use of its public waters." As was well said by Mr. Justice Story in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 605, 9 L. ed. 773, 847: "Whether the grant of a franchise is or is not, on the

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same, under authority of law. Depew v. Wabash & E. Canal Trustees, 5 Ind. 8.

One authorized to construct a roadway across a bay owned by a town in fee, and who, under the license, builds a road on piles, cannot thereafter replace such structure with a solid embankment, although the terms of the license are broad enough to have permitted the construction of an embankment in the first instance. Southampton v. Jessup, 10 App. Div. 456, 42 N. Y. Supp. 4.

By Statute 7 Jac. chap. 20, piers, piles, jetties, and the like, which are set for fortification and strength, are ordered to be maintained. Callis, Sewers, 266.

Boom companies organized under the Washington act of 1895 have no right to interfere with the navigation or use of the stream upon which they have constructed booms. Carl v. West Aberdeen Land & Improv. Co. 13 Wash. 616, 43 Pac. 890.

A boom company is liable for needlessly or wilfully obstructing a navigable stream to the hindrance and consequent injury of persons driving their own logs. Watts v. Tittabawassee Boom Co. 52 Mich. 203, 17 N. W. 809.

In J. S. Keator Lumber Co. v. St. Croix Boom Corp. 72 Wis. 62, 38 N. W. 529, it is said that a booming corporation authorized to construct its works on navigable waters may not unnecessarily interfere with the navigation of steamboats and other water craft.

A log boom constructed in a manner conformable to a state statute at a time when Congress had not assumed jurisdiction over the waters is affirmatively authorized by law, within the meaning of a statute prohibiting any obstruction not affirmatively authorized by law. United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343.

There is no question of reasonable use for the jury to pass upon, and the court may properly instruct them that the maintaining of a boom was unauthorized, when, under a charter right so to construct its booms as not to interfere with the public navigation of a stream, a boom company swings its boom across the stream and prevents the navigation thereof. Plummer v. Penobscot Lumbering Asso. 67 Me. 363.

A corporation authorized by one state to maintain booms and other works for the handling of logs on a river forming the boundary between two states, and over which they have concurrent jurisdiction, is not liable for damages from the obstruction of the navigation of the river due to lack of facilities for storage, because it fails to take possession of a lake on the other state's side of the river for the storage of logs, which would be beyond the scope of its charter. J. S. Keator Lumber Co. v. St. Croix Boom Corp. 72 Wis. 62, 38 N. W. 529.

A legislative intent to restrict a public right of floatage in a stream in favor of a manufacturing corporation obtaining a grant of power to exercise riparian rights therein cannot be presumed by the court from the fact merely that the manufacturing business may be more important than the lumber interests claiming the right to enjoy the public easement of floatage in the stream. Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090.

2. *Exceeding authority.*

A dam across navigable water, constructed under authority of the legislature, is liable to abatement as a nuisance if it is so built as to impede navigation beyond what the statute authorized. Renwick v. Morris, 3 Hill, 621.

Under a franchise to erect a dam in a public stream to create water power, no justification can be found for raising a pool to be used for retaining timber in connection with a steam sawmill. Com. v. Church, 1 Pa. St. 105, 44 Am. Dec. 112.

A grant of a privilege to erect and maintain a dam in a navigable river provided it does not obstruct or impede navigation, only restricts the power of erection so far as the obstruction is a substantial impediment, not merely making navigation more difficult, but partially destroying the power of using the stream for navigable purposes. Ensworth v. Com. 52 Pa. 320.

Where one may maintain a dam on a navigable stream so long as navigation is not impeded thereby, he will be liable for damage when his dam cannot be passed with the use of ordinary care, diligence, and skill, no matter what the stage of the water. Plumer v. Alexander, 12 Pa. 81.

A dam in a navigable river is of illegal height where the major part thereof is higher than authorized by statute, although a slide or chute in the center of the dam does not exceed the authorized height. Arpin v. Bowman, 83 Wis. 54, 53 N. W. 151.

One having a legislative grant to build and maintain a dam across a navigable river, on condition of making and keeping in good order and repair a lock for the safe passage, without delay or expense, of such boats and other craft as usually navigate the river, and also a sluice of stated dimensions for the benefit of shad

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whole, promotive of the public interests, is a question of fact and judgment, upon which different minds may entertain different opinions. It is not to be judicially assumed to be injurious, and then the grant to be reasoned down. It is a matter exclusively confided to the sober consideration of the legislature, which is invested with full discretion, and possesses ample means to decide it. For myself, meaning to speak with all due deference for others, I know of no power or authority confided to the judicial department to rejudge the decisions of the legislature upon such a subject. It has an exclusive right to make the grant, and to decide whether it be or be not for the public interests. It is to be presumed, if the grant is made, that it is made from a high sense of public duty, to promote the public welfare, and to establish the public prosperity." Such being the respective rights of the legislature and the court, the defendants' charter can be annulled or modified, if at all, not by a court of equity, but only by the authority by which it was granted. It follows from these conclusions that the mere lowering of the lake by the defendants to the charter point can afford the state and public no well-founded ground of complaint, if done in a reasonable manner; and, *a fortiori*, much less can the lowering of it only about 2½ feet, which is the extent of the defendants' acts in that regard, so far as appears. And certainly the littoral proprietors, as such, can have no better ground of complaint, because, as is well understood, in public waters there is no private ownership in the soil below ordinary high-water mark. The primary ground of their grievance, and the one from

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fishery, is only liable on his default to such persons as bring themselves within the strict terms of the grant, *e. g.*, navigators of such craft as usually navigated the river when the grant was made. Farwell v. Smith, 16 N. J. L. 133.

A dam erected across a navigable stream under sanction of a legislative act requiring it not to interfere with navigation may be regarded as a nuisance if not kept in the condition required by the act, and an action as for injury by a nuisance may be maintained by the owner of a boat injured by reason of an obstruction of navigation thereby. Hogg v. Zanesville Canal & Mfg. Co. 5 Ohio, 410.

The grantee of a right to erect a dam on a navigable stream provided that navigation be not impeded thereby must remove any bar formed in the river by reason of the dam although a natural consequence of any dam that could be built. Bacon v. Arthur, 4 Watts, 437.

The owners of a dam across a navigable stream which is a common highway under the ordinance of 1787, constructed by them under legislative authority, which provides that if it shall be so maintained as in any wise to impede or render dangerous navigation they shall be civilly liable to persons injured, are liable for damages to the owner of a boat injured by reason of an obstruction of navigation by such dam, although all diligence was used to prevent the dam from creating an obstruction to navigation, where want of ordinary care on the part of those navigating the boat is not shown. *Ibid.*

One who has erected a dam upon a navigable stream under the authority of the legislature, requiring the maintenance of a good and sufficient slide for the passage of rafts, and by doing so has improved the navigation, may not, if he causes injury to rafts properly and skilfully constructed and managed, by means of the improper condition of the dam or other improper obstructions, defend on the ground that the same rafts could not have floated on the river at all in its natural state. Volk v. Eldred, 23 Wis. 410.

One who obstructs, by a dam of illegal height, a river constituting a public highway, is liable, without notice to abate, to one injured by reason thereof while rightfully using the river for a lumber drive, although the dam is but a continuance of a pre-existing nuisance. Arpin v. Bowman, 83 Wis. 54, 53 N. W. 151.

Under a right to erect a dam across a public stream on condition that proper locks and slopes are provided for the passage of boats and rafts, the owner of a dam will be liable for damages resulting from his failure to provide those facilities. Hughes v. Heiser, 1 Binn. 463.

A statute prohibiting the construction of a dam across a stream without sufficient locks or slopes to admit the free navigation of such stream is violated by the owner of a dam who, though equipping it with a slope, kept the gates closed and refused to allow a person to pass through with a raft without paying toll. State v. Cullum, 2 Specrs, L. 581.

Simply consenting to the repair of a dam does not make the party consenting liable for damages to lumber rafts by reason of the raising of the dam to a height greater than that authorized by statute. Arpin v. Bowman, 83 Wis. 54, 53 N. W. 151.

The rights of the public in relation to a free passageway on navigable streams for the property of each citizen should be liberally, and the rights of the owners of piers and booms strictly, construed. It is the duty of owners of piers and booms on a navigable stream to use unusual diligence in clearing a passageway for logs, but they are not responsible if logs cannot be put through their piers, or divided there because obstructed below. Leigh v. Holt, 5 Biss. 338, Fed. Cas. No. 8,220.

A boom company swinging its boom across a river to the obstruction of the public use, contrary to its charter powers, will be held liable for damages caused thereby; and no one is bound to take notice of the declared purpose of the company to so swing its boom, or to take more than ordinary care in the preservation of his logs after he has notice that the damage is done. Plummer v. Penobscot Lumbering Asso. 67 Me. 363.

Under a statute providing that booms shall be so constructed as to allow the free passage of vessels between them and the opposite shore, a boom is not authorized which completely blocks up the channel of the river, leaving no space for the free passage of boats, although it has a "trip" which may be opened to permit such passage. United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343.

But the fact that a boom constructed in a river within a state in pursuance of state legislative authority does not conform to the requirements of the statute permitting its erection does not render it an unlawful structure of which a Federal court may take cognizance. Id. 26 C. C. A. 547, 48 U. S. App. 443, 81 Fed. 658.

Where a boom company is indicted for maintaining a dam in a navigable stream, it is a defense that the obstruction was authorized by

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which all the others follow, is the uncovering of a portion of the land underlying the water between the high and low-water marks. "But," as is said by the defendants' counsel, "the state, and not these individual plaintiffs, is the owner of the lake and of the soil to high-water mark, and had a right to confer its use and enjoyment upon its grantee. If this affords some inconvenience to the plaintiffs in reaching the water, or lessens the enjoyment of residences upon or near the lake shores, there is no legal ground of complaint; it is purely *damnum absque injuria*." See *Fay* v. *Salem & D. Aqueduct Co.* 111 Mass. 27, 28, 29, and authorities cited. But, while the plaintiffs have no well-founded ground of complaint occasioned merely by the lowering of the lake within the charter limit, the defendants, notwithstanding their charter, were bound to exercise the right so obtained in a reasonable manner, not only as to the plaintiffs, but as to all others having rightful interests upon the shores or in the waters of the lake, and are justly subject to liability for failure to do so. Nevertheless, we think the rights expressly conferred by the charter must be regarded as paramount to, and as necessarily impairing to some extent, such other interest; and therefore, while the defendants' management of their dam in respect of low water in 1880 or 1881 may properly have been open to the adverse criticism bestowed upon it by the referee, still, in view of the limited extent to which the defendants have exercised their right to lower the lake, and their sixty years' user of it without objection, and in the absence of any finding that the water has ever been drawn below what was necessary for the

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the boom law, unless it appears that by means of the dam unreasonable and avoidable delay is caused in the passage of boats. State v. Elk Island Boom Co. 41 W. Va. 796, 24 S. W. 590.

When a state reservoir in a floatable stream has been lawfully constructed, and the only fault for which liability can attach is in the location and construction of a chute, the evidence must be plain as to the extent to which such fault has impeded navigation, or from which special damages can be estimated. Denton v. State, 72 App. Div. 248, 76 N. Y. Supp. 167.

An aqueduct constructed to carry a canal across a navigable river, the navigation of which is thereby interfered with, becomes, upon the abandonment of the canal by the state, a common nuisance for the abatement of which an action may be maintained by any riparian proprietor especially injured thereby. Hubbard v. Toledo, 21 Ohio St. 379.

3. *Bridges.*

There is no doubt at the present time of the legislative right to authorize the bridging of navigable waters. Provision is usually made for bridges of such a character that the rights of navigation will receive as little injury as possible.

A bridge over a navigable river or arm of the sea is a nuisance unless authorized by the legislature. Charles River Bridge v. Warren Bridge, 7 Pick. 344; Monongahela Bridge Co. v. Kirk, 46 Pa. 112, 84 Am. Dec. 527.

But in Reg. v. Betts, 16 Q. B. 1022, 4 Cox, Ch. Cas. 211, 19 L. J. Q. B. N. S. 501, 22 Eng. L. & Eq. 240, it was held that the building of a bridge partly in the bed of a navigable river is not necessarily a nuisance; that the question whether in fact it was so or not in a particular instance is for the jury. Lord Campbell said, the true question is whether a damage accrues to the navigation in a particular locality, and that is for the jury.

And in a Canada case it was held that a bridge over navigable waters is not a nuisance so long as it is no damage to the navigation. Thurlow v. Bogart, 15 U. C. C. P. 9.

There are three cases in which the authority of the legislature to erect a bridge across a stream is necessary: (1) Where the stream is navigable; (2) where the title to the bed of the stream is in the public; (3) where the right to take tolls is desired. Ft. Plain Bridge Co. v. Smith, 30 N. Y. 44.

A bridge may be erected over a stream which is navigable for rafts. Spring v. Chase, 2 Dane, Abr. 696.

When a railroad is authorized to construct a bridge over a public stream provided that the free and uninterrupted navigation thereof shall not be interfered with, the condition of the grant is not met unless navigation is left open at all times,—that is, entirely uninterrupted. Snure v. Great Western R. Co. 13 U. C. Q. B. 376.

Although a bridge is of very great public benefit, while the prejudice it causes to the public as an obstruction to navigation is of the slightest possible degree, if unauthorized, it is an illegal structure amounting to a public nuisance. Queen v. Moss, 26 Can. S. C. 322, Affirming 5 Can. Exch. 30.

So one who rightfully maintains a milldam, whereby a stream sufficiently large and deep to permit of the floating of logs at some seasons of the year is rendered of sufficient capacity to float a steamer which has long been used to transport the products of the mill up the river, the bridges across which have been built so as to permit of the passage of the boat, is entitled to an injunction restraining local authorities from rebuilding a bridge so as to deprive him, without condemnation or compensation, of his right to run his boat. Stoffiet v. Estes, 104 Mich. 208, 62 N. W. 347.

But the common-law rule that every obstruction, however small, to the free navigation of a public river is in strictness a nuisance, is unreasonable and absurd when applied to every creek where the tide ebbs and flows, or which a chance sloop might occasionally visit, as against the construction of a railroad or other highway thereover for the convenience of the public. The question in every such case is as to the relative importance of the two interests in that particular instance. Devoe v. Penrose Ferry Bridge Co. 3 Am. L. Reg. 79, Fed. Cas. No. 3,845.

And the construction of a bridge over a navigable stream under legislative authority cannot be adjudged a nuisance where the state has the constitutional power to authorize it. People *ex rel.* State Harbor Comrs. v. Potrero & B. V. R. Co. 67 Cal. 166, 7 Pac. 445.

If the abridgment of the right of passage along a river occasioned by the erection of a bridge across a stream is for a public purpose and produces a public benefit, and if the erection is in a reasonable situation, and a reasonable space is left for the passage of vessels on the river, it is not an unreasonable obstruction and indictable. Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311.

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beneficial operation of the machinery on the river, or that the defendants have made an intentional misuse of the water, or have intended in any way to cause unnecessary annoyance and damage to the plaintiffs, we are of opinion that no case is established by the reported facts which entitles the plaintiffs, or any of them, to equitable relief. In respect to the raising of the water to an unusual height, another and quite a different case is presented. The defendants' charter authorizes the erection of a dam to low-water mark only, whereas the height to which they originally constructed and have since maintained it is the natural high-water mark; or, in other words, 2 feet above the point authorized by the charter. This maintenance, however, so far as appears, caused no injury to the shore owners or to the public up to 1851, when, as is found by the referee, in order to enable them to draw the water to a lower depth, the defendants sunk the channel of the river below the dam to the depth of 2½ feet or more, reconstructed the dam, removed obstacles to the flow of the water from the channel above it, and by means of these changes and the addition of flashboards to the dam created a higher level of the water, which caused injury to the shore owners upon the lake by the flowage of their lands. Some of them subsequently brought suits therefor, and received compensation through an adjustment made with them by the defendants involving the "acknowledgment of liability, determination, and satisfaction of damages." One of the suits so adjusted was that of John Pike, which, in addition to the payment of damages, resulted in an agreement, made in 1855 between him and the defendants,

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It cannot be urged that a drawbridge over a navigable stream is not a legal structure because not located at the exact point authorized by the board of supervisors, where it has been in existence for twenty-nine years without anyone questioning its legality, and the legislature and board of supervisors have recognized it by providing for its maintenance. Dietrich v. Schremms, 117 Mich. 298, 75 N. W. 618.

A bridge permitted by an act of the state legislature, but not constructed in accordance with it, is an unauthorized obstruction, and the owner of a vessel injured by a collision with it may maintain a suit *in personam* in admiralty against the owner of the bridge for damages; but he must allege and prove that the collision was caused by the defective construction or maintenance of the bridge in some specified particular. Oregon City Transp. Co. v. Columbia Street Bridge Co. 53 Fed. 549.

A bridge constructed across a navigable river at a point where the current is straight and sluggish is not an obstruction to navigation where the draws are 120 feet in the clear, the piers except where the draws are placed are 250 feet apart, and the bridge stands 33 feet above low water and 23 feet above high water. United States v. Railroad Bridge Co. 6 McLean, 517, Fed. Cas. No. 16,114.

A bridge company will be restrained from proceeding with its works and placing piles in a navigable river, without proof of substantial injury to the public, where it is proceeding in violation of law and in a manner tending to public injury. Atty. Gen. v. Shrewsbury (Kingsland) Bridge Co. L. R. 21 Ch. Div. 752, 51 L. J. Ch. N. S. 746, 46 L. T. N. S. 687, 30 Week. Rep. 916.

A statute authorizing a railroad company to erect a bridge similar to one already erected by it is no defense in an action by a steamboat owner to recover damages for the obstruction of navigation caused by the bridge during the time it was in existence prior to the passage of the statute. Feltus v. Swan, 62 Miss. 415.

The question as to whether a bridge over a navigable stream is a public nuisance does not depend upon the amount of public benefit conferred by it; but, if a bridge is necessary for the convenience of the public, and does not prevent the free use of the stream as a public highway, although causing some slight inconvenience to those who had been in the habit of navigating the stream by obliging them to take some additional precautions in passing it, it is not necessarily a nuisance. Williams v. Beardsley, 2 Ind. 591.

A bridge is not necessarily a nuisance because it causes an obstruction to the channel of the river. The Passaic Bridges, 3 Wall. 782, and *sub nom.* Milnor v. New Jersey R. & Transp. Co. 16 L. ed. 799.

A bridge with proper draws, constructed over a navigable river under authority of law, is not a nuisance. The resulting hindrance to navigation is a public necessity. Manlius Highway Comrs. v. Chaffee, 1 Mich. N. P. 147.

The erection of bridges over rivers, so constructed and placed as to do the least possible injury to the navigation, has never been held to be a nuisance. Thompson v. Paterson & H. R. R. Co. 9 N. J. Eq. 526.

Every bridge may be said to be an obstruction, but the delay or risk inseparable to its existence does not make it an obstruction in contemplation of law. Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3,046.

The regulation of bridges over public streams is a legislative, not a judicial, question. Milnor v. New Jersey R. Co. 6 Am. L. Reg. 6, Fed. Cas. No. 9,620.

A statute conferring power to lay out highways, although silent as to the construction of bridges, carries with it by implication the power to construct bridges along its route, even over navigable waters, necessitating the construction of bridges provided with draws. Brown v. Preston, 38 Conn. 219.

A railroad company authorized by act of Congress to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad between specified points, with all the powers, privileges, and immunities necessary to that end, is entitled to bridge a navigable river which it must necessarily cross, although it will in some measure impair the navigability of the river, and the extent of such obstruction is a question the courts must determine in the absence of specific directions on the part of Congress. Hughes v. Northern P. R. Co. 9 Sawy. 313, 18 Fed. 106.

The right to build a bridge over a navigable stream under a grant of the legislature having jurisdiction thereof is coextensive with the right of navigating such stream, and if such bridge is constructed so as to interfere as little as possible with free navigation, upon the most approved plan, with a sufficient way left for the passage of boats in ordinary conditions of wind and stages of water, it cannot be adjudged to be a material obstruction to such navigation, although in times of high wind or water ordinary prudence would require a boat to delay passing through the draw until the condition of the elements should become more favorable.

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that the water should not thereafter be raised to a higher level than is now indicated by the figure 10 upon a gauge at the dam. Upon the reasonable construction which the Pike agreement is entitled to receive, no violation of it by the defendants appears until 1897. During the spring and summer of that year, especially in May and June, it is found by the referee that "an exceptionally large quantity of rain fell, and the waters of Lake Sunapee were extremely high, and before or during this period of high water the level of the lake was further raised by putting additional plank upon the dam." He further finds that "the evidence did not clearly indicate by whom such additional plank were placed upon the dam, but Mr. Abbott, who at the time had charge of the dam, knew they were on, and permitted them to remain until June 12th, thus continuing the level of the water to an unusual height for an unreasonable length of time. The directors of the defendant corporation did not direct Mr. Abbott to put those additional plank upon the dam, or to continue them upon it; and upon the complaint of parties whose property and rights were affected by the high water, the directors, on June 12, 1897, ordered Mr. Abbott to draw off and lower the water." It is further found that, "although the high water of May and June, 1897, rendered it much more difficult to regulate the water, and secure an even and uniform flow or level, thereby subserving the interests of the shore owners and those interested in navigation, as well as the proprietors of mill privileges on Sugar river, yet, had one of the directors, at least, given his personal attention to it, or had the dam been managed by Mr. Abbott as it had been by Mr. Flanders [the former manager], much, if not all, of the injury complained of would have been either avoided or diminished;" and that

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Illinois River Packet Co. v. Peoria Bridge Assn. 38 Ill. 467.

The owners of an authorized bridge are liable only for negligence in its construction, and such negligence as is specifically set forth in the pleading of the party seeking to recover therefor. Abbott v. Kansas City, St. J. & C. B. R. Co. 83 Mo. 271, 53 Am. Rep. 581.

A railroad company lawfully constructing its road in a proper manner over navigable water is not liable for damages resulting from the obstruction, without its fault, of an open space left for the passage of vessels, as such space, simply spanned by its draw for the passage of trains, is left, not only to the free use, but to the control and care, of the public. Pensacola & A. R. Co. v Hyer Bros. 32 Fla. 539, 22 L. R. A. 868, 14 So. 381.

A railroad company authorized to construct a bridge over tidal navigable waters, provided it does not "prevent the navigating said waters," is not subject to indictment for "obstructing and impeding" such river, as such acts to a certain extent are necessary and reasonable to the enjoyment of its franchise. State v. Portland & K. R. Co. 57 Me. 402.

A provision in an act authorizing the erection of a railroad bridge over a river, that suitable and sufficient draws shall be made so as not to obstruct navigation, is not a prohibition against building a bridge if navigation shall be at all obstructed thereby, but simply a requirement that the draws shall be sufficient not to obstruct navigation. Atty. Gen. *ex rel.* Easton v. New York & L. B. R. Co. 24 N. J. Eq. 49.

One seeking to recover for injury done by a bridge crossing a navigable river of the United States, on the ground that it does not conform with the act by which it was authorized, has the burden of showing that fact. Silver v. Missouri P. R. Co. 101 Mo. 79, 13 S. W. 410.

Under a statute granting the privilege of constructing a railroad bridge across a navigable stream, provided it be at least 42 feet above the bed of the river, that the railroad company pay the expense of putting hinges on the smokestacks of steamboats, and transport certain fertilizers at a specified rate, the conditions are continuing ones, and the bridge, after its construction at the prescribed height, becomes a nuisance if the distance between it and the bed of the stream becomes less than 42 feet by reason of the raising of the bed of the stream by natural deposits or other causes. 59 L. R. A.

State v. South Carolina R. Co. 28 S. C. 23, 4 S. E. 796.

A vessel owner who is specially injured by the maintenance of a bridge over a river is entitled, as damages, to the reasonable worth of the boat for such time as it was detained, including wages to the crew. Farmer's Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 579, 29 L. R. A. 700, 23 S. E. 43.

A bridge cannot be presumed to be a public nuisance for interfering with navigation when the facts show that there are other bridges above and below the one complained of which are more likely to obstruct navigation. Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 1.

No implied authority to obstruct navigation.

That a bridge was constructed under authority of an act of Congress does not render it a legal structure except so far as it conforms to the limitations of the act. If the powers granted by the act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection. Missouri River Packet Co. v. Hannibal & St. J. R. Co. 1 McCrary, 281, 2 Fed. 285.

The right of navigating a river in this country does not necessarily conflict with the right of bridging it. But these rights can only be maintained when they are so exercised as not to be incompatible with each other. Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249.

A charter to a bridge company to erect a bridge over a navigable stream does not authorize it to create any obstruction to the navigation of the stream in constructing the bridge. Terre-Haute Drawbridge Co. v. Halliday, 4 Ind. 36.

A bridge erected over a navigable stream under legislative authority must be so erected as to interfere no more with navigation than is reasonably necessary. State v. Freeport, 43 Me. 198.

A railroad company authorized to construct its road across a mill stream will not be allowed, in the absence of necessity, to construct its bridges so low as to interfere with the flow of the water or the passage of barges. Manser v. Northern & E. Counties R. Co. 2 Ry. & Canal Cas. 380, 5 Jur. 983.

General authority in a railroad company "to build bridges" does not confer power so to construct them as either to destroy or interfere

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"the effect of the management of the dam was to raise the water of the lake to such an extent as to submerge the wharves of the steamboats as well as those of others, to injure and destroy some of those wharves, flood some cellars upon the shores, and wash and injure beaches upon the properties, respectively, of the plaintiffs Quackenbos and Illay, and injuriously affect the state's fish hatchery on the shore of the lake." And, in addition to the foregoing findings, the referee also finds there was no evidence of any claim by the defendants, since 1855, of a right to raise the water above the point agreed upon with Pike, and that during May and until June 12, 1897, "the use of the waters of the lake by the defendant corporation was not a reasonable use of such waters." Whatever the legal rights of the defendants may be in Sunapee lake, they are, as before stated, bound to exercise them in a reasonable manner, for in this state the law of public waters is what justice and reason require (*Concord Mfg. Co.* v. *Robertson*, 66 N. H. 22, 18 L. R. A. 691, 25 Atl. 728); and, while the foregoing findings leave no room for doubt that the right to an assessment of compensatory damages in favor of those of the plaintiffs who may be legally entitled thereto is established in the particular instance referred to, yet, in view of the circumstances attending it, as detailed by the referee, the improbability of its repetition, and the unquestioned ability of the defendants to respond in damages, we do not think a case is made which at this time calls for the restraining power of equity by way of injunction.

Case discharged.

Pike, J., did not sit. The others concurred.

Rehearing denied.

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seriously with the navigation of a public stream: as, in the absence of express provisions, it will not be assumed that the legislature authorized the construction of a permanent structure over one of its streams susceptible of use for navigation, which would seriously impede the enjoyment of that use. Southern R. Co. v. Ferguson, 105 Tenn. 552, 59 S. W. 343.

In Texas railroad companies are forbidden to erect a bridge or other obstructions across, in, or over any navigable stream so as to prevent or unreasonably impede the navigation thereof (Oldham & White's Digest, art. 1634). Selman v. Wolfe, 27 Tex. 68.

It seems, that if a state has the power to grant to a railroad company the right to impede navigation by the construction of a bridge, the grant must be explicitly given, and it will not be implied simply because a navigable stream intervenes between terminal points of the chartered right of way of the railroad company. Little Rock, M. River & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277.

The right to free navigation of a river is consistent with the right of the state to provide means of crossing it by bridges or otherwise when the wants of the public require them, provided such bridges do not essentially injure its navigation. Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3,046.

The construction of a bridge across a stream at a point above the tide, but where the public by user have a right of navigation, will not be prevented where it does not, and is not likely to, interfere with navigation. Ewing v. Colquhoun, L. R. 2 App. Cas. 839.

It has always been the settled policy of the state of Texas to guard its navigable streams from obstruction, and to improve them as common highways of trade and travel; and in view of this policy, and of the laws passed by the state for the protection of its navigable streams, the private act of February 10, 1858, authorizing certain persons to erect a toll bridge across the Angelina river, did not confer upon the grantees the right to obstruct the navigation of the stream, as such right was not expressly granted or necessarily implied from the language of the act. Selman v. Wolfe, 27 Tex. 68.

In an action against a bridge company by the owner of boats, for damages occasioned by the detention of his boats by an obstruction created by the bridge, also for the loss of a boat for the same cause, it is a question for the jury to determine whether such bridge created such an obstruction to navigation as to render the company liable for the damages occasioned thereby. Terre-Haute Drawbridge Co. v. Halliday, 4 Ind. 36.

If a public bridge in its original construction and its condition impedes the free navigation of a stream for rafting timber, for which purpose it has been used for many years, that fact may be shown in defense of an indictment for the destruction of the bridge. Owens v. State, 52 Ala. 400.

County commissioners as successors of a plank-road company have no authority to construct a bridge over a navigable river in such a manner as to interfere with the navigation thereof, under charter power to such company to construct it as part of its road, where the act confers no express power to obstruct navigation, and that is not necessary for the accomplishment of the purpose contemplated by the general power granted. Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

Construction.

One complying with his franchise while erecting a bridge over a navigable stream is liable for only such injury to navigation as results from his negligence. Jutte v. Keystone Bridge Co. 146 Pa. 400, 23 Atl. 235.

A railroad company cannot be held liable to an individual for injuries temporarily caused to him during the construction by it of a bridge over a navigable river under authority from the legislature. Hamilton v. Vicksburg, S. & P. R. Co. 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206.

A steamboat owner cannot recover damages from a railroad company authorized to rebuild a bridge across a navigable stream because of obstruction of the channel by a temporary bridge, where an unprecedented rainy season caused unavoidable delay in the completion of the work. Id. 34 La. Ann. 970, 44 Am. Rep. 451.

Where a bridge erected across a navigable stream under a statute permitting its erection provided it be at least 42 feet above the bed of the stream was carried away by a freshet, the bridge to replace it must be erected at least 42 feet above the bed of the stream as it exists at the time of the construction of such new bridge. State v. South Carolina R. Co. 28 S. C. 23, 4 S. E. 796.

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MAINE SUPREME JUDICIAL COURT.

Charles F. FROST
v.
WASHINGTON COUNTY RAILROAD COMPANY.

(96 Me. 76.)

1. **The decision by Congress that a bridge** across a navigable body of water, erected under authority of a state statute which provides that it shall not unnecessarily obstruct the navigation, is lawful, is conclusive upon the state courts as to whether or not the conditions have been complied with.
2. **A bridge across navigable water will continue to be lawful** until the Secretary of War orders its modification, under an act of Congress declaring it to be so, with the proviso "that such modifications are made in their present position, condition, and elevation as the Secretary of War may order in the interests of navigation."
3. **A railroad company may, under legislative authority, close the entrance to a navigable cove** without making compensation to the owners of property on the cove, the value of which is thereby diminished, under a Constitution requiring compensation to be made only for property taken for public use.

(December 23, 1901.)

A company authorized to erect a bridge over a navigable river has the right to drive piles in the bed of the river, but is bound to observe all reasonable precaution to secure the safety of boats navigating the stream; but if, at an ordinary flood-stage of the river, such piles are likely to become a hidden and dangerous obstruction to navigation, it should mark the spot by buoys or otherwise, and is not relieved from such duty although the piles might create a break on the surface of the water which a skilful navigator would, in daylight, observe and understand. The Modoc, 26 Fed. 718.

Under a statute permitting a railroad company in constructing a bridge across a navigable stream to construct a temporary bridge for the purpose of aiding in the erection of the permanent one, the temporary structure, operated in a bona fide effort to carry out the purpose contemplated, is not rendered illegal by the fact that it is also used for other purposes, if no further impediment to the navigation is rendered thereby. Priestley v. Manchester & L. R. Co. 4 Younge & C. Exch. 63, 2 Ry. & Canal Cas. 134.

The Central Railroad Company of New Jersey, being chartered by special statute declared in terms to be a public act and commanding the courts so to recognize it, and having power, by a supplement thereto, to extend its road to New York bay, and in doing so to construct a suitable bridge over all navigable waters crossed on the way, is not liable, under allegations, for obstructing Newark bay by a viaduct bridge otherwise properly located and constructed by driving 500 piles so near to the navigable channel as to greatly narrow it and impede and hinder navigation. Stephens & C. Transp. Co. v. Central R. Co. 33 N. J. L. 229.

An obstruction to navigation is lawful, where a railroad company, by authority of its charter, constructed a bridge across a navigable stream, during the construction of which, and without which said bridge could not have been built, it was absolutely necessary to erect such temporary trestles and other structures as for the time being to obstruct and prevent navigation of the stream: provided such obstructions were extended over no more of the stream at any one time, and were continued for no longer period, than the necessity of the case, under skilful management and diligent exertion of an adequate force of men and machinery, imperatively demanded and required. Cantrell v. Knoxville, C. G. & L. R. Co. 90 Tenn. 638, 18 S. W. 271.

Temporary obstructions to a navigable stream caused by necessary temporary structures in the erection of a railway bridge, are not within the meaning of a statute prohibiting the obstruction of navigation by a "mill-dam, fish trap, bridge, or other improvement." *Ibid.*

But obstruction to navigation, caused by the erection of temporary structures, by a railroad company, in constructing a bridge across a navigable stream, is a public nuisance, rendering such company liable to any person damaged thereby, where the charter of said railroad company, authorizing it to build such bridge, contained a proviso that the navigation of said stream should not be obstructed thereby, and it was not shown that such temporary structure was indispensable, without which such bridge could not have been built, and that the same was constructed only for a reasonable time, and it was not possible to keep a passageway open for the needs of navigation. Memphis & O. R. Co. v. Hicks, 5 Sneed, 427.

And a railroad company authorized by act of Parliament to construct a bridge across a navigable river, and entering into a contract with another to construct it, is liable for delay caused a vessel by the failure of the contractor to properly construct the bridge. Hole v. Sittingbourne & S. R. Co. 6 Hurlst. & N. 488, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274.

Piers.

A statute authorizing a bridge, the piers of which shall be parallel with the current of the river, will be sufficiently complied with if the piers are located fairly and substantially parallel with the usual and ordinary course of the current. Silver v. Missouri P. R. Co. 101 Mo. 79, 13 S. W. 410.

Where an act of Congress providing for the construction of a bridge across a navigable river required that it be equipped with a draw with spans of not less than 160 feet in the clear on each side of the pivot pier of the draw, and that the piers should be parallel with the current of the river, it intended to reserve for the navigation of vessels a space of the prescribed limits, measured at right angles with the current of the stream; and a bridge constructed diagonally across the stream, with such space consisting of only 150 feet when so measured, is an unlawful structure, although such space, when measured along the chord or line of the bridge, gives a measurement of 160 feet; and its owners are liable for injuries to vessels caused or contributed to by the unlawful structures while such vessels are attempting to pass through the draw in charge of pilots exercising usual or ordinary skill. Mis-

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REPORT by the Supreme Judicial Court for Washington County for the opinion of the full bench of questions arising in an action brought to recover damages for the alleged closing of a navigable channel leading to plaintiff's property. *Judgment for defendant.*

The facts are stated in the opinion.

Messrs. **G. M. Hanson, A. St. Clair,** and **L. H. Newcomb** for plaintiff.

Messrs. **G. A. Curran** and **B. B. Murray** for defendant.

Emery, J., delivered the opinion of the court:

A small tide-water bay or cove makes westerly from Passamaquoddy bay into the land in the town of Perry. The entrance to this cove from the bay is a navigable channel between Pleasant point on the mainland on the north and Carlow island on the south, and this channel, for the purposes of this case, may be regarded as the only practicable passage by water in and out of the cove. For several years prior to 1898, and since, the plaintiff has owned a tract of land on the shore of this cove about three quarters of a mile up the cove from the entrance. On this tract of land, prior to 1898, he had built a wharf into the cove, and had built a gristmill, and was carrying on a business of buying, grinding, and selling grain, etc., and also was dealing in wood, country produce, etc. The most of his transportation of the merchandise of his business was by water to and from his

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souri River Packet Co. v. Hannibal & St. J. R. Co. 79 Mo. 478.

To render a lessee of a bridge which is not parallel with the current, as required by the act under which it was constructed, liable for injuries caused thereby, he must have notice of that fact, although the request to abate the nuisance is not necessary to render him liable. But direct evidence of knowledge of the nuisance is not necessary. It may be inferred from facts and circumstances sufficient to impart it. Silver v. Missouri P. R. Co. 101 Mo. 79, 13 S. W. 410.

A bridge erected under a statute requiring the piers at the draw to be placed parallel to the current of the river is not an unlawful structure, nor is the company erecting it chargeable with negligence, because a subsequent excavation made by the government in the bed of the river changed the direction of the current at the draw, if the passage remains reasonably safe. St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co. 31 Fed. 755.

Although a railroad company, in the construction of a bridge authorized by an act of Congress, makes the spans between the piers of less width than the act provides, yet this violation of law does not give one whose boat collided with the bridge a right of action against the company, unless it caused or contributed to the injury complained of. Missouri River Packet Co. v. Hannibal & St. J. R. Co. 1 McCrary, 281, 2 Fed. 285.

Draws.

Mere diminution of space, required by statute to be left for the passage of vessels in the construction of a bridge by private individuals, does not of itself require a removal of the bridge if sufficient space still exists for the purpose for which it is required. Thompson v. People *ex rel.* Taylor, 23 Wend. 537.

That a drawbridge to some extent delays passing vessels does not constitute such an obstruction to navigation as will make it a nuisance. Works v. Junction R. Co. 5 McLean, 425, Fed. Cas. No. 18,046.

A bridge constructed under an act requiring draws not less than 130 feet in width in the clear, and providing that the location and construction of the bridge and draws shall be approved by a competent board of engineers will not be held to be an unlawful obstruction, where the draw space, while 130 feet wide in the clear between the abutments down to the level of low water, was of less width below that point because of the outward sloping of the riprap foundation of the piers, when such construction was at the time approved by the board of engineers and confirmed by the court as within the requirements of the act. Gildersleeve v. New York, N. H. & H. R. Co. 82 Fed. 763.

The construction of a bridge across the Wallamet river at Portland, Oregon, with a draw of but 100 feet on either side of the pivot pier, under a statute authorizing the erection of a bridge with a draw of not less than 100 feet, will be enjoined, where it appears that the proposed structure will render navigation unsafe, and may prevent sea-going vessels from passing the bridge, to the detriment of riparian owners Hatch v. Wallamet Iron Bridge Co. 7 Sawy. 127, 6 Fed. 326.

A statute requiring a draw in a bridge to be of a certain width is complied with if it is of that width with the level of the bridge. Gildersleeve v. New York, N. H. & H. R. Co. 82 Fed. 763.

The width of 160 feet required for the safety of navigation between the draw piers of a bridge over a navigable river should be measured at right angles to the piers at low-water mark, and need not be calculated at right angles across the current. St Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co. 31 Fed. 755.

Under a statute authorizing the construction of a drawbridge, and requiring that it shall have spans not less than 160 feet in length in the clear on each side of the center or pivot pier of the draw, such distances should be measured at right angles with the pier across the channel, and a measurement along the line of the bridge is not proper, where the structure is built diagonally across the river, and not at right angles to the current. Missouri River Packet Co. v. Hannibal & St. J. R. Co. 1 McCrary, 281, 2 Fed. 285.

A statutory requirement that a bridge be constructed with a draw 75 feet in width intends such a width embracing the principal channel, and, if the bridge runs irregularly across it, a distance of 75 feet must be left open across the channel, estimating with reference to its curve. Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3046.

Under a statute authorizing the construction of a bridge with a draw not less than 30 feet wide if the bridge is built directly across the river, the draw must be in the clear between the pivotal piers and the other piers at least 30 feet; but if not built directly across the current, or perpendicular to it, then it must leave a clear width of 30 feet, estimated with reference to its curve and the obliquity of the bridge. Assante v. Charleston Bridge Co. 41 Fed. 365.

A statute authorizing the construction of a

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wharf, in and out of the cove, through the entrance above described. From this wharf and cove, vessels and boats could proceed by sea to other coast states and to the coasts of foreign nations.

The plaintiff had been carrying on this business in this manner through this navigable channel for several years prior to 1898, when the Washington County Railroad Company, in building its railroad into Eastport, built and has since maintained and now maintains a trestle across this channel between Pleasant point and Carlow island for the passage of its trains. This trestle practically prevents any navigation of that channel and any transportation by water in and out of the cove. This event has greatly injured the plaintiff's business and the value of his wharf and mill, although the railroad company has not taken nor trespassed upon any of his land or other property, but only interfered with his right of navigation through the channel into the bay and sea. He has brought this action on the case against the railroad company to recover compensation for the injury thus done him by the company's acts in building and maintaining that trestle.

1. The first question is whether the defendant company has any legal right to build and maintain a trestle of that character at that place with such effect. It was authorized by its charter (Special Laws 1893, chap. 454) to locate, construct, maintain, and operate a railroad from some point on the Maine Central Railroad in Hancock county to Calais, including a branch to Eastport. It was also empowered by its charter (§ 5) "to erect and maintain bridges across tide waters . . . which

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bridge over navigable waters is not void as an interference with the rights of navigation because of failure to specify the size of the draw to be made therein, since it will not be held to have intended the construction of a bridge without a sufficient draw for the convenience of navigation. Baltimore v. Stoll, 52 Md. 435.

Where a state has authorized a railroad bridge over a navigable river if constructed with a draw, if the bridge is constructed without a draw it is a nuisance, and, if navigation is wantonly obstructed, subject to summary abatement. State v. Parrott, 71 N. C. 311, 17 Am. Rep. 5.

A railroad company which constructs over a navigable river a bridge with a draw narrower than that required by the act of Congress authorizing the structure, and which failed to submit the plans to or secure the approval of them by the Secretary of War, as provided by the act, is chargeable with the maintenance of an illegal structure, and liable for damages sustained by a boat owner whose vessels are detained by an accumulation of driftwood against the piers of the bridge. Texarkana & Ft. S. R. Co. v. Parsons, 20 C. C. A. 481, 40 U. S. App. 13, 74 Fed. 408.

When a railroad company has power by statute to build a viaduct across navigable water, located at a point convenient for navigation, with a pivot draw thereon with two openings, each 75 feet in width, at right angles to the channel, in the absence of any allegation of bad faith or want of care in selecting the location, and of the width of the draw openings, an action does not lie for alleged mislocation, or for placing the draw other than at right angles to the channel. Stephens & C. Transp. Co. v. Central R. Co. 34 N. J. L. 280.

In Minturn v. Lisle, 4 Cal. 181, which was an action to recover damages for the obstruction of navigation, it was contended that the closing of a draw in the bridge did not amount to an absolute obstruction of navigation because of the possibility of passing the bridge through the slough, but the court said that this defense, if proved, would go in mitigation of damages, but would not relieve defendant from liability.

Where by statute the keeper of a railroad drawbridge is forbidden to open the draw for the passage of vessels within fifteen minutes of the time a train is due, the corporation will not be liable for injuries to a vessel which becomes caught under the bridge and is sunk by the rising tide because of refusal to open the bridge to release her, when it does not appear that the request to open the bridge was made at a time when it could have been complied with under the statute. Jennings v. Fitchburg R. Co. 146 Mass. 621, 16 N. E. 468.

A railroad maintaining a drawbridge across a river, which, when the draw is closed, obstructs navigation with tugs as those are usually constructed, may not delay such boats longer than is necessary by using due diligence to open the draw. Gates v. Northern P. R. Co. 64 Wis. 64, 24 N. W. 494.

A verdict in favor of the owner of a schooner will not be disturbed where the facts appear that in a severe storm the schooner signaled the guard of a drawbridge to open the same, and, in consequence of his omission so to do, was lost; the signal being given by blowing a conch shell until within 100 yards of the bridge, and there was evidence that such a signal had been often used at this bridge, and could be heard from 1½ to 5 miles, according to the state of the atmosphere. Louisville & N. R. Co. v. McDonald, 79 Miss. 641, 31 So. 417, 418.

A city owning a bridge, which it is required to keep in good repair, is liable to one whose vessel is injured because of failure to maintain a draw of the requisite width. Boston v. Crowley, 38 Fed. 202.

The Chicago river is a public navigable highway, and it is the duty of the city, upon the approach of a propeller with sound of whistle or notice of her intended passage, to use all proper and reasonable efforts to open the bridges in view of the state of the weather and the existing circumstances. Scott v. Chicago, 1 Biss. 510. Fed. Cas. No. 12,526.

Where a town has undertaken to manage and control a drawbridge it is liable for an injury to a vessel caused by failure to open the bridge for its passage, although it may not have originally been charged with such duty. Greenwood v. Westport, 62 Conn. 575, 53 Fed. 824.

The voluntary action of a town in opening a draw in a bridge for the passage of vessels was not a governmental act so as to relieve it from liability for its negligent performance of the same. Id. 63 Conn. 587, 60 Fed. 500.

Where a town has for a long period assumed the duty of opening a draw in a bridge for the passage of vessels, it is liable for injuries resulting to a vessel from its negligent failure to open the bridge, although such duty was not imposed upon the town by law, and was voluntarily assumed by it. *Ibid.*

But the court, in Daly v. New Haven, 69 Conn. 644, 38 Atl. 397, in deciding that the operation of a drawbridge constituted a governmental duty, relieving the town from lia-

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its railroad may cross; provided they shall be so constructed as not unnecessarily to obstruct the navigation of such waters."

Under this charter the defendant company duly located its branch line to Eastport across this channel where the trestle now is, and this location was duly filed with the railroad commissioners and the county commissioners, and was duly approved by them. The defendant company thereupon, in 1898, built the trestle on the line of the approved location to support its railroad track, and now maintains it as a part of its through railroad from Eastport to its connection with the Maine Central Railroad and with the railroad system of the United States and Canada. The railroad commissioners gave authority to the company to operate its railroad over the trestle as now constructed.

The plaintiff, however, contends that all this gave the defendant company no authority to construct and maintain the trestle it has; *viz.*, a trestle so constructed that it unnecessarily obstructs, and even entirely prevents, the navigation of this channel and cove. He claims that the proviso above quoted in § 5 of its charter limits its authority to build bridges and trestles to those of such character and construction as will not unnecessarily obstruct navigation as described, to his detriment, and hence this trestle is, as to him at least, an unlawful structure not authorized by the company's charter.

To meet this contention of the plaintiff the defendant relies upon an act of the Congress of the United States approved April 12, 1900 (31 Stat. at L. 74, chap. 187), of the following tenor, *viz.*: "Be it enacted,"

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bility for negligence, stated that such determination was not in conflict with Greenwood v. Westport, 62 Conn. 575, 53 Fed. 824, and 63 Conn. 587, 60 Fed. 560, as that decision rested upon the somewhat peculiar and exceptional state of facts in that case, and upon principles of maritime law.

A town which assumes the duty of attending and managing a draw in a bridge over a navigable stream, by purchase thereof under a statute requiring it to keep it in repair "and attended," a condition of the right to maintain which was that a draw should be constructed therein and opened when required for navigation by boats and vessels, is liable for damages arising from an obstruction of the navigation of the river by its failure to operate the draw, resulting in the death of a person navigating the same. Weisenberg v. Winneconne, 56 Wis. 667, 14 N. W. 871.

A town owning a bridge over a navigable stream, a condition of the right to maintain which is that a draw shall be maintained therein and operated when required for navigation, and a village in which such bridge is situated, whose duty it is to repair bridges within its limits, are jointly and severally liable for the death of a person navigating a stream, due to the obstruction of the navigation thereof by failure of the officers and agents of both such town and village, who had charge, control, and management thereof, to operate the draw. *Ibid.*

A town which maintains a drawbridge across a navigable river is liable for the loss of a steam barge which approached the bridge with proper signals, and when the draw did not open kept stopping, going ahead, and backing, until she became unmanageable, and sheering, struck bottom and sank. Van Etten v. Westport, 60 Fed. 579.

Although an ordinance of a city declares it to be unlawful for a vessel to attempt to approach nearer than the end of the bridge protection while the bridge may be opening or closing, nevertheless when the same ordinance designates the means by which those in charge of vessels plying the river shall know whether the bridge is or is not open for passage, the city cannot escape liability for injury to a schooner which was caused by a tug accepting the invitation of the bridge tender upon the signal that the way was clear, and that the draw of the bridge was open for passage, when it in fact had not been fully opened and locked, owing to the gross negligence of the bridge tender. Chicago v. Mullen, 116 Fed. 292.

In Massachusetts the owner of a vessel delayed by the fact that the draw in a bridge maintained by a municipal corporation under statutory obligation as part of a highway is not of the width required by statute has no right of action against the municipality unless expressly given by statute. French v. Boston, 129 Mass. 592, 37 Am. Rep. 393. This is put upon the ground that no private action can be maintained against a city for the neglect to perform a public duty from the performance of which it receives no benefit or advantage.

And it has been held that the duty of maintaining and operating a drawbridge constituting part of a public highway across a navigable river is a public governmental duty relieving the town operating it from liability to a person injured while crossing it for negligence in operating the draw. Daly v. New Haven, 69 Conn. 644, 38 Atl. 397.

A railroad company maintaining a drawbridge across a stream is liable for damages arising from the consequent loss to the navigators thereof by reason of the additional cost in getting out logs at a low and unfavorable stage of water, due to the delay caused by the failure of the railroad company to open the draw, where such unfavorable condition arises from the usual variation of the water with the change of season, such as is to be anticipated. Gates v. Northern P. R. Co. 64 Wis. 64, 24 N. W. 494.

A railroad company authorized to construct a bridge across a navigable channel provided it should be open so as to afford reasonable accommodation for passing vessels is liable to a boat owner for damages sustained by a delay due to the falling of the draw caused by the negligence of the railroad company. Piscataqua Nav. Co. v. New York, N. H. & H. R. Co. 89 Fed. 362.

The proprietors of a drawbridge over navigable waters of the United States are bound to use it in such a manner as not unnecessarily to obstruct navigation, and this duty includes the use of available signals and of reasonable methods tending to avoid accident or collision. Pennsylvania R. Co. v. Central R. Co. 59 Fed. 100.

When the draw of a bridge is turned to permit a boat to pass through it must be securely fastened, and in case it is not, and swings round to the injury of the vessel, the bridge owner will be liable. Etheridge v. Philadelphia, 26 Fed. 43.

It is the duty of a railroad company maintaining a drawbridge over navigable waters to exercise reasonable care not to impede the navi-

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etc., "that the trestle on the Eastport branch of the Washington County Railroad being the property of the Washington County Railroad Company, and running from the extreme point of land south of Pleasant point in the town of Perry county of Washington and state of Maine to the extreme northern end of Carlow's island in the town of Eastport in said county and state; and a certain other trestle, also the property of said railroad company, in the East Machias river in said county of Washington and state of Maine, at the extreme end of said river near the village of East Machias in said county and state, be, and both of said trestles hereby are, declared to be lawful structures; provided, that such modifications are made in their present position, condition, and elevation as the Secretary of War may order in the interests of navigation." It is not disputed that the trestle first described in the above act is the trestle in question.

We have now to consider the effect of this act of Congress upon the question whether the trestle, as now built and maintained, is a lawful or unlawful structure as to the plaintiff. Under the commerce clause of the Constitution of the United States (art. 1, § 8, ¶ 3), Congress undoubtedly has full and exclusive jurisdiction over navigation and commerce in this channel whenever it chooses to exercise that jurisdiction. Whatever navigability existed in this channel and cove to and from the plaintiff's wharf was directly available to commerce with other states and foreign nations over the waters of the cove, channel, bay, and the great highway of the ocean. "Commerce among states does not stop at a state

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gation of passing vessels, or not to unnecessarily delay them; and it is liable for injuries sustained by a tow, where it unreasonably delays opening the draw in response to signals of the tug until passage cannot be made with safety. Central R. Co. v. Pennsylvania R. Co. 8 C. C. A. 86, 20 U. S. App. 136, 59 Fed. 192.

It is an unreasonable and unjustifiable obstruction of a tug and tow to refuse to open the draw of a bridge when they are coming up with the tide not over 1,500 or 2,000 feet away, in order to give a preference to a freight train 2 miles away. Pennsylvania R. Co. v. Central R. Co. 59 Fed. 190.

A county is not liable in damages for the delay of vessels detained by failure, due to a broken casting, to open a swing bridge maintained by it, where the bridge tender had reported that the bridge was operated with difficulty, and the breakage was due to the defective work of the repairers sent to repair it. Pettit v. Camden County, 34 C. C. A. 159, 63 U. S. App. 286, 91 Fed. 998.

A railroad company, failing to open its bridge for the passage of a boat, is not guilty of detaining the boat within the meaning of the statute forbidding detention of boats, where the mast of the boat was so constructed that it could have been lowered and the boat have passed under the bridge. West Lancashire R. Co. v. Idon, 49 L. T. N. S. 600.

Repairs.

A railroad company authorized to construct a bridge over a public stream provided it keeps the bridge and draw in efficient working condition at all times is liable if it obstructs navigation while making needed repairs to the draw. Jones v. Baltimore & P. R. Co. 4 Mackey, 106.

A corporation engaged in repairing its drawbridge, "which shall not be liable for damages occasioned by obstructing or stopping navigation thereby," will not be exempt from that liability unless the work necessary to be done in making the repairs cannot be done with the draw open. Lister v. Newark Pl. Road Co. 36 N. J. Eq. 477.

Obstructing navigation for a period of forty-seven days, by the erection of false work so as to enable a railroad company to repair a drawbridge across a navigable stream, is not unreasonable so as to render such company liable therefor where its charter authorizes the construction of bridges "so as not unreasonably to obstruct the navigation of any navigable stream," and the work was done after due notice had been given navigators, at a season of the year when it was likely to interfere with navigation the least, and was done as expeditiously as possible; and, although by the expenditure of more money, and the stopping of traffic over the road during the interval, such bridge by an unusual method might have been built without the use of such false structure, yet such course was not required under its charter. Green & B. River Nav. Co. v. Chesapeake, O. & S. W. R. Co. 88 Ky. 1, 2 L. R. A. 540, 2 Inters. Com. Rep. 515, 10 S. W. 6.

A statute permitting the repair of bridges between certain dates named will exclude the right to repair at other times so as to obstruct navigation. Delaware, L. & W. R. Co. v. Mehrhof Bros. Brick Mfg. Co. 53 N. J. L. 205, 23 Atl. 170.

A corporation maintaining a bridge over navigable water is subject to a general law exempting such corporations from liability for obstructing or stopping navigation while making necessary repairs. Lister v. Newark Pl. Road Co. 36 N. J. Eq. 477.

A railroad company authorized to maintain a bridge across a navigable stream may, in an ordinarily skilful manner, make use of piling for the purpose of repairing it, and losses resulting to one using the stream to raft logs is *damnum absque injuria*. Central Trust Co. v. Wabash, St. L. & P. R. Co. 32 Fed. 566.

A railroad company authorized to maintain a bridge so as not unreasonably to obstruct navigation is not liable to a shipper compelled to pay increased freight by rail during a temporary obstruction of navigation due to necessary repairs on the bridge, where the railroad company provided for the transfer of freight at the bridge without charge to shippers. Rhea v. Newport News & M. Valley R. Co. 50 Fed. 16.

See also *infra*, VII.

d. Statutory prohibition.

The questions which have arisen in cases involving statutory prohibitions of obstructions are for the most part those in which an accused has claimed that his act was not within the terms of the statute. In addition to the cases here cited see *supra*, II. c, 3.

The obstruction of the navigable streams of the state of Texas is declared a high misdemeanor, punishable by a penalty (Hart's Digest, art. 465; Penal Code, 428). Selman v. Wolfe, 27 Tex. 68.

The statute against obstructions to the navigation of the Delaware (act March 1, 1820) includes only dams, wings, or other devices for

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line. Coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable." *Gilman* v. *Philadelphia*, 3 Wall. 725, 18 L. ed. 96. In *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423, the American river, a small branch of the Sacramento, though entirely within the state and navigable only by barges and small steamboats, was yet said to be a navigable water of the United States, and as such under the control of the government of the United States, as to its navigation. So, Grand river, though wholly within the state of Michigan and flowing into Lake Michigan, was held to be within the commerce clause of the United States Constitution. *The Daniel Ball*, 10 Wall. 557, *sub nom.* *The Daniel Ball* v. *United States*, 19 L. ed. 999. When, therefore, Congress acts, and so far as it acts, in the premises, the jurisdiction of the state government, judicial as well as legislative, recedes. If Congress declares a bridge or other structure over or on navigable waters to be an unlawful structure, the state legislature cannot make it lawful, nor can the state court declare it to be lawful. So, if Congress declares the structure to be lawful, neither the state legislature nor the state court can, even upon the most plenary proof, declare it unlawful as interfering with navigation. The judgment of Congress is conclusive; not to be questioned by any court. In the *Wheeling Bridge Case*, 18 How. 421, 15 L. ed. 435, the United States Supreme Court had, upon allegation and proof, adjudged the Wheeling bridge across the Ohio river to be an un-

taking fish or creating a water power. Lair v. Killmer, 25 N. J. L. 522.

A statute declaring that no person shall erect a milldam or other obstruction across any stream used for the purpose of navigation applies to a stream used for such purpose at the time of the obstruction, although it may not have been so used when the statute was enacted. State v. Cullum, 2 Speers, L. 581.

Minn. Gen. Stat. chap. 32, does not prohibit the construction and maintenance of a dam by the owner of the adjoining land which does not obstruct the passage of logs, timber, or lumber; nor does it make the right to construct the dam depend upon a license by the county commissioners. The license is only needed to enable the party who builds and maintains the dam to charge tolls for sluicing logs, as against those with whom he has no contract; but it is not necessary to enable him to recover from those who employ him to sluice logs through it. Lamprey v. Nelson, 24 Minn. 304.

Dams, booms, or dividing piers built and maintained for use in connection with his sawmill, by a riparian proprietor without legislative permission, in a stream navigable only for the floatage of logs and timber, are not unlawful under a statute forbidding, under penalty, obstructions impairing the free navigation of navigable streams, if they do not materially interfere with the free navigation thereof. A. C. Conn Co. v. Little Suamico Lumber Mfg. Co. 74 Wis. 652, 43 N. W. 660.

A general statute imposing a penalty for obstructing a navigable river does not apply to a boom company whose charter gives it the right to maintain a boom in a river navigable only for the running of logs. Edwards v. Wausau Boom Co. 67 Wis. 463, 30 N. W. 716.

Restrictions contained in charters of corporations organized for manufacturing with water power, that the grants of authority therein shall not be exercised so as to interfere with rights of navigation, cannot introduce a rule of construction that the charters without such restrictions would authorize unnecessary interference and obstruction of such rights. Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090

The provisions of § 10 of 26 Stat. at L. 426, fixing a penalty for obstruction of navigable waters, are applicable to § 7 of such act as amended and re-enacted by 27 Stat. at L. 88, which extends the act to the alteration of ports and harbors. Leovy v. United States, 34 C. C. A. 392, 92 Fed. 344.

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e. Refuse and débris.

Under a statute providing a penalty for casting rubbish or other substance into any port, harbor, or navigable river so as to tend to the obstruction of the navigation thereof, or in any place or situation on shore where the same shall be liable to be washed into the sea or into any ports, harbors, or navigable rivers by the tide, but which latter clause is silent as to the effect on navigation, a person violating the latter clause is subject to the penalty, although no injury is done to the navigation. United Alkali Co. v. Simpson [1894] 2 Q. B. 116.

A tug is not subject to the penalty prescribed by the act of June 29, 1888, forbidding the dumping of mud within certain limits around the port of New York, and providing, for every violation, that the person offending shall be guilty of an offense against the act, and that any boat used in the violation shall be liable to the penalty imposed, where the illegal dumping took place from scows in tow, the crew of which were in no way connected with the tug, and who acted of their own volition and contrary to the orders of the captain of the tug. The Emperor, 49 Fed. 751.

A steamship from which ashes are dumped in the tidal waters of the harbor of New York, in violation of the act of June 29, 1888 (25 Stat. at L. 209, chap. 496, U. S. Comp. Stat. 1901, p. 3533), is liable for the prescribed penalty, where the act was done by firemen presumably acting under the orders of persons in authority. The Bombay, 46 Fed. 665.

But a ship is not liable for a penalty imposed by the act of June 29, 1888 (25 Stat. at L. 209, chap. 496, U. S. Comp. Stat. 1901, p. 3533), to prevent the dumping of obstructive deposits in the harbor of New York, where an employee, without orders from anyone in authority, threw overboard a single scuttle of ashes. The Anjer Head, 46 Fed. 664.

One carrying on a business adjoining a navigable river is liable for a nuisance created by the sliding into the river of piles of rubbish placed on the banks by his servants, although without his knowledge and contrary to general directions which he had sometime given to his servants, directing them to effect some other method of disposing of the rubbish. Queen v. Stephens, L. R. 1 Q. B. 702, 35 L. J. Q. B. N. S. 251, 12 Jur. N. S. 961, 14 L. T. N. S. 593, 14 Week. Rep. 859, 7 Best & S. 710.

Where the purpose of an indictment for creating a nuisance by throwing rubbish into a navigable river in the carrying on of a business is the abatement of the nuisance, the proceed-

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lawful structure as obstructing the navigation of the river, and had decreed that it should be removed or elevated so as to permit free navigation of the river. Then Congress passed an act declaring the bridge to be a lawful structure in its then position and elevation. The court held that this act of Congress conclusively determined this bridge to be a lawful structure at its then elevation, and that the court could not proceed further in the matter. In the *Clinton Bridge Case*, 10 Wall. 454, 19 L. ed. 969, the plaintiff sought to prove that the bridge across the Mississippi river was a serious and dangerous obstruction to navigation, to his special detriment. After the erection of the bridge, Congress passed an act declaring that the bridge (describing it) "shall be a lawful structure." The court held that the act of Congress took the question from the court. The action was thereupon dismissed without hearing any evidence. In *Miller* v. *New York*, 13 Blatchf. 469, Fed. Cas. No. 9,585, a case concerning the Brooklyn bridge, the United States circuit court considered the effect of an act of Congress declaring a bridge over navigable waters to be a lawful structure, and, after reviewing the authorities, said: "It results from the cases considered that the authority of Congress is paramount in the regulation of commerce under the Constitution, and that its determination in respect to interference with navigation by obstructions thereto is conclusive. What it authorizes may be justified upon its authority. What it forbids is necessarily unlawful. Nor is it to be forgotten that this power of Congress is at all times capable of exercise. If it should turn out that the judgment of Con-

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ing is not strictly criminal in its nature so as to save the defendant from liability for acts of his agents. *Ibid.*

The provisions of the act of March 1, 1893 (27 Stat. at L. 507, chap. 183, U. S. Comp. Stat. 1901, p. 3553), declaring hydraulic mining injurious to the navigability of specified river systems and unlawful, and requiring persons desirous of carrying on such mining to file a petition with, and obtain permission from, the *débris* commission, prohibits hydraulic mining in the territory until such permission is granted. United States v. North Bloomfield Gravel-Min. Co. 81 Fed. 243.

The provisions of the act of March 1, 1893 (27 Stat. at L. 507, chap. 183, U. S. Comp. Stat. 1901, p. 3553), regulating hydraulic mining in the state of California, and prohibiting it in the territory drained by the Sacramento and San Joaquin river systems, unless a permit is applied for and obtained from the *débris* commission, are mandatory, and applicable to those already engaged in such occupation, who must obtain the required permit in order to continue it. North Bloomfield Gravel Min. Co. v. United States, 32 C. C. A. 84, 59 U. S. App. 377, 88 Fed. 664.

An injunction to restrain hydraulic mining as detrimental to navigation on a river will be granted where the impounding dam is constructed of wood, and stands in the bed of a torrential stream so that it is liable to be carried away by freshets to the injury of the navigability of lower streams. United States v. Lawrence, 53 Fed. 632.

A mill owner is liable for the creation of a nuisance, who obstructs a public stream by casting slabs and other sawmill waste therein, except as connected with a reasonable use of the stream or by direct authority of law; and one using the stream may cut a channel through such waste or drift material in a reasonable manner, and will not thereby incur liability for diverting the water from the mill. Veazie v. Dwinel, 50 Me. 479.

The mill owner will be liable to an action at law by any individual who shall be specially damaged thereby. *Ibid.*

The owners of a bridge across a navigable stream must use reasonable diligence to prevent accumulations of drift around the bridge piers, and where they fail to use such diligence they are liable, where a craft navigating the stream with proper care is injured by running against the drift. St. Louis, I. M. & S. R. Co. v. Meese, 44 Ark. 414.

An easement to throw sawdust and other mill refuse into a navigable stream cannot be obtained by user if a nuisance to navigation be created thereby. Atty. Gen. v. Harrison, 12 Grant Ch. (U. C.) 466.

A city is entitled to an injunction restraining the discharge of mash from a brewery through the sewer into a navigable river the free use of which for purposes of navigation is impeded by diminishing the depth of the water so that vessels will be prevented from coming to the city's wharves, thereby depriving it of dockage and wharfage. New York v. Baumberger, 7 Robt. 219.

That a brewery discharges mash into a navigable river through a sewer constructed by the city and which the brewery is licensed to use does not make the discharge any less the act of the brewery, nor is such use of the sewer proper or legitimate. *Ibid.*

It seems that a municipal corporation has no power to authorize a factory to discharge refuse through a sewer emptying into a navigable stream, in such quantities as to impede navigation and constitute a nuisance. Hudson River R. Co. v. Loeb, 7 Robt. 418.

Discharge of refuse matter by a factory through a sewer emptying into a navigable river is not justifiable on the ground that the sewer empties into the river at a point where the city possesses the right to fill out to an exterior bulkhead line, when such mode is not sanctioned by the city authorities, and it appears that the deposit obstructs navigation both above and below the point of discharge. *Ibid.*

That a sewer is a lawful structure does not entitle the proprietors of a brewery authorized to drain therein to discharge through it any such quantities as will form a deposit at the mouth of the sewer, and obstruct, to the damage of wharf owners, the full and free navigation of a public stream into which the sewer empties. *Ibid.*

But the owner of a pier which is obstructed by the deposit of refuse about it so as to prevent access to it has no claim to relief as a riparian owner, but his right, if any, is with the other people of the state whose use of the highway has been obstructed or disturbed by an individual. *Ibid.*

However, one interrupted in the full and free use of the waters in the slips between his piers or wharves, by the deposit of refuse in the river through a sewer whereby he is deprived of wharfage, sustains a special or peculiar injury entitling him to maintain a private action to restrain the nuisance. *Ibid.*

But, to entitle the owner of a wharf to maintain an action to restrain the deposit of refu-

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gress has been mistaken, and that navigation is injuriously affected, it can by law require the bridge to be altered or removed, and can adopt its regulation of commerce to its view of the public interests." This language was quoted with approval by the New York court of appeals in *People ex rel. Murphy* v. *Kelly*, 76 N. Y. 475, and the decision was affirmed in *Miller* v. *New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228.

It must be apparent from the foregoing authorities, and from the nature of the case, that if Congress has declared this trestle, as now constructed and maintained, to be a lawful structure, this court cannot hear the plaintiff to complain that it unlawfully impedes him in navigating the channel and cove. In such case the question of lawfulness or unlawfulness of the structure has been taken from the court.

But the plaintiff contends that the act of Congress has not declared the trestle to be a lawful structure *in præsenti*, but only *in futuro*, in case and when the defendant company shall perform the condition of the proviso of the act, *viz.*: "Provided that such modifications are made in their [its] present position, condition, and elevation as the Secretary of War may order in the interests of navigation." He says, and truly, that it does not appear that the defendant company has made any such modifications, and he urges that such modifications are a condition precedent to the trestle becoming a lawful structure. But it does not appear, either, that the Secretary of War has ordered any modifications, or that he deems any to be necessary in the interests of navi-

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so as to cut off access to the wharf, it must be a legal structure erected by the license or permission of competent authority. *Ibid.*

A private citizen cannot, unless he shows special injury, maintain an action against one who discharges refuse into a navigable river whereby its navigability is affected. Manhattan Gaslight Co. v. Barker, 7 Robt. 523, 36 How. Pr. 233.

The owner of a dock may have an injunction against a city to prevent the discharge of sewage at that place obstructing navigation and destroying the use of the dock. Breed v. Lynn, 126 Mass. 367; Haskell v. New Bedford, 108 Mass. 208.

A municipal corporation may maintain a suit in equity to enjoin the driving of piles in a river to construct a runway for logs, the effect of which will be to deflect the current of the river from along its wharves, creating thereby a deposit of mud, and to render it impossible for boats navigating the stream to approach the wharves. St. Louis v. Knapp, S. & Co. Co. 104 U. S. 658, 26 L. ed. 883.

One throwing rubbish into a beck at a point about 4 miles from a river into which it flows does not violate a statute against throwing rubbish into the river or any water course thereunto belonging, as the words "thereunto belonging" must be confined to water courses forming part of the navigation. Smith v. Barnham, 34 L. T. N. S. 774.

f. *Pipes and cables.*

Telegraph cables so laid or suspended in navigable waters as to catch upon the keels of, or come in contact with, vessels navigating the stream, and which but for such cables would pass without difficulty or interruption, are improperly placed, and injuriously interrupt navigation, within the meaning of the condition in the charter of the company that they shall not do so. Blanchard v. Western U. Teleg. Co. 60 N. Y. 510, Reversing 67 Barb. 228.

Telegraph cables laid in the soft mud or silt in a navigable river constitute an obstruction to navigation, not permitted by U. S. Rev. Stat. § 5263 (U. S. Comp. Stat. 1901, p. 3579), authorizing the laying of telegraph lines under navigable waters so as not to obstruct navigation: and the telegraph company is liable for an injury to the propeller of a steamship accustomed to plow through the mud in her movements about the docks. The City of Richmond, 43 Fed. 85.

A telegraph company authorized to lay submarine cables across the Passaic river is not only bound to lay the cable in such a way that it will not catch the bottom of vessels navigating that water in the ordinary method, but also to maintain it in that condition. Stephens & C. Transp. Co. v. Western U. Teleg. Co. 8 Ben. 502, Fed. Cas. No. 13,371.

A telegraph company is liable for the injury caused to a propeller, the screw of which caught in a submarine cable; and the owners of the boat are not liable for the resulting injury to the cable, where the officers of the propeller undertook to free the screw by working the engine back and forth, whereby they pulled the cable out from shore and finally broke it off, although they refused the assistance of employees of the telegraph company, tendered at a time when it was thought the screw was cleared from the cable. *Ibid.*

A steamship which, although touching bottom, passes by the aid of her propeller through the soft mud, is navigating, and where her screw catches and breaks a submarine cable, the cable company must show that the wires were so maintained as not to obstruct navigation, as required by U. S. Rev. Stat. § 5263 (U. S. Comp. Stat. 1901, p. 3579); and, in default of such proof, it is liable for the fouling of the screw, and cannot recover for the breaking of the cable. Western U. Teleg. Co. v. Inman & I. S. S. Co. 8 C. C. A. 152, 20 U. S. App. 247, 59 Fed. 365, Affirming 43 Fed. 85.

The right of a gas company to lay pipes in the bed of a navigable stream under its charter is subordinate to the rights of navigation. Milwaukee Gaslight Co. v. The Gamecock, 23 Wis. 144, 99 Am. Dec. 138.

A gas company authorized to lay and maintain lines of pipe across a navigable river should place them so that they will not interfere with the right of vessels to the free navigation of the river. Omslaer v. Philadelphia Co. 31 Fed. 354.

A gas company which maintains its pipes in an exposed condition in the bed of a navigable river is liable for damages inflicted upon a boat, which, after grounding, ran foul of the pipe, which parted, and the escaping gas set fire to the boat, which was consumed. In such case the wrongful maintenance of the pipe, and not the grounding, is the proximate cause of the disaster. *Ibid.*

The cable of a ferry is an obstruction to navigation, and unlawful, when, owing to the unusual pressure of the current and wind against the boat, it is held at or near the surface of the water for not less than 300 feet or one fourth of the width of the stream; and the company is liable where it materially contrib-

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gation. The proviso is evidently a condition subsequent only. The trestle is declared to be a lawful structure *in præsenti*. It is made such until the defendant company shall fail to make the modifications ordered by the Secretary of War. If the Secretary does not order any modifications,—and apparently he has not,—then the trestle remains a lawful structure if kept up in its then present condition. It was competent for Congress to thus fix the matter (*Miller* v. *New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *South Carolina* v. *Georgia*, 93 U. S. 13, 23 L. ed. 782); and, Congress having done so, persons desiring the removal or modification of the trestle as an obstruction to navigation should apply to Congress or to the Secretary of War. The courts have now no jurisdiction in the matter.

2. The plaintiff further contends that even if the trestle in its present condition is a lawful structure, and is lawfully maintained by the defendant company, he has nevertheless suffered much pecuniary loss from the action of the defendant company in building and maintaining it, and should be reimbursed therefor by the company. He concedes that the company has not taken, nor even touched, any of his tangible property, real or personal. The trestle is three fourths of a mile distant from the property described in this suit. But the closing of the channel by the trestle has undoubtedly reduced the earning powers and selling value of his property on the cove, and has lessened the profits of the business he was carrying on there. He claims he has a cause of action against the railroad company for

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utes to a casualty causing death. Ladd v. Foster, 31 Fed. 827.

A ferry cable extending across a navigable stream should be so managed as not to be an obstruction to navigation and so as to cause neither inconvenience nor damage to boats. The Globe v. Kurtz, 4 Greene, 433.

A public ferryman is liable for damages caused by loss of property due to an obstruction of the stream by a rope stretched across it for use in connection with the ferry, as a license to keep a public ferry on a navigable river does not authorize him to place obstructions across the stream, even though convenient and proper to the passage of the ferry-boat. Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695.

A wire cable stretched across the Wallamet river for the operation of a ferry-boat is not an unlawful obstruction to navigation if it does not prevent or render hazardous the navigation of the river by others. The Vancouver, 2 Sawy. 381, Fed. Cas. No. 16,838.

The wire cable of a ferry-boat constitutes an obstruction to navigation, and is unlawful, in the absence of legislative authority, when, at 18 feet from the end of the boat in water over 30 feet deep and in the line of approach to the public docks, it is held within 11½ feet of the surface The Imperial & The S. G. Reed, 3 L. R. A. 234, 13 Sawy. 630, 38 Fed. 614.

g. *Liability.*

The King had jurisdiction to punish nuisances in or by the rivers. Hale, De Jure Maris, chap. 2.

A presentment charged that one had suffered trees to grow into the water, by reason whereof ships were hindered in their passage, and there was a writ directing the sheriff to remove the nuisance. But the judge said that he should not be amerced because the nuisance was no act of his, but the trees grew so naturally of themselves. 42 Assis. pl. 15.

One obstructing a navigable stream which is a public highway, by the erection of a fish dam, is liable for the detention of a vessel caused thereby. Tyrrell v. Lockhart, 3 Blackf. 136.

Contractors erecting a bridge are liable, under their contract to be responsible for damages due to their negligence, for an injury sustained by a tow which, while being taken through the draw at such an angle as to avoid a grounded vessel, struck on the stone steps of an abutment from which they had removed the protecting piling. Wilson v. Chicago, 42 Fed. 506.

Contractors who, having constructed public works in a navigable river, sold the piles which they had driven into the bed of the river to persons who cut them off, are not liable for injury to a vessel striking against the ends left in the ground from which the action of the water had washed away the earth, as the accident would not have occurred without gross negligence on the part of those in control of the vessel, if the piles had been left in a state in which the contractors had left them. Bartlett v. Baker, 3 Hurlst. & C. 153, 34 L. J. Exch. N. S. 8.

The corporation of Trinity house is not, by authority of the Merchant shipping act 1864, constituted servants of the Crown so as to exempt them from liability to an action for negligence in the performance of their duties; and they are liable for negligently removing a beacon in such a manner as to leave an iron stump sticking up in the water, which injured a ship. Gilbert v. Trinity House, L. R. 17 Q. B. Div. 795, 56 L. J. Q. B. N. S. 85, 35 Week. Rep. 30.

A railroad company placing piles in navigable waters to protect a bridge constructed by it under legislative authority must use all necessary precaution for the safety of commerce, and, upon failure to do so, is liable for the loss or injury of a vessel by contact with the piles. Darrall v. Southern P. Co. 47 La. Ann. 1455, 17 So. 884.

A contractor who, in repairing a bridge, removes piles placed to ward off vessels from the abutments of the piers is liable for injuries sustained by a vessel which subsequently struck against the abutments. Vessel Owners' Towing Co. v. Wilson, 11 C. C. A. 366, 24 U. S. App. 49, 63 Fed. 626.

A railroad company whose pontoons maintained at a bridge across a navigable river were sunk by unavoidable accident is entitled to a reasonable time to raise and remove them; but, where it leaves them in the channel for more than two years, it is liable to the owner of a vessel which was injured by their presence there. Missouri River Packet Co. v. Hannibal & St. J. R. Co. 1 McCrary, 281, 2 Fed. 285.

The owners of a bridge, who permitted sunken pontoons placed in the river by them to remain, thereby diverting the current of the river from its usual or ordinary course or channel, causing difficulty or danger to boats approaching the bridge draw, are liable for damages sustained by a boat, handled with due care, which collided with the draw rest of the bridge, where the change of current due to the obstruction caused or contributed to the collision. *Ibid.*

There can be no question as to the power of the state to prevent a nuisance in a floatable

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the injury thus done to his property and business.

This claim cannot be sustained. The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased, or inherited. He did not earn it, create it, or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual. The plaintiff only shared in the public right. He had no right against the public. The sovereign had the absolute control of it, and could regulate, enlarge, limit, or even destroy it, as he might deem best for the whole public; and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby. The sovereign cannot take private property for public uses without providing for just compensation to its owner, but this constitutional provision does not limit the power of the sovereign over public rights. If, in the evolution of life and commerce, the sovereign comes to believe that the public good will be increased by the creation of some new or additional means of communication and commerce at the expense, or even sacrifice, of some older one enjoyed merely as a public right, the sovereign can so ordain, even to the detriment of individuals. If, in the judgment of the sovereign, a railroad across a navigable channel of water, and completely ob-

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stream by making indictable any act amounting to an obstruction of it. State v. White Oak River Corp. 111 N. C. 661, 16 S. E. 331.

The inhabitants of Vills, having the right of common passage over a river belonging to the lords of the adjoining manors and in which such lords have a fishery, ought to cleanse it when a common nuisance has been created by obstructions, but if they have not such common passage then the lords ought to cleanse it. Viner Abr. title *Nuisance* (a).

Under W. Va. Code, chap. 44, § 24, a boom company may be proceeded against by indictment for erecting and maintaining a dam in a watercourse which is a public highway, which obstructs the navigation or the passage of fish. State v. Elk Island Boom Co. 41 W. Va. 796, 24 S. E. 590.

One who unlawfully erects and maintains a dam in a navigable stream is indictable, although he is but the agent or servant of another. Queen v. Brewster, 8 U. C. C. P. 208.

III. *Powers and liabilities of municipality.*

a. *Authority.*

Local authorities must be empowered to act by the legislature to legalize their acts in conferring power to interfere with navigable waters.

A board of supervisors of a county have no authority, in the absence of a statute authorising it, to build a bridge over the waters of a navigable lake, since the bed belongs to the state, and the waters may not be obstructed without its consent; and, although the bridge be furnished with a draw for the passage of boats, any obstruction to its construction is not obviated. General statutes giving authority to construct highways and bridges are not sufficient. Snyder v. Foster, 77 Iowa, 638, 42 N. W. 506.

A municipal corporation has no authority, under a general power in its charter to erect bridges over navigable streams within its limits, so to construct a bridge as to seriously interfere with the navigation of a river,—especially where a slight change of the location thereof would obviate the difficulty, and the public would be as well accommodated by a bridge in the latter place. Barnes v. Racine, 4 Wis. 454.

A private drawbridge with an opening 20 feet wide, constructed by an individual with the consent of town authorities, but without legislative authority, across a bay navigable in fact, but at a point where the tide does not ebb or flow, is a nuisance *per se*, although, if legally authorized, it would not unreasonably obstruct navigation. People *ex rel.* Howell v. Jessup, 28 App. Div. 524, 51 N. Y. Supp. 228.

County commissioners cannot, under their general powers, construct a bridge as part of a highway across a navigable stream in such a manner as to interfere with navigation, where there is no necessity for its construction in that manner. Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

A bridge cannot be established over a navigable stream or cove of the sea by county commissioners under a general authority to locate highways, no express authorization therefor having been granted by the state. State v. Anthoine, 40 Me. 435.

Local commissioners of highways will be restrained from erecting bridges over streams which are navigable and the beds of which belong to the state, until permission to do so is obtained from the legislature. People v. Gutchess, 48 Barb. 656.

County commissioners have no authority to lay out highways and require the building of a bridge over a navigable stream. Charlestown v. Middlesex County, 3 Met. 202.

General authority to a court of sessions to lay out highways will not include power to lay a highway over a navigable river, fresh or salt, so that the river may be obstructed by a bridge. A navigable river is of common right a public highway, and general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public. Com. v. Coombs, 2 Mass. 489.

The court of sessions has no authority to lay out a road over an inlet of the sea which is navigable for any useful purpose. Com. v. Charlestown, 1 Pick. 180, 11 Am. Dec. 161.

The town council has no power to lay out a highway over navigable waters. This power is vested in the state. Simmons v. Mumford, 2 R. I. 172.

The mere power of a municipal corporation to lay out, open, and improve streets across waterways does not empower such municipality to fill up and destroy a navigable waterway so as to impair and obstruct the right of navigation, but such municipality must so bridge the waterway that its use for navigation will not necessarily be impaired. The right of navigation and the right of crossing the water are equal. Both are to be exercised, and the rights of each are to be guarded. Ligare v. Chicago, 139 Ill. 46, 28 N. E. 934.

But in Connecticut it is held that special legislative authority is not necessary to em-

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structing its navigation, is of more benefit to the public than the navigation of the channel, he has the unrestricted power to thus close the channel to navigation, without making compensation to those who had been wont to use it. Every individual making use of a merely public privilege must bear in mind that he may be lawfully deprived of that privilege whenever the sovereign deems it necessary for the public good, and he must order his business accordingly. Unless the person authorized by statute to obstruct or close a navigable channel is required by the statute to make compensation to persons injured by such action, he is under no legal obligation to do so. In such case the inconvenience and loss, however great, are *damnum absque injuria*. The company has damaged the plaintiff, but it has not wronged him. The defendant company has not interfered with the private property nor private rights of the plaintiff. It has lawfully, by express authority from the sovereign, merely abridged the use of a public right which was within the exclusive control of the sovereign. For this lawful act it is not obliged to make any compensation to the plaintiff, any more than to all other persons who might have occasion, however seldom, to navigate the channel.

The authorities which support the fore-

power county commissioners to lay out highways across other highways, such as coves and creeks. Groton v. Hurlburt, 22 Conn. 178.

The metropolitan board of works has no power to erect any works on the bed or soil of the Thames without the consent of the admiralty and the conservators of the river, and consequently it is liable to the owner of a vessel sustaining damage from grounding upon piles negligently placed upon the foreshore by a contractor employed by it. Brownlow v. Metropolitan Bd. of Works, 13 C. B. N. S. 768, 31 L. J. C. P. N. S. 140, 8 Jur. N. S. 891, 6 L. T. N. S. 187, 10 Week. Rep. 384, Affirmed in 16 C. B. N. S. 546, 33 L. J. C. P. N. S. 233, 12 Week. Rep. 871.

Analogous to the above is the ruling that the consent or license given by the commissioners of the land office to the maintenance of a dam across a navigable river is no defense to an action by the state to enjoin such maintenance. People v. Page, 39 App. Div. 110, 56 N. Y. Supp. 834, Affirming 58 N. Y. Supp. 239.

The acts of a board of supervisors determining the necessity for the erection of a bridge across a river and providing for its construction are legislative, and the county is not liable therefor in an action for the obstruction of navigation by reason of alleged improper construction of the bridge. Larkin v. Saginaw County, 11 Mich. 88, 82 Am. Dec. 63.

The power of a city to build bridges across a navigable river within its limits being expressly granted by its charter, the power to regulate them by prescribing the time and manner of vessels passing through them is a necessary incident to the power to erect them; and an ordinance for that purpose, being a proper and reasonable exercise of that power, is valid. Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 293.

A municipal corporation may for the purpose of preserving the public health fill up a tidal creek which has become a nuisance by reason of the offal which has been cast into it where it does not appear that it was ever a navigable stream in its natural condition. The rights of riparian owners on the stream are held subordinate to the right of the municipality to preserve the health of its citizens. The law presumes the riparian owner is compensated by sharing in the advantages arising from such beneficial regulations. Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421.

b. *Liability.*

See also *supra*, II. c, 3.

A municipal corporation cannot impair navigation in a public stream under color of necessity in time of drouth, so far as that necessity comprises what is expended for pavement washing, etc. Philadelphia v. Gilmartin, 71 Pa. 140.

A municipal corporation is liable for unlawfully damaging navigation by taking water for its public supply from a public stream occupied by a navigation company, although the navigation company be a joint tort feasor by detaining the water in the reservoirs. Gallagher v. Philadelphia, 4 Pa. Super Ct. 60.

Under a constitutional provision requiring compensation for property taken, injured or destroyed by the exercise of powers of eminent domain, a city is liable for injury consequential to property in a private wharf injured by destroying access thereto by masted vessels. *Re* Construction of Walnut Street Bridge, 191 Pa. 153, 43 Atl. 88.

A municipal corporation may be indicted for laying out without authority a highway across a navigable arm of the sea in such a way as to obstruct navigation. Com. v. Gloucester, 110 Mass. 491.

But a private citizen has no right to maintain an action against a municipal corporation for excluding him, together with all other persons, from the waters of a lake within the highways and parks of the city, since the wrong must be redressed by the public. Long v. Minneapolis, 61 Minn. 46, 63 N. W. 174.

The obstruction of a navigable stream being prohibited by the Wisconsin statutes, the construction of a bridge over such a stream by a municipal corporation so as to interfere with the navigation thereof is a public nuisance if the construction thereof is unauthorized. Barnes v. Racine, 4 Wis. 454.

A township whose duty it was to build a bridge over a navigable river within its limits is liable for the damages sustained by the owner of boats on account of such bridge having been built in such a manner as to obstruct the free navigation by such boats of the river. Harlem v. Emmert, 41 Ill. 319.

By virtue of the act of 1860 (Rev. 86, § 9), making any township or board of freeholders, charged with the duty to build and repair bridges, liable for injuries to person or property due to wrongful neglect of such duty; taken in connection with the act of November 24, 1790, under which the bridge across the Passaic at Newark was built, and which required the maintenance of a draw therein in good and sufficient repair, well attended at all times, to give free and easy passage to vessels,—the freeholders of Essex and Hudson counties, who became vested with such bridge under the act of 1871, are liable, in a joint action, to the master of a vessel injured in passing through the draw because it was out of repair, and could not be moved quickly enough. Ripley v. Essex & H. Counties, 40 N. J. L. 45.

A county cannot be sued for injuries sustained by the detention of a steamer on a river by reason of the defective construction of a

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going statement of the law are numerous and uncontradicted. We cite a few only: *Spring* v. *Russell*, 7 Me. 273; *Rogers* v. *Kennebec & P. R. Co.* 35 Me. 319; *Gowen* v. *Penobscot R. Co.* 44 Me. 140; *Brooks* v. *Cedar Brook & S. C. River Improv. Co.* 82 Me. 17, 7 L. R. A. 460, 19 Atl. 87; *Miller* v. *New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pound* v. *Turck*, 95 U. S. 459, 24 L. ed. 525; *Hamilton* v. *Vicksburg, S. & P. R. Co.* 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

It follows that the plaintiff has no legal claim to compensation, and cannot sustain the action. We regret that the plaintiff has been damaged by this new railroad being lawfully built across the channel he was wont to use, but he is only one of many thousands who are being individually damaged every day by the frequent lawful changes in the means and methods of manufacture and commerce, and yet cannot be said to be wronged by illegal acts.

Judgment for the defendant.

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bridge, in the absence of any statutory provision subjecting counties to actions for detaining steamers or craft of any kind upon the water. White Star Line S. B. Co. v. Gordon County, 81 Ga. 47, 7 S. E. 231.

A city is not liable to the owner of a boat which was damaged while passing at high water a pier owned by the city, by colliding with submerged spiles which had fallen from the pier and projected out towards the channel of the river, where the spiles were placed about the pier by its occupant to serve as a fender for boats, and the city had no notice of the obstruction. Seaman v. New York, 3 Daly, 147.

A municipal corporation is not liable to an owner for injury to his wharf boat caused by its dropping upon an obstruction maintained in a public street by such municipal corporation between high and low water marks of a navigable river, when the high waters, which entirely submerged the obstruction, suddenly receded while the boat was moored over the same, where such owner was aware of the existence of the obstruction, although its exact location, when submerged, was not known to him. Mount Vernon v. Dusouchett, 2 Ind. 586, 54 Am. Dec. 467.

The statute (Rev. 86, § 9) charging upon townships and freeholders the duty of building and repairing bridges, and charging them with liability for injuries to person and property due to neglect of such duty, does not limit such liability to persons or property passing along the bridge, but there is included a liability for injuries to vessels passing through drawbridges. Ripley v. Essex & H. Counties, 40 N. J. L. 45.

Where a city by flowing sewage in a dock and obstructing the same injures a wharf, in an action against the city by the owner of the wharf for the injury, it is immaterial that the owners of lots along the dock have a right to fill out the land to the harbor line, if the riparian owner has not exercised such right and the city does not claim that it was acting under the permission of any riparian owner. Clark v. Peckham, 9 R. I. 455.

IV. *Prescriptive rights.*

No length of time will legalize an unauthorized obstruction in a navigable stream. De Laney v. Blizzard, 7 Hun, 7; Olive v. State, 86 Ala. 88, 4 L. R. A. 33, 5 So. 653; Southern R. Co. v. Ferguson, 105 Tenn. 552, 59 S. W. 343.

Usage can give loggers no right to block a navigable stream by putting a boom across it so that vessels cannot pass through. Gifford v. McArthur, 55 Mich. 535, 22 N. W. 28.

A right to maintain a dam over a navigable river cannot be acquired by prescription. Knox v. Chaloner, 42 Me. 150; Queen v. Brewster, 8 U. C. C. P. 208.

A prescriptive right to obstruct or disturb the flow of the water of a public navigable stream cannot be acquired. Vooght v. Winch, 2 Barn. & Ald. 662.

The easement of the public in a stream cannot be barred by the maintenance of a dam across it for more than twenty years. Brown v. Black, 43 Me. 443; Renwick v. Morris, 3 Hill, 621.

The obstruction of a river which is navigable, and therefore a public highway, cannot be justified on the ground of prescriptive right. Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

A mill owner cannot obtain a right by prescription to leave his logs in a public river until they are manufactured, if the owner of another mill privilege above him is thereby injured. Brown v. Black, 43 Me. 443.

A person by constructing a dam across a floatable stream cannot by prescription acquire the right to continue the dam as against the public, so that the stream cannot be used for the purpose of floating logs and other products. Gaston v. Mace, 33 W. Va. 14, 5 L. R. A. 392, 10 S. E. 60.

But while a prescriptive right cannot be obtained to maintain a dam in a public stream, as against the public, important rights, as against individuals, may be acquired and lost by adverse enjoyment for a period of twenty years or more. Charnley v. Shawano Water Power & River Improv. Co. 109 Wis. 563, 53 L. R. A. 895, 85 N. W. 507.

After the grant of the right to maintain a dam across the mouth of a tidal creek for the drainage of meadows has been acted upon and enjoyed for nearly a hundred years, it cannot be revoked and the dam thrown down. Glover v. Powell, 10 N. J. Eq. 211.

V. *Right to object to obstruction.*

a. *Where injury merely theoretical.*

In considering the question of the right to object to obstructions, it must be remembered that the state may always object, and through the proper officers remove the obstruction as either a purpresture or a nuisance. It is only when the right of the individual to object is approached that difficulty is encountered. There are many conditions which must be met before the complaint of an individual will be heard. Among these are, that the injury must be actual, and not merely theoretical, the objector must not have consented to the obstruction, and the injury must cause special injury to him different from that caused to the public at large. The application of these rules furnishes ample ground for difference of opinion, and the cases are by no means uniform in the application. The cases seem to agree fairly

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UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

NORTHERN PACIFIC RAILWAY COMPANY, *Appt.*,
v.
UNITED STATES OF AMERICA.

(44 C. C. A. 135, 104 Fed. 691.)

1. **An obstruction in the bed of a river,** caused by the bulging out of a stratum of plastic clay, due to pressure of a railroad embankment near the riverside, although the result was entirely unforeseen, is the immediate and direct result of the construction of the embankment, for which the railroad is liable, and not a merely indirect, remote, or consequential result.
2. **The right to obstruct a navigable stream by an upheaval of plastic clay,** caused by the pressure of a railroad embankment near the river, is not granted by an act of Congress authorizing the construction of the railroad parallel to the river, where the existence of the clay was unknown to Congress, and the result was not foreseen by anyone.
3. **The prohibition against obstructions in navigable waters,** made by the act of Congress of September 19, 1890 (26 Stat. at L. 454, chap. 907), applies to an obstruction subsequently caused by adding material to a railroad embankment along a river, by which plastic clay was forced up in the bed of the river, although the railroad had been previously built, where it had no vested right under its charter to improve its roadbed in such a manner as to obstruct navigation.

(October 27, 1900.)

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well that one cannot object unless it is evident that his injury will be actual.

A private person has no right of action, either in law or equity, to prevent the erection of a bridge over a navigable stream, unless he alleges and proves some special damage. Flanagan v. Philadelphia, 8 Phila. 110.

Persons who have not established title to land alleged to be injured by an obstruction to navigation cannot maintain a suit in equity to enjoin the obstruction. Lownsdale v. Gray's Harbor Boom Co. 117 Fed. 983.

A runway for logs will not be enjoined in advance of its completion upon averments that it will obstruct navigation by diversion of water, and cause a deposit of mud and sediment, so as to prevent boats from landing at a wharf of the complainant, but to justify such interference it must appear that the threatened structure will, if erected, be a nuisance *per se*. St. Louis v. Knapp, S. & Co. Co. 2 McCrary, 516, 6 Fed. 221.

An artificial detention of the tide for fifteen minutes will not be presumed to be unlawful, or to be an element of special damage to a riparian owner higher up the stream. Carvalho v. Brooklyn & J. B. Turnp. Co. 76 N. Y. Supp. 859.

The construction of a dam in a navigable river will not be enjoined because of a prospective abridgment of complainant's right to the free navigation of the river, nor upon the theory that no dam can be constructed at that point that will not obstruct the navigable use of the river. Woodman v. Kilbourn Mfg. Co. 1 Abb. (U. S.) 158, 1 Biss. 546, Fed. Cas. No. 17,978.

A landowner does not sustain special damages by the obstruction of a navigable stream on which his lands are situated, although they would be useful only for purposes connected with shipping and freighting business, where it is doubtful whether there will ever be a demand for them for such purposes. Potter v. Indiana & L. M. R. Co. 95 Mich. 389, 54 N. W. 956.

The obstruction of a navigable river gives no right of action in favor of a riparian owner of land further up the stream whose land is fitted for use as a spar yard, for which it cannot be used because of the obstruction, where it does not appear that he ever used it for that purpose. Brightman v. Fairhaven, 7 Gray, 271.

It is not a ground for the issuance of an injunction restraining the erection of a dam across a navigable stream that the complainant owns property thereon which he alleges will be injured, when he does not show how such injury will occur. Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245.

A private person has no right to remove a crib from navigable water, even if it might constitute an obstruction to navigation, where he sustains no special and peculiar damage therefrom, although the intended future use thereof might injure his business. Larson v. Furlong, 50 Wis. 681, 8 N. W. 1.

The upper proprietor on a nontidal stream cannot interfere with the erection of a bridge by the lower proprietor on the ground that it may obstruct navigation, if it does not interfere with the navigation as it has been exercised in the stream. Ewing v. Colquhoun, L. R. 2 App. Cas. 839.

In that case, which was an action against persons constructing a bridge across a river upon the ground that its piers interfered with the navigation, it was held that the structure did not interfere with the navigation, and was not illegal. Lord Blackburn, in speaking of Bickett v. Morris, L. R. 1 H. L. Sc. App. Cas. 47, 12 Jur. N. S. 803, 14 L. T. N. S. 835, said that he understood the principle of that case to be that where an erection is a present sensible *injuria* to the proprietary right of the owner of the other part of the *alveus*, or of the opposite bank of a running stream, he may have it removed on the ground that there is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage. But he did not think it was intended to be decided, or that it is the law, that an erection in the *alveus* of a natural stream is illegal *per se*, if all who have property on the banks of the stream consent to the erection. Nor did he think it was meant to be decided that a riparian proprietor on the water of Kilmarnock, or on the water of Irvine, into which it flows 10 miles below the town, on whose land the flow of the water would be in no way affected, could have maintained the action against Bickett for altering the line of his building in the town on the water side, which Morris, the proprietor of the houses and building ground immediately opposite, did maintain: as that would be no injury to the proprietary right of the party complaining in respect of such land. In this construction of the Bickett Case, Lord Blackburn differed from the construction that had been placed upon it by the Lord President when the Ewing Case was before him, and who, as Lord Justice Clerk, was a party to the decision in the Bickett Case,

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APPEAL by defendant from a decree of the Circuit Court of the United States for the District of North Dakota enjoining defendant from placing material upon its right of way in such a way as to cause the obstruction of a navigable river. *Affirmed.*

Statement by **Thayer**, Circuit Judge:

The United States of America exhibited its bill in the United States circuit court for the district of North Dakota against the Northern Pacific Railway Company, the appellant, to restrain it from creating an obstruction in the channel of the Red River of the North opposite the city of Grand Forks, in the state of North Dakota. At the place in question the Red river is navigable, and constitutes a part of the navigable waters of the United States, for the improvement of which money has been appropriated by Congress. While there is some traffic upon the river, the traffic is not large. The case discloses, without contradiction, the following facts: By virtue of lawful authority, the defendant company located and built its railroad through the city of Grand Forks in the year 1887. Between Cheyenne avenue and Hill avenue, in said city, the railway was located about 320 feet from the bank of the Red River of the North at the furthest point therefrom, and 175 feet distant from the nearest point. Intervening between the company's right of way and the bank of the river are other lands, varying in width from 50 to 200 feet. After the road had been constructed, the track for the distance of some 1,200 feet between Cheyenne avenue and Hill avenue began to settle, the greatest depression at any one point being about 17 feet below the horizontal plane on which the track was originally laid. For this reason the defendant com-

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the Lord President saying that the principle of the Bickett Case is that, where there are other parties beside the party complained of who have an interest in a running water, it is illegal to build *in alveo*. It is not enough to say in defense of the operation complained of that it does nobody any harm. It may be that at the present moment the injury may not be foreseen, and yet it may occur, because nothing is so wilful and capricious as a stream of running water; and it is almost impossible to foresee what the effect may be of any interference with the natural flow of such a stream as regards the proprietors further down the stream, or as regards the proprietor opposite the place where the operation is carried out. Now, in like manner in the case of a navigable river like this, where the deep part of the channel is but narrow, it is very difficult to foresee what the effect of any operation of this kind may be in times of flood, or in various states of the river. And, therefore, to put down the pier of a bridge or any other building in the *alveus* of a river of this kind appears to be a dangerous operation as regards the navigation, even though it cannot be shown that at the present moment it constitutes an absolute obstruction to that navigation.

The owner of a reversionary interest in land adjoining a river cannot maintain an action for the obstruction of the navigation of the river. Dobson v. Blackmore, 16 L. J. Q. B. N. S. 233, 9 Q. B. 991, 11 Jur. 556.

Intimately connected with the question of theoretical injury, are the cases where other obstructions have already destroyed the navigation of the stream before the one complained of is erected. Such facts have had some bearing upon the question of the state's right to authorize the obstruction, as will be seen from subd. I., *supra*.

If an obstruction actually infringes individual rights on principle, the one responsible for it should not be relieved from liability merely because other obstructions also exist, and so it has been decided.

In an action against the owner of a milldam across a stream, declared by statute to be navigable, for damages sustained by the owner of a boat, loaded with corn, on its way to the market below, because his boat could not get over such dam, but was obliged, on account thereof, to discontinue the voyage, the fact that there were other and higher dams across the stream below that would have prevented the boat reaching its destination, even if defendant's dam had not existed, does not relieve him from the damage sustained by reason of his obstruction,—especially as the owner claimed damages only to the extent of the value of the boat and the corn where it was, and did not ask damages for the profit he could have made by selling his corn in the market below. Clark v. Lake, 2 Ill. 229.

b. *Where navigation merely impaired.*

If the obstruction merely impairs the navigation without destroying it for any use to which it might be put, the individual has no cause of complaint. He has no right to insist on the best possible accommodations.

A railroad company is not liable for injury to a mill owner on a stream across which it has built a bridge by the increased difficulty in getting his supplies by water to the mill. Blood v. Nashua & L. R. Corp. 2 Gray, 137, 61 Am. Dec. 444.

Slight difficulties in passing a bridge, which occasion short stoppages and some loss of time, do not constitute the structure a material obstruction: but if they endanger life, or require the use of extraordinary caution, or involve much loss of time, they do essentially impair the right to free navigation. Jolly v. Terre Haute Draw-Bridge Co. 6 McLean, 237, Fed. Cas. No. 7,441.

See also II. c, 3.

The owner of land on a tidal river cannot enjoin the erection of a bridge by legislative authority lower down the river, the only effect of which will be to occasion him some additional trouble and expense, or some additional delay and risk. Atty. Gen. *ex rel.* Pettee v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526.

Mere temporary inconvenience occasioned by the lawful construction of a bridge over navigable waters affords no claim for damages. Carvalho v. Brooklyn & J. B. Turnp. Co. 76 N. Y. Supp. 859.

c. *Special injury.*

1. *General rule.*

The general rule is that an individual cannot maintain an action for a public nuisance unless he has received therefrom a special injury different from that received by the public at large. This rule is applicable to the obstruction of navigable waters. Yolo County v. Sacramento, 36 Cal. 193; South Carolina S. B. Co. v. Wilmington, C. & A. R. Co. 46 S. C. 329, 33 L. R. A. 541, 24 S. E. 337; O'Brien v. Norwich & W. R. Co. 17 Conn. 372; Hall v. Kitson,

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pany began to raise its embankment by depositing thereon additional material, such as soil, silt, and gravel. It transpired that the embankment rested upon a stratum of yellow clay mixed with sand, which was some distance beneath the surface of the earth, through which water percolates. This stratum was so plastic that it would flow laterally when pressed upon by any considerable weight in addition to the weight of the soil in its natural condition. When the defendant company began to raise its embankment between the points above stated the additional weight added to the embankment caused the yellow clay to flow laterally in the direction of the river, and to bulge up in the channel thereof, thereby causing a bar, which operated as an obstruction to navigation. In view of these facts, the trial court issued a perpetual injunction, restraining the defendant company from placing any additional material in its embankment between the points aforesaid in the city of Grand Forks so as to create an obstruction in, or lessen the navigability of, the Red River of the North at that point. The present appeal was taken to obtain a reversal of this order.

Argued before *Caldwell*, *Sanborn*, and *Thayer*, Circuit Judges.

Mr. **C. W. Bunn**, for appellant:

The railway company has at least the ordinary rights of any landowner to improve his property in the usual and customary way, either by excavation, or filling, or the erection of structures. The United States has no higher right of property in the river than a private landowner would have under similar circumstances.

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4 Chand. (Wis.) 20, 3 Pinney (Wis.) 296; Ft. Plain Bridge Co. v. Smith, 30 N. Y. 44; Groat v. Moak, 94 N. Y. 115; Esson v. Wattier, 25 Or. 7, 34 Pac. 756; Carvalho v. Brooklyn & J. B. Turnp. Co. 76 N. Y. Supp. 859.

The erection of a bridge over a navigable stream so as to obstruct navigation is a public nuisance for which a private action lies only in case of special damage to the complainant, and for which, in the absence of such special damage, indictment is the only remedy. South Carolina R. Co. v. Moore, 28 Ga. 398, 73 Am. Dec. 778.

A nuisance created by the obstruction of navigation by a railroad bridge deflected from a right angle to the current of the stream and with an alleged insufficient draw will not, at the suit of individuals, be abated, or an injunction granted restraining the construction and maintenance thereof, unless placed at right angles to the stream and with a larger draw in the absence of anything to show peculiar and special injury to them differing in kind and character from that suffered by members of the general public. Jarvis v. Santa Clara Valley R. Co. 52 Cal. 438.

One entitled to riparian rights in the navigable waters of a bayou may maintain a bill for an injunction against one who has converted the bayou into a booming ground, depriving the riparian owner of ingress and egress thereover to his lands. Turner v. Holland, 54 Mich. 300, 20 N. W. 51.

The owner of a mill adjoining a river cannot maintain an action against one constructing a wharf to the injury of navigation, unless he suffers some special damage. Brown v. Gugy, 10 Jur. N. S. 525, 2 Moore, P. C. N. S. 341, 10 L. T. N. S. 45, 12 Week. Rep. 492.

But a nuisance, such as an unreasonable and unnecessary obstruction of a navigable stream, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom distinct and apart from the common injury. Page v. Mille Lacs Lumber Co. 53 Minn. 492, 55 N. W. 608, 1119.

So that a bill for an injunction against a public nuisance will be sustained in favor of a private individual, where he sustains a peculiar injury distinct from that suffered in common with the rest of the community. Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Stiles v. Hooker, 7 Cow. 266; Burrows v. Pixley, 1 Root, 362, 1 Am. Dec. 56.

But to entitle one to recover for the obstruction of a stream above tide water, on the ground that it is a navigable and public highway, he must prove the alleged navigable and public character thereof. Bayzer v. McMillan Mill Co. 105 Ala. 395, 16 So. 923.

And one who seeks to abate obstructions in a river as a nuisance preventing him from floating logs must allege and prove that the business conducted by him is lawful. Spokane Mill Co. v. Post, 50 Fed. 429.

The question, therefore, is, What is necessary to inflict special injury on an individual? The cases do not fully agree on this question. General principles and the better considered cases, however, would seem to point to the following answers. One whose right is merely identical with that of the public generally has no private right of action regardless of the volume of his business, or of the fact that it is largely or exclusively carried on, on the water obstructed. On the other hand, the owners of property valuable for commercial purposes, which is cut off from access with the general system of navigable highways, or of a business which is deprived of supplies by the obstruction, has a right of action. Again, one who undertakes a voyage without knowledge of the obstruction, which is actually obstructed or defeated by it, has a right of action. But he must not undertake his voyage with knowledge of the obstruction, expecting to be stopped and to bring suit for the injury, because such is not the proper method of abating the nuisance. Also, one whose property is actually injured by an obstruction without negligence on his part has a right of action. It is believed these general rules will solve most of the problems presented.

The rule requiring notice to abate a nuisance before an action for damages can be maintained does not apply to the case of an obstruction of a navigable river. Missouri River Packet Co. v. Hannibal & St. J. R. Co. 1 McCrary, 281, 2 Fed. 285.

It seems, that where navigation is obstructed by a bridge built by a railroad company persons navigating the stream are not precluded from recovering, in an action for damages against the company for maintaining a public nuisance, because they did not at the time the bridge was constructed give notice to the company to remove the obstructions. Little Rock, M. River & T. R. Co. v. Brooks, 39 Ark. 403, 73 Am. Dec. 277.

One may maintain a suit to enjoin the obstruction of a navigable river in violation of the ordinance of the Northwest territory declaring such waters highways and forever free,

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The damage caused by the bulging of the soil is not direct, and necessary, and proximate, as it would be where one dumps earth on his neighbor's land, but is the incidental, remote, or consequential result, not readily to have been foreseen, and not naturally to be expected of a lawful work carefully conducted. The obstruction was one of those results which in law are termed consequential.

Northern Transp. Co. v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Wilson* v. *Waddell*, L. R. 2 App. Cas. 95; *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Greenleaf* v. *Francis*, 18 Pick. 117; *Pennsylvania Coal Co.* v. *Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453.

A railroad company constructing its road in the usual and proper manner, without negligence, is not liable for thereby increasing or diminishing the flow of surface water upon neighboring lands.

Hannaher v. *St. Paul, M. & M. R. Co.* 5 Dak. 1, 37 N. W. 717.

Messrs. **John W. Griggs,** United States Attorney General, and **P. H. Rourke,** for appellee:

The only criterion which separates the lawful use of property from that unlawful use which constitutes a nuisance is the consequence of the use to others. The use itself in both cases is the same, but in the one case it results in physical and material injury to neighbors or to the property of neighbors, while in the other case such a result does not follow.

Jordeson v. *Sutton, S. & D. Gas Co.* [1899] 2 Ch. 217; *Cabot* v. *Kingman*, 166 Mass. 403, 33 L. R. A. 45, 44 N. E. 344; *St. Helen's Smelting Co.* v. *Tipping*, 11 H.

although a citizen of the state of Massachusetts, and not a party to the compact, if he is specially injured by the obstruction. Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245.

To entitle an individual to recover damages for a public nuisance in obstructing navigation, his injuries must result directly from the obstruction, and not as a secondary consequence thereof, and must differ in kind, and not merely in degree or extent, from that suffered by the general public; hence, expenses incurred in remodeling a boat so that it will pass under a bridge, not being a direct result of the obstruction, will not entitle the owner to maintain an action. South Carolina S. B. Co. v. South Carolina R. Co. 30 S. C. 539, 4 L. R. A. 209, 9 S. E. 650.

2. Injury to navigation right.

Mere interference with the right of one who wishes to use the water for purposes of navigation will not give a right of action.

A private action for the obstruction of a stream cannot be maintained by one who has no interest in the stream beyond that enjoyed by the public in common to use it as a highway. Potter v. Indiana & L. M. R. Co. 95 Mich. 389, 54 N. W. 956.

The proposed construction of a dam across a navigable stream will not be enjoined at the suit of a citizen who claims the right of free navigation which the proposed dams would destroy, when it does not appear that he is about to navigate the river. Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245.

The construction of a highway across a creek, in the use of which an individual has no right except in common with the public generally, even if unauthorized and illegal, does not constitute an injury for which the individual can maintain a private action. Clark v. Saybrook, 21 Conn. 313.

So, under a statute authorizing commissioners to lay out a highway and to assess the damage which will thereby accrue to an individual, only direct and immediate damages may be assessed, and not such damages as may be sustained from being deprived of the use of a creek, crossed by the highway, in which the injured party did not have an exclusive right. *Ibid.*

The fact that the extension of a railroad across an arm of the sea will interfere with plaintiff's right to navigate such waters does not inflict on him an injury different from that done to the public at large, so as to entitle him to an injunction, although he lives in the village at the head of the cove, if he alleges no injury to his house, wharf, or land. O'Brien v. Norwich & W. R. Co. 17 Conn. 372.

But where a railroad company so obstructed navigation by its bridge that the owner of a cotton-seed oil mill could not convey thereto a quantity of cotton seed; and where the railroad company, after agreeing so to do, failed to convey the seed, whereupon the owner abandoned the same with the intention of fastening the liability therefor upon the railroad company, the latter is liable for the value of the seed at the place of delivery less its value at the place of shipment and the amount of the agreed freight, plus the amount it would have cost to have protected the seed from decay. Armistead v. Shreveport & R. Valley R. Co. 108 La. 171, 32 So. 456.

A private action cannot be maintained by one desiring to use a navigable stream for transportation purposes, for a nuisance created by an obstruction thereof by a bridge, where no special injury is alleged, and the damages rest only in contemplation. Clark v. Chicago & N. W. R. Co. 70 Wis. 593, 36 N. W. 326.

And a recovery for loss of profits may be had of the owner of the bridge where a plaintiff chartered a boat to carry cotton seed to his cotton-seed oil mill, but was prevented from doing so on account of the obstruction of navigation by the bridge of a railroad company, which resulted in the loss of the seed; but profits expected to be realized from the sale of liquors and fruit on the trip, and from the expected purchase of other cotton seed, are too uncertain to be considered. Armistead v. Shreveport & R. Valley R. Co. 108 La. 171, 32 So. 456.

A suit to compel removal of a bridge across a lake, which prevented plaintiff using the lake for the purpose of boating and fishing, cannot be maintained where he shows no greater interest in the lake than the general public, anyone having the right to use it for the same purpose that he did, although he had purchased boats and kept them for rent to persons wishing to navigate the lake the part of which beyond the bridge, which could not be passed with boats, was best for boating. Innis v. Cedar Rapids, I. F. & N. W. R. Co. 76 Iowa, 165, 2 L. R. A. 282, 40 N. W. 701.

The extent of business of a person using a stream does not give him a right to sue in his own name to abate a public nuisance by the obstruction of it. Delaware & H. Canal Co. v. Lawrence, 2 Hun, 163.

So, a navigation company is not entitled to

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L. Cas. 642; *Shelfer* v. *London Electric Lighting Co.* [1895] 1 Ch. 287; *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

At common law, the right of lateral support for one's land by the soil of an adjoining proprietor is a right of support while the lands remain in a natural state. The right of support for artificial weight placed thereon by the erection of buildings or otherwise can be acquired only by grant or prescription.

Costigan v. *Pennsylvania R. Co.* 54 N. J. L. 233, 23 Atl. 810.

The defendant's charter affords it no immunity from the acts complained of.

Shelfer v. *London Electric Lighting Co.* [1895] 1 Ch. 287; *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Costigan* v. *Pennsylvania R. Co.* 54 N. J. L. 233, 23 Atl. 810.

The defendant has not been granted a license by statute to do an act which would otherwise be a nuisance, and is not, therefore, excused by the exercise of care.

Ray, Negligence of Imposed Duties, 34; *Trinidad Asphalt Co.* v. *Ambard* [1899] A. C. 594, referred to in a note to *Jordeson* v. *Sutton, S. & D. Gas Co.* [1899] 2 Ch. 260.

The fact that other premises intervened between those where the cause of injury was set in motion and those where the injurious effect was produced does not make the act less an invasion of an absolute right, and it is such an invasion which renders the act a nuisance.

Woodruff v. *North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753.

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damages for the obstruction of a river by a bridge which may constitute a public nuisance, where it has no special interest in the navigation thereof above such bridge, and is therefore not especially injured by such obstruction. Alabama Sipsey River Nav. Co. v. Georgia P. R. Co. 87 Ala. 154, 6 So. 73.

And the obstruction of a river by a bridge is not a violation of the charter rights of a navigation company for which damages can be recovered, where it does not appear that the work of improvement has been completed, which is a condition precedent to the exclusive right of the navigation thereof, or that the point of obstruction has been reached "in the progress of its work," which is a condition on which its right to remove obstructions depends. *Ibid.*

The mere fact that one complaining of a bridge across a navigable river is prevented from using the stream in passing up and down daily in his yacht, and that he is prevented from transporting freight up and down past the bridge, which is required in his business, and which, because of the bridge, he is obliged to transport by a more circuitous route, does not show special injury which will entitle him to maintain an action. Clark v. Chicago & N. W. R. Co. 70 Wis. 593, 36 N. W. 326.

The construction of a railroad under the authority of the state of New York laterally along the Hudson river and in front of docks and brick yards situated on the shore will not be enjoined as an obstruction of navigation at the suit of the owner of a vessel who has contracted with riparian proprietors to transport bricks for them to the city of New York. Ormerod v. New York, W. S. & B. R. Co. 21 Blatchf. 106, 13 Fed. 370.

A person who has entered into a contract obligating himself to drive logs down a stream navigable for such purposes, knowing that the stream had been and was unlawfully obstructed, and who is hindered and subjected to expense in performing his undertaking by reason of such impediments, is not entitled to maintain a private action for damages against the person creating such obstructions in the highway. Lammers v. Brennan, 46 Minn. 209, 48 N. W. 766.

But in one case it was held that one who, under contract to carry articles down a navigable stream, is prevented from so doing by a boom across the river, is entitled to maintain an action for a public nuisance by which he has suffered special damage. Dudley v. Kennedy, 63 Me. 465.

It is submitted that mere interference with the performance of such a contract, without more, does not show special injury.

3. *Injury to riparian or wharf right.*

The cases are not fully agreed, but the better rule seems to be that the closing of a water highway against riparian owners, so as to shut them off from access to the general system of such highways, is a special injury.

A riparian owner whose property will be cut off from access to the sea by the erection of a bridge is sufficiently interested to maintain an action to prevent the erection of the bridge. Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

Additional expenses to a manufacturer in procuring wood and also in selling his product by reason of the cutting off of access from his wharf to the sea, by dams erected by a corporation across a creek on which the wharf is situated, are within the terms of the corporate charter requiring the corporation to pay for the injuries caused by the building of the dams. Boston & R. Mill Corp. v. Gardner, 2 Pick. 33.

But one having no riparian rights cannot personally complain of an obstruction to navigation in front of his land. Eldridge v. Cowell, 4 Cal. 80.

Riparian owners, the use of whose ship yards and wharves built for commercial purposes will be specially interfered with by the obstruction of the navigation of a river by a bridge to be constructed by a municipal corporation, are specially injured thereby, so as to entitle them to maintain a private action to enjoin the construction thereof, where the circumstances are such as to warrant the interference of equity. Barnes v. Racine, 4 Wis. 454.

The right of a vessel owner to compensation for damages from a bridge maintained over a river to his nuisance is not impaired because he was doing business as a common carrier as well as for the manufacturers who owned it, and was one of a class engaged in transporting materials from below the bridge to the factory above. Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 579, 29 L. R. A. 700, 23 S. E. 43.

One occupying land adjoining a tidal fleet, and using it for the purpose of navigation, is entitled to relief against obstructions to the fleet which render it unnavigable, thereby compelling him to transport his goods by land at a greater expense. Pentney v. Lynn Paving Comrs. 13 Week. Rep. 983, 12 L. T. N. S. 818.

And he will not be denied relief against an

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Thayer, Circuit Judge, delivered the opinion of the court:

It is contended in behalf of the defendant company that the facts above recited do not disclose an actionable wrong on account of which relief can be afforded under a bill filed by the United States. The principal reasons assigned in support of this contention may be stated briefly as follows: It is said that the existence of the bar in the Red river opposite the city of Grand Forks is not the immediate and direct result of any act done or performed by the defendant company, but is the indirect, consequential, and unforeseen result of placing additional weight upon its right of way; and that inasmuch as it was duly authorized by its charter and a city ordinance to construct its road through the city of Grand Forks on the line where its road is in fact located, and has been guilty of no negligence either in constructing or maintaining the same, it cannot be held accountable for an obstruction to navigation which is merely one of the incidental results of its authorized acts. It accordingly becomes necessary to determine if these several propositions are tenable.

We have no doubt that the bar in the river was the unforeseen result of placing additional weight on the defendant's right of way, but no reason exists for saying that the obstruction was merely an indirect, remote, or consequential result of the increased burden. The bed of the river rose, and navigation was thereby obstructed, because the additional weight placed on the defendant's right of way forced the stratum of plastic clay upwards in the bed of the stream, thereby creating a bar. The rela-

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obstruction to the navigation upon the ground that he is only a tenant from year to year, and his trade limited. *Ibid.*

The owner of a brickyard on the shore of a navigable river may maintain an action against one who obstructs the navigation of the river, causing him special injury by the loss of the use of the boats used in conveying his bricks to market, and the expense of sustaining them, and the loss of trade and profit. Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co. 51 N. J. L. 56, 16 Atl. 12.

One who owns a tannery, flouring mill, sawmill, warehouse, wharf, and water lots situated on a navigable river will sustain such individual and irreparable injury, irremediable at common law, from the erection of a railroad bridge obstructing the navigation of a bay into which the river empties, as will entitle him to injunctive relief, when such obstruction will materially injure the trade of the town. Works v. Junction R. Co. 5 McLean, 425, Fed. Cas. No. 18,046.

Where a tidal basin has been conveyed by a state to a municipal corporation for the purpose of improving the shipping facilities of its water front with the right to riparian owners to charge wharfage, and the implied power to build wharves, a riparian owner becomes possessed of privileges which will entitle him to maintain an action against one who fills up the basin so as to cut off his access from the sea. Easton & A. R. Co. v. Central R. Co. 52 N. J. L. 267, 19 Atl. 722.

A town whose shipping interests are affected by the construction of a toll bridge at a place and in a manner different from that authorized by the legislature, and which suffers a special damage by reason of failure to follow the authority, not common to others, may have a private suit to abate the nuisance. Dover v. Portsmouth Bridge, 17 N. H. 200.

But the mere fact that a toll bridge across a river obstructs the passage of war vessels up the river, upon which is situated a United States port of entry for one of its districts, is no ground upon which an individual or a town owning wharfs above the bridge can institute proceedings for its abatement as a nuisance. *Ibid.*

And a municipal corporation cannot maintain an action for a public nuisance consisting in the obstruction of a public navigable river to the injury of the shipping interests of its water front, the property of its citizens. Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012.

In a Minnesota case it was held that the mere fact that a boom prevents a riparian owner from shipping fuel from above the boom to his brickyard below it does not give him a private right of action for the obstruction. Swanson v. Mississippi & R. River Boom Co. 42 Minn. 532, 7 L. R. A. 673, 44 N. W. 986.

But this case was overruled in a later case where it was held that the maintenance of a boom in such a way as to interfere with the floating of logs by other persons down the river is a nuisance which will give the person injured a right of action. Page v. Mille Lacs Lumber Co. 53 Minn. 499, 55 N. W. 608, 1119.

One operating a tannery on a navigable stream sustains such special injuries from the obstruction thereof as to entitle him to maintain a private action therefor, where, by its total obstruction for six weeks, he was prevented from obtaining the bark needed in the operation of his tannery, which could only be obtained and transported from a place up the river by means of boats, thus delaying its operation, whereby the liquors ran down and deteriorated, thereby flattening the stock and decreasing the weight of the leather and depreciating its quality, and during which delay the price of leather depreciated. Enos v. Hamilton, 27 Wis. 256.

A private action may be maintained for an unlawful obstruction of a navigable river causing special damages to one operating a sawmill thereon by delaying the floating of logs for use thereat. A. C. Conn Co. v. Little Suamico Lumber & Mfg. Co. 55 Wis. 580, 13 N. W. 464.

A mill owner prevented by a dam, canal, and personal interference from getting logs down a river to his mill, which was forced to remain idle for want of them, may recover damages for the hindrance and the enforced idleness of the mill. Richards v. Johnston, 46 Mich. 297, 9 N. W. 423.

There are a few cases which are not in accord with the above, but they needlessly sacrifice private rights, and do not seem to accord with the better reason.

In Blackwell v. Old Colony R. Co. 122 Mass. 1, which was an action for damages for building a bridge across a navigable arm of the sea, the court says that a private action could not be maintained for it because the injury was to the public navigation, and the mere fact that the plaintiff alone had a wharf above the bridge did not alter the case, the injury being only in degree, and not in kind. It is further said that the case has no analogy to those in which the obstruction, being in front of complainant's land, entirely cuts off his access to

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L. Cas. 642; *Shelfer* v. *London Electric Lighting Co.* [1895] 1 Ch. 287; *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

At common law, the right of lateral support for one's land by the soil of an adjoining proprietor is a right of support while the lands remain in a natural state. The right of support for artificial weight placed thereon by the erection of buildings or otherwise can be acquired only by grant or prescription.

Costigan v. *Pennsylvania R. Co.* 54 N. J. L. 233, 23 Atl. 810.

The defendant's charter affords it no immunity from the acts complained of.

Shelfer v. *London Electric Lighting Co.* [1895] 1 Ch. 287; *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Costigan* v. *Pennsylvania R. Co.* 54 N. J. L. 233, 23 Atl. 810.

The defendant has not been granted a license by statute to do an act which would otherwise be a nuisance, and is not, therefore, excused by the exercise of care.

Ray, Negligence of Imposed Duties, 34; *Trinidad Asphalt Co.* v. *Ambard* [1899] A. C. 594, referred to in a note to *Jordeson* v. *Sutton, S. & D. Gas Co.* [1899] 2 Ch. 260.

The fact that other premises intervened between those where the cause of injury was set in motion and those where the injurious effect was produced does not make the act less an invasion of an absolute right, and it is such an invasion which renders the act a nuisance.

Woodruff v. *North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753.

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damages for the obstruction of a river by a bridge which may constitute a public nuisance, where it has no special interest in the navigation thereof above such bridge, and is therefore not especially injured by such obstruction. Alabama Sipsey River Nav. Co. v. Georgia P. R. Co. 87 Ala. 154, 6 So. 73.

And the obstruction of a river by a bridge is not a violation of the charter rights of a navigation company for which damages can be recovered, where it does not appear that the work of improvement has been completed, which is a condition precedent to the exclusive right of the navigation thereof, or that the point of obstruction has been reached "in the progress of its work," which is a condition on which its right to remove obstructions depends. *Ibid.*

The mere fact that one complaining of a bridge across a navigable river is prevented from using the stream in passing up and down daily in his yacht, and that he is prevented from transporting freight up and down past the bridge, which is required in his business, and which, because of the bridge, he is obliged to transport by a more circuitous route, does not show special injury which will entitle him to maintain an action. Clark v. Chicago & N. W. R. Co. 70 Wis. 593, 36 N. W. 326.

The construction of a railroad under the authority of the state of New York laterally along the Hudson river and in front of docks and brick yards situated on the shore will not be enjoined as an obstruction of navigation at the suit of the owner of a vessel who has contracted with riparian proprietors to transport bricks for them to the city of New York. Ormerod v. New York, W. S. & B. R. Co. 21 Blatchf. 106, 13 Fed. 370.

A person who has entered into a contract obligating himself to drive logs down a stream navigable for such purposes, knowing that the stream had been and was unlawfully obstructed, and who is hindered and subjected to expense in performing his undertaking by reason of such impediments, is not entitled to maintain a private action for damages against the person creating such obstructions in the highway. Lammers v. Brennan, 46 Minn. 209, 48 N. W. 766.

But in one case it was held that one who, under contract to carry articles down a navigable stream, is prevented from so doing by a boom across the river, is entitled to maintain an action for a public nuisance by which he has suffered special damage. Dudley v. Kennedy, 63 Me. 465.

It is submitted that mere interference with the performance of such a contract, without more, does not show special injury.

3. *Injury to riparian or wharf right.*

The cases are not fully agreed, but the better rule seems to be that the closing of a water highway against riparian owners, so as to shut them off from access to the general system of such highways, is a special injury.

A riparian owner whose property will be cut off from access to the sea by the erection of a bridge is sufficiently interested to maintain an action to prevent the erection of the bridge. Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

Additional expenses to a manufacturer in procuring wood and also in selling his product by reason of the cutting off of access from his wharf to the sea, by dams erected by a corporation across a creek on which the wharf is situated, are within the terms of the corporate charter requiring the corporation to pay for the injuries caused by the building of the dams. Boston & R. Mill Corp. v. Gardner, 2 Pick. 33.

But one having no riparian rights cannot personally complain of an obstruction to navigation in front of his land. Eldridge v. Cowell, 4 Cal. 80.

Riparian owners, the use of whose ship yards and wharves built for commercial purposes will be specially interfered with by the obstruction of the navigation of a river by a bridge to be constructed by a municipal corporation, are specially injured thereby, so as to entitle them to maintain a private action to enjoin the construction thereof, where the circumstances are such as to warrant the interference of equity. Barnes v. Racine, 4 Wis. 454.

The right of a vessel owner to compensation for damages from a bridge maintained over a river to his nuisance is not impaired because he was doing business as a common carrier as well as for the manufacturers who owned it, and was one of a class engaged in transporting materials from below the bridge to the factory above. Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 579, 29 L. R. A. 700, 23 S. E. 43.

One occupying land adjoining a tidal fleet, and using it for the purpose of navigation, is entitled to relief against obstructions to the fleet which render it unnavigable, thereby compelling him to transport his goods by land at a greater expense. Pentney v. Lynn Paving Comrs. 13 Week. Rep. 983, 12 L. T. N. S. 818.

And he will not be denied relief against an

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Thayer, Circuit Judge, delivered the opinion of the court:

It is contended in behalf of the defendant company that the facts above recited do not disclose an actionable wrong on account of which relief can be afforded under a bill filed by the United States. The principal reasons assigned in support of this contention may be stated briefly as follows: It is said that the existence of the bar in the Red river opposite the city of Grand Forks is not the immediate and direct result of any act done or performed by the defendant company, but is the indirect, consequential, and unforeseen result of placing additional weight upon its right of way; and that inasmuch as it was duly authorized by its charter and a city ordinance to construct its road through the city of Grand Forks on the line where its road is in fact located, and has been guilty of no negligence either in constructing or maintaining the same, it cannot be held accountable for an obstruction to navigation which is merely one of the incidental results of its authorized acts. It accordingly becomes necessary to determine if these several propositions are tenable.

We have no doubt that the bar in the river was the unforeseen result of placing additional weight on the defendant's right of way, but no reason exists for saying that the obstruction was merely an indirect, remote, or consequential result of the increased burden. The bed of the river rose, and navigation was thereby obstructed, because the additional weight placed on the defendant's right of way forced the stratum of plastic clay upwards in the bed of the stream, thereby creating a bar. The rela-

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obstruction to the navigation upon the ground that he is only a tenant from year to year, and his trade limited. *Ibid.*

The owner of a brickyard on the shore of a navigable river may maintain an action against one who obstructs the navigation of the river, causing him special injury by the loss of the use of the boats used in conveying his bricks to market, and the expense of sustaining them, and the loss of trade and profit. Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co. 51 N. J. L. 56, 16 Atl. 12.

One who owns a tannery, flouring mill, sawmill, warehouse, wharf, and water lots situated on a navigable river will sustain such individual and irreparable injury, irremediable at common law, from the erection of a railroad bridge obstructing the navigation of a bay into which the river empties, as will entitle him to injunctive relief, when such obstruction will materially injure the trade of the town. Works v. Junction R. Co. 5 McLean, 425, Fed. Cas. No. 18,046.

Where a tidal basin has been conveyed by a state to a municipal corporation for the purpose of improving the shipping facilities of its water front with the right to riparian owners to charge wharfage, and the implied power to build wharves, a riparian owner becomes possessed of privileges which will entitle him to maintain an action against one who fills up the basin so as to cut off his access from the sea. Easton & A. R. Co. v. Central R. Co. 52 N. J. L. 267, 19 Atl. 722.

A town whose shipping interests are affected by the construction of a toll bridge at a place and in a manner different from that authorized by the legislature, and which suffers a special damage by reason of failure to follow the authority, not common to others, may have a private suit to abate the nuisance. Dover v. Portsmouth Bridge, 17 N. H. 200.

But the mere fact that a toll bridge across a river obstructs the passage of war vessels up the river, upon which is situated a United States port of entry for one of its districts, is no ground upon which an individual or a town owning wharfs above the bridge can institute proceedings for its abatement as a nuisance. *Ibid.*

And a municipal corporation cannot maintain an action for a public nuisance consisting in the obstruction of a public navigable river to the injury of the shipping interests of its water front, the property of its citizens. Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012.

In a Minnesota case it was held that the mere fact that a boom prevents a riparian owner from shipping fuel from above the boom to his brickyard below it does not give him a private right of action for the obstruction. Swanson v. Mississippi & R. River Boom Co. 42 Minn. 532, 7 L. R. A. 673, 44 N. W. 986.

But this case was overruled in a later case where it was held that the maintenance of a boom in such a way as to interfere with the floating of logs by other persons down the river is a nuisance which will give the person injured a right of action. Page v. Mille Lacs Lumber Co. 53 Minn. 499, 55 N. W. 608, 1119.

One operating a tannery on a navigable stream sustains such special injuries from the obstruction thereof as to entitle him to maintain a private action therefor, where, by its total obstruction for six weeks, he was prevented from obtaining the bark needed in the operation of his tannery, which could only be obtained and transported from a place up the river by means of boats, thus delaying its operation, whereby the liquors ran down and deteriorated, thereby flattening the stock and decreasing the weight of the leather and depreciating its quality, and during which delay the price of leather depreciated. Enos v. Hamilton, 27 Wis. 256.

A private action may be maintained for an unlawful obstruction of a navigable river causing special damages to one operating a sawmill thereon by delaying the floating of logs for use thereat. A. C. Conn Co. v. Little Suamico Lumber & Mfg. Co. 55 Wis. 580, 13 N. W. 464.

A mill owner prevented by a dam, canal, and personal interference from getting logs down a river to his mill, which was forced to remain idle for want of them, may recover damages for the hindrance and the enforced idleness of the mill. Richards v. Johnston, 46 Mich. 297, 9 N. W. 423.

There are a few cases which are not in accord with the above, but they needlessly sacrifice private rights, and do not seem to accord with the better reason.

In Blackwell v. Old Colony R. Co. 122 Mass. 1, which was an action for damages for building a bridge across a navigable arm of the sea, the court says that a private action could not be maintained for it because the injury was to the public navigation, and the mere fact that the plaintiff alone had a wharf above the bridge did not alter the case, the injury being only in degree, and not in kind. It is further said that the case has no analogy to those in which the obstruction, being in front of complainant's land, entirely cuts off his access to

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tion of cause and effect was as immediate as it would have been if the defendant had dumped a mass of silt and earth into the river, and had thereby formed a bar. And, inasmuch as one who places or creates an obstruction in a navigable river without legal sanction thereby creates a public nuisance, the defendant company can only escape liability for its acts by showing that Congress has in fact authorized it to create obstructions of the kind now in question. It is hardly necessary to observe that the city of Grand Forks has no power, by ordinance or otherwise, to authorize persons or corporations to create obstructions in any of the navigable waters of the United States over which Congress exercises jurisdiction. The only authority, therefore, on which the defendant company can rely to justify the obstruction in question, is the act of Congress which authorized its predecessor in interest, the Northern Pacific Railroad Company, to build and maintain a transcontinental railroad along a designated route. But a statute which authorizes a railroad corporation to build its road parallel to a navigable stream, and several hundred feet distant therefrom, does not, by any fair rule of interpretation, empower it to create an obstruction in the channel of the stream which will interfere with its navigability. The power to build a highway like a railroad does not carry with it, by implication, the right to destroy or obstruct a water highway. There is an implied condition attached to all legislative grants, authorizing the construction and operation of railroads or other public improvements, that in the exercise of the authority conferred nuisances shall not be created, and that private

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the stream, and thereby causes a direct and peculiar injury to his estate.

The obstruction of a navigable stream is a public, and not a private, nuisance, and a riparian owner on the bank of the stream cannot maintain an action, although, by reason of the obstruction, his use of the stream for purposes of navigation is impaired or destroyed. Blood v. Nashua & L. R. Corp. 2 Gray, 137, 61 Am. Dec. 444.

The raising of a dam across a creek, thereby interfering with public travel thereon, constitutes a public nuisance for which an individual cannot maintain an action without showing some injury distinct from that which he suffers in common with the rest of the community; and the mere fact that the dam is between the residence and land of a riparian owner, so as to prevent him from using it for access from one to the other, does not give him a right of action. Seeley v. Bishop, 19 Conn. 128.

When a bridge is erected over a navigable river between the lands of a riparian proprietor and a lake, as such proprietor he suffers no special damage such as will enable him to maintain a private action for the public nuisance. Small v. Grand Trunk R. Co. 15 U. C. Q. B. 283.

A water mill owner, who is prevented from rafting his lumber to a shipping point by the building of a railroad bridge over the stream, cannot recover compensation for interference with the right common to the public. Archibald v. Queen, 23 Can. S. C. 147, Affirmed in 3 Can. Exch. 251.

The owner of a wharf is not entitled to compensation for the construction of a railroad trestle in such a manner as to interfere with the navigation of a vessel navigating the harbor and using this wharf, where his injury is of the same kind as, though greater in degree than, that suffered by other owners in the harbor. Magee v. Queen, 5 Can. Exch. 391.

Although there may be, under the French law, *droit de acces et de sortie* belonging to riparian land, which, if interfered with, will at once give the proprietor a right of action, this right is confined to what it is expressed to be *acces*, or the power of getting from the waterway to and upon the land in a free and uninterrupted manner, and does not extend to an obstruction to the navigation; and the riparian owner is not entitled to maintain an action in respect to such obstruction without proof of actual and special damage. Bell v. Quebec, L. R. 5 App. Cas. 84, 49 L. J. P. C. N. S. 1, 41 L. J. 451.

But it was said by Sir Montague E. Smith, in delivering the judgment of the lords, that while a riparian proprietor cannot maintain an action for an interference with the navigation unless he suffers a special damage, his being such proprietor would be an important element in the question whether such damage had in fact been sustained. *Ibid.*

One whose dock property is injured by the construction of a bridge is not estopped from recovering damages, although his grantor signed the petition presented to the board of supervisors asking that the bridge be located where it was placed, when the conduct of the company constructing it was not influenced or affected by the conduct of such grantor. Maxwell v. Bay City Bridge Co. 46 Mich. 278, 9 N. W. 410.

4. Interruption of voyage.

In case of the actual interruption of a voyage undertaken in good faith, and not for the purpose of having it interrupted, the injured person may maintain an action on the ground of special injury.

Although an obstruction to navigation is a public nuisance, a person whose barge is prevented from passing through the stream by a railroad bridge has suffered special damage, and he has a right of action for damages against the one maintaining the bridge. Little Rock, M. River & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277.

A person navigating a stream suffers a special damage by a public nuisance, entitling him to maintain an action, where the nuisance is created by the defendant wrongfully mooring a barge across a stream, thereby impeding the plaintiff in navigation of the stream, and compelling him to unload his barges laden with goods and carry them overland. Rose v. Miles, 4 Maule & S. 101.

One suffers special damage from an unreasonable obstruction of navigation of public waters, when he is compelled to unload his cargo on one side of the obstruction, portage to, and reload it on the other side. Drake v. Sault Ste. Marie Pulp & Paper Co. 25 Ont. App. Rep. 251.

One shows special damage from the unreasonable obstruction of navigation by a bridge when he cannot remain in the enjoyment of the natural navigability of the river, but must transship or carry by land. E. A. Chatfield Co. v. New Haven, 110 Fed. 788.

One who suffers injury by reason of the illegal obstruction of a navigable river by a bridge the draw of which is not opened until

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property shall not be taken without just compensation. *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 332, 333, 27 L. ed. 739, 744, 745, 2 Sup. Ct. Rep. 719; *Chicago G. W. R. Co.* v. *First M. E. Church*, 50 L. R. A. 488, 42 C. C. A. 178, 102 Fed. 85; *Costigan* v. *Pennsylvania R. Co.* 54 N. J. L. 233, 23 Atl. 810; *Shelfer* v. *London Electric Lighting Co.* [1895] 1 Ch. 287, 295, 296. It may be conceded for present purposes that a right conferred upon a railroad corporation to construct its road along a designated route carries with it by implication, when the power is not expressly given, the right to obstruct navigable streams and public highways to such limited extent as may be necessary to carry its track over and across such streams and highways as it is found necessary to cross. Express provisions, however, are usually found in legislative acts authorizing the building of railroads to cover cases of the latter kind, and it rarely happens that the power to create even slight obstructions in navigable streams or public highways is left by the legislature to implication. We are of opinion that the right to create an obstruction in a navigable stream like the one involved in the present case cannot be deduced by implication from the fact that Congress has authorized the construction of a railroad parallel to the course of the stream, and some distance therefrom. In the case in hand the fact that the existence of the stratum of plastic clay underneath the surface of the soil was unknown to Congress at the time the construction of the defendant's road was authorized, and that the result which would flow from the making of a heavy embankment at the place in contro-

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after considerable delay may recover damages from the parish maintaining the bridge. Houston v. Police Jury, 3 La. Ann. 566.

The owners of vessels prevented, by the obstruction of a navigable channel due to the negligent falling of a draw in a bridge, from entering a bay for the purpose of discharging cargoes, or from leaving it when ready to proceed to sea, may maintain suits in admiralty to recover in the way of demurrage irrespective of decisions of the local courts. New York, N. H. & H. R. Co. v. Piscataqua Nav. Co. 47 C. C. A. 225, 108 Fed. 92, Affirming 89 Fed. 362.

In Rose v. Miles, 4 Maule & S. 101, in which it was held that a person suffered special damage entitling him to maintain an action where his navigation of the stream was interrupted by an obstruction compelling him to unload his goods and send them across land, Dampier, J., said: "The present case, I think, admits of this distinction from most of the other cases, that here the plaintiff was interrupted in the actual enjoyment of the highway. The expense was incurred by the immediate acts of the defendant, for the plaintiff was forced to unload his goods and carry them overland. If this be not a particular damage, I scarcely know what is. Lord Ellenborough, Ch. J., said: "The plaintiff was in the occupation, if I may say so, of the navigation; he had commenced his course upon it, and was in the act of using it when he was obstructed. It did not rest merely in contemplation. Surely this goes one step farther; this is something substantially more injurious to this person than to the public at large, who might only have in contemplation to use it, and he has been impeded in his progress by the defendants wrongfully mooring their barge across it, and has been compelled to unload and carry his goods overland, by which he has incurred expense. . . . It seems to me that this plaintiff has shown a particular damage."

One prevented from floating logs by obstructions placed in a river suffers special damage entitling him to maintain a suit to abate the nuisance. Spokane Mill Co. v. Post, 50 Fed. 429.

Where timber floating down a public river is actually obstructed by the construction of the pier and boom, the owner of the timber suffers such particular damage as will entitle him to maintain an action. Esson v. McMaster, 1 Kerr (N. B.) 501

One whose rafts floating on a river are stopped by an obstruction placed therein by a third person suffers special damage which will give him a right of action for the nuisance. Hughes v. Heiser, 1 Binn. 463, 2 Am. Dec. 459.

One who sustains loss or damage by delay in running his logs in consequence of an unlawful obstruction in the river may recover against those who placed the obstruction in the stream. Weatherby v. Meiklejohn, 61 Wis. 67, 20 N. W. 374.

But it has been held that the failure of the owner of a bridge crossing a navigable stream to perform its agreement to leave the draw in the bridge open so as to permit plaintiff's boats to pass through does not inflict on him an injury different from that suffered by the general public, so as to entitle him to maintain an action for damages. South Carolina S. B. Co. v. Wilmington, C. & A. R. Co. 46 S. C. 329, 33 L. R. A. 541, 24 S. E. 337.

And that a person whose raft is delayed in its passage down a navigable stream by reason of an obstruction, and who expends a considerable sum of money in removing the obstruction, does not thereby suffer a special damage entitling him to maintain an action. Carey v. Brooks, 1 Hill, L. 365.

Mere interruption in the use of a vessel will give no right of action.

A tug is not entitled to recover damages by reason of the negligent falling of a draw which prevented vessels from passing or repassing the bridge for several days, where the only injury suffered was a diminished employment in towing vessels. New York, N. H. & H. R. Co. v. Piscataqua Nav. Co. 47 C. C. A. 225, 108 Fed. 92.

An owner of a steamboat, prevented from taking his boat down a navigable river, and compelled to keep it tied up several days by reason of the defective construction of a railroad bridge in such a manner as to cause flood wood to lodge against the piers creating a jam, does not suffer special damages from a public nuisance not common to the general public, so as to entitle him to maintain an action therefor. Jones v. St. Paul, M. & M. R. Co. 16 Wash. 25, 47 Pac. 226.

If an obstruction of a navigable stream may have violated the rights of one operating a line of steamers on an established time schedule to a greater degree than those of the general public, it did not inflict on him any special or peculiar damage entitling him to maintain an action for damages. South Carolina S. B. Co. v. Wilmington, C. & A. R. Co. 46 S. C. 329, 33 L. R. A. 541, 24 S. E. 337.

5. *Physical injury.*

One whose boat while being navigated with

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versy was unforeseen, conclusively negatives the inference that the legislature intended to empower it to do and perform acts, either in the construction or maintenance of its road, that would not only obstruct navigation in the Red River of the North, but would probably damage some private property adjacent to its roadbed. It is by no means probable that Congress would have authorized the building of the defendant's railroad at the point in question, without imposing some restrictions as to the method of building it, had it been acquainted with the condition of the soil in that locality, and had it foreseen the unique effect upon the river bed of building a heavy embankment in close proximity thereto. It cannot be presumed that it intended to authorize the creation of a public nuisance, and what it did not intend to do it has not in fact done.

From another point of view we also reach the conclusion that the defendant company was guilty of an unlawful act in placing such an increased burden on its right of way as occasioned an uprising in the bed of the river and a consequent obstruction to navigation. By the 10th section of an act approved September 19, 1890 (26 Stat. at L. 454, chap. 907), Congress in express terms prohibited "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction;" and furthermore declared, in substance, that the creation or continuance of any such unlawful obstruction might be prevented by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction might be threatened, and that proper proceedings to that

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care and skill is forced by a cross current caused by sunken pontoons against the pier of a bridge not constructed in accordance with the act authorizing it, and through the draw of which he was attempting to pass, may recover damages of the defendant company which maintained the two unlawful obstructions. Missouri River Packet Co. v. Hannibal & St. J. R. Co. 1 McCrary, 281, 2 Fed. 285.

In case a vessel is injured in a collision with an unlawful obstruction to navigation the owner is entitled to recover the loss necessarily incurred in repairing the injured vessel, and also for the use of the boat during the time necessary to make the repairs and fit her for business. *Ibid.*

The charterer of a vessel, who was subjected to expense in getting her off from a gas pipe upon which she was caught while passing along a navigable river being navigated with due care, may maintain an action against the one who placed the pipe in the stream, if it was unlawful to recover the expense of delay so caused. Benson v. Malden & M. Gaslight Co. 6 Allen, 149.

A propeller which, by reason of the negligent failure of the authorities of the city of Chicago to open a bridge over the river upon notice, is frozen in, is entitled to recover the necessary expense incurred in cutting her way out of the ice, together with damages for delay and injuries sustained while the officers of the vessel were in the exercise of skill and prudence. Scott v. Chicago, 1 Biss. 510, Fed. Cas. No. 12,526.

But a boat owner cannot recover for damages sustained by reason of an obstruction placed in a navigable river, unless he was in the exercise of ordinary skill. Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3,046

So, a boat owner cannot recover for damages sustained by a collision of his vessel with the pier of a bridge constituting an unlawful obstruction if the injury is due to the reckless and unskilful management of the boat. Jolly v. Terre Haute Draw-Bridge Co. 6 McLean, 237, Fed. Cas. No. 7,441.

d. *Consent to obstruction and contributory negligence.*

One who would otherwise have a right of action for an obstruction may deprive himself of his remedy by participating in the obstruction or by contributory negligence. See also V. c, 5, *supra.*

A private action cannot be maintained to

recover damages for the unlawful obstruction of a river by log booms constructed near its mouth by the defendant for its use in connection with its mills, and which stop the passage of all logs floated down the river, where the plaintiff sanctioned, employed, and was benefited by such booms. Nester v. Diamond Match Co. 52 L. R. A. 950, 44 C. C. A. 666, 105 Fed. 567.

So, where he has permitted a company to maintain jam booms at the mouth of a river, and has allowed such company to sort and store his logs, he waives the right to recover damages on the ground that such booms constituted an unlawful obstruction to navigation, nor can he, where the action is in tort and not upon contract, express or implied, recover damages for unreasonable delay in handling the logs. *Ibid.*

One who, knowing of obstructions in a stream, drives his logs upon them without allowing time for their removal, cannot recover for loss occasioned in attempting to pass the obstructions. Harold v. Jones, 86 Ala. 274, 3 L. R. A. 406, 5 So. 438.

But in Sullivan v. Jernigan, 21 Fla. 264, it was held that the knowledge of a person about to start his logs that there was a boom across the river did not show him to be guilty of contributory negligence in not waiting for the obstruction to be removed, since his right to navigate was superior to that of the other person to obstruct the stream.

The owner of a pier which constitutes an obstruction to navigation is not liable for the loss of a vessel which struck it, where she was at fault in starting to leave the harbor in the existing state of the wind, sea, and tide without an experienced pilot, and persisted in her effort after it became hopeless, and did not anchor when driven towards the pier. The Henry Clark v. O'Brien, 65 Fed. 815.

Those navigating a stream across which a railroad drawbridge is maintained are not required to resort to extraordinary and unusual methods of tug-boat construction, such as adjustable smokepipes, permitting them to pass under such bridge, in order to avoid delay and damage resulting from the failure of the railroad company to open the draw. Gates v. Northern P. R. Co. 64 Wis. 64, 24 N. W. 494.

One who has aided in putting logs in a river is not thereby estopped from suing for the obstruction caused by their detention therein for an unreasonable length of time. Gifford v. McArthur, 55 Mich. 535, 22 N. W. 28.

An owner of timber lost while being floated to market on a navigable river may recover

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end might be instituted under the direction of the Attorney General of the United States. The present action appears to have been brought in accordance with the provisions of that act. The prohibition contained in this statute against creating an obstruction in navigable waters, unless it is affirmatively authorized by law, is general in its terms, and the statute was enacted before the increased burden was imposed on the defendant's right of way which caused the formation of the bar in the channel of the river. Neither the defendant company nor its predecessor in interest had a vested right under its charter to improve its roadbed in such a manner as would obstruct navigation in a navigable river, and, having no such right, the acts complained of fall within the prohibition of the aforesaid statute, and are clearly unlawful.

The record contains evidence which tends to show that the defendant's embankment now in process of construction will shortly settle through the stratum of plastic clay, and rest upon a solid foundation of blue clay, after which time the lateral movement of the plastic stratum will cease. In view of this fact, and because of the present great depression in the defendant's track which impedes the movements of its trains, and because it seems evident that the bar which is at present forming may be kept down by dredging, so as not to obstruct navigation, we have concluded to modify the injunction that was granted by the lower court so as to make it plain that the work of raising the defendant's embankment may proceed, provided the bar in the river is kept down so as not to obstruct navigation. With this purpose in view, and to avoid any misappre-

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therefor from the owner of a milldam erected across the stream so as to obstruct the same, thereby causing the loss, even if the length of the logs was such that the owner himself did not believe that they would float over the dam in safety. Martin v. Pliss, 5 Blackf. 35, 32 Am. Dec. 52.

VI. *Partial or immaterial obstruction.*

By an unlawful obstruction in a navigable stream is meant such an impediment to navigation that boats in passing along the stream cannot, by the use of skill and care, avoid being injured. Terre Haute Draw-Bridge Co. v. Halliday, 4 Ind. 36.

A bridge may be authorized over a stream which is floatable for logs only 1½ miles above it and when only one person is interested in the floatage, although the effect will be to cut off all possibility of floating logs on the stream. Peters v. New Orleans, M. & C. R. Co. 56 Ala. 528.

A person cannot be indicted for obstructing a water course by building a dam across it if at the time he built the dam the stream was not navigable, although by private enterprise it has since been cleaned out and made so. State v. Hickson, 5 Rich. L. 447.

The owner of a milldam across a stream, navigable at that point for small boats and crafts only, is not guilty of maintaining a public nuisance because the dam does not contain a lock or slope as required by the act in pursuance of which it was erected, where the stream is of no practical public utility for navigation, and it does not appear that anyone has been prevented from, or obstructed in, its navigation. Neaderhouser v. State, 28 Ind. 257.

The construction of a highway across a cove does not interfere with navigation, so as to constitute a public nuisance, where the only navigation in the cove consists of an occasional skiff, fish-boat, or Indian canoe being pushed through its waters. Wethersfield v. Humphrey, 20 Conn. 218.

The riparian proprietor of both banks of a nonnavigable stream may place a barbed-wire fence across such stream to prevent the passage of pleasure rowboats. Griffith v. Holman, 23 Wash. 347, 54 L. R. A. 178, 63 Pac. 239.

No impediment to navigation will be presumed to exist by reason of a building erected by the riparian proprietor 2 feet above a portion of a tidal stream which is empty at mean tide, although navigable by boats and gondolas at high tide. Low v. Knowlton, 26 Me. 128, 45 Am. Dec. 100.

A mill owner erecting a dam on a navigable stream is only liable so far as the natural degree of navigability is lowered. A dam is not an impediment to navigability created by and depending on the dam. Hall v. Lacey, 3 Grant, Cas. 264.

A railroad company which used piling to repair a bridge lawfully maintained by it, and thereafter cut off the piles, leaving the stumps in the water, is not liable for obstructing navigation to one using the stream to raft logs, where the piling was cut off so far below the surface of the stream as not to be an obstruction during the period during which the river was susceptible of navigation. Central Trust Co. v. Wabash, St. L. & P. R. Co. 32 Fed. 566.

While the unobstructed navigation of a river is an inherent paramount right of the people, it does not exclude a partial obstruction or inconsiderable detention by a dam constructed in pursuance of governmental authority for the accommodation of public interests, or of commerce, or of travel upon the land. Woodman v. Kilbourn Mfg. Co. 1 Abb. (U. S.) 158, 1 Biss. 546, Fed. Cas. No. 17,978.

The general government may require a temporary suspension of the navigation of a stream while it is engaged in its improvement. United States v. Rum River & M. Boom Co. 1 McCrary, 397, Fed. Cas. No. 16,206.

A mill owner makes no unreasonable use of a floatable stream by erecting a dam across it, when at the same time he erects a suitable sluiceway for the passage of logs and other timber. Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561.

Bridges across a navigable river, within the limits of a city, furnished with capacious draws for the passage of vessels, do not unlawfully obstruct navigation because vessels are subject to delay on account of an ordinance of the city requiring such draws, during a portion of the day, to be closed after remaining open ten minutes, and remain closed for a like period, if necessary for the needs of the public desiring to cross the bridge, before being again opened for the passage of vessels. Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295.

One who lawfully maintains a dam across a navigable stream is entitled to a reasonable time in which to repair a break in the dam, and has a right to reasonably protect it, although the temporary detention of logs is necessary to such repair and protection. Pratt v. Brown, 106 Mich. 628, 64 N. W. 583.

County commissioners are not liable for the detention of a boat, caused by the erection of a

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hension as to the scope of the injunction, the following clause will be added to the decree: "The injunction hereby awarded shall not be so construed as to prevent the defendant company from proceeding with the work of raising its tracks between Cheyenne and Hill avenues to the proper level, if by dredging or otherwise, as the work progresses, it shall, at its own cost and expense, prevent the formation of any such bar in the channel of the Red River of the North as will at any time lessen or impair its navigability."

As thus amended, *the decree below is affirmed.*

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bridge across a navigable river authorized by the commissioners, where the bridge, when erected, was no obstruction to the navigation of the river along the channel then used, but, by reason of a freshet, a dam previously constructed under authority of law for the improvement of navigation gave way causing the water to abandon the new channel and lock, through which the improvement caused it to flow, and resume the old channel, which had, in the meantime, become obstructed by a bar so as, in connection with the bridge, to create an obstruction to navigation. St. Joseph County v. Pidge, 5 Ind. 13.

A contractor engaged in constructing a pier for a lighthouse is not liable for an injury sustained by a schooner which at night ran into the derrick used in such work of construction, although there was no light or watchman on the structure, where the schooner was at the time out of her proper course. The Maud Webster, 8 Ben. 547, Fed. Cas. No. 9,302.

But a riparian owner on a navigable stream is liable for the loss of a vessel occasioned by running against a log which such owner had removed from his bank so as to prevent injury to his property and left upon a bar in the river outside the usual and ordinary channel taken by boats, but submerged during high water to a sufficient depth to afford a safe passage for boats if such log had not been there. Porter v. Allen, 8 Ind. 1, 65 Am. Dec. 750.

The unauthorized obstruction of any part of a navigable river where boats could run with safety but for the obstruction is unlawful. *Ibid.*

VII. *Obstruction a nuisance.*

See also *supra*, II. c, 8.

All obstructions to navigation not authorized by the legislature are public nuisances. Alden v. Pinney, 12 Fla. 348; Swanson v. Mississippi & M. River Boom Co. 42 Minn. 532, 7 L. R. A. 673, 44 N. W. 986; Com. v. Church, 1 Pa. St. 105, 44 Am. Dec. 112; South Carolina S. B. Co. v. South Carolina R. Co. 30 S. C. 539, 4 L. R. A. 200, 9 S. E. 650; Newark Pl. Road & Ferry Co. v. Elmer *ex rel.* Van Wagenen, 9 N. J. Eq. 755.

Whoever unnecessarily obstructs the navigation of the Mississippi river is guilty of maintaining a nuisance. Hayward v. Knapp, 23 Minn. 431.

A dam over a public stream constitutes a nuisance when not erected where authorized by the franchise therefor. State v. Godfrey, 12 Me. 361.

Also, to erect an obstruction over public waters across their regular course is a purpresture. Glanville, lib. XIV.

A dam which without legislative authority impedes or obstructs the right of the public, in floating boats or logs in a stream in which they can be floated in its natural state, is *pro tanto* a nuisance. Knox v. Chaloner, 42 Me. 150.

Any obstruction, however, inconsiderable, placed in a navigable stream without constitutional legislative authority is a nuisance to be abated at the suit of an individual or of the state. Woodman v. Kilbourn Mfg. Co. 1 Abb. (U. S.) 158, 1 Biss. 546, Fed. Cas. No. 17,978. 59 L. R. A.

Obstructions in the way of navigation constitute a nuisance although no actual injury is shown, as they render such navigation less convenient, less secure, and less expeditious. State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411.

A dam which impedes or obstructs the rights of the public for floating boats or logs, in a stream in which they can be floated, must be held a nuisance so far as such use is destroyed or unreasonably obstructed. Veazie v. Dwinel, 50 Me. 479.

The erection of an obstruction in a navigable river, resulting in public injury and inconvenience to navigation, is a nuisance, which no amount of benefit conferred thereby upon an indefinite number of individuals, or upon a local community, can countervail. Gold v. Carter, 9 Humph. 369, 49 Am. Dec. 712.

But if the public utility of an obstruction in a navigable river is sufficient to overcome the abridgment of the right of navigation caused by its existence it will not be a nuisance. Pilcher v. Hart, 1 Humph. 524.

A vessel navigating a river has a right to the unobstructed use of all its natural width, and if that width be unnecessarily diminished so as to impede the navigation at all times, by day and by night, at high water or low water, in fair weather or in foul, the structure which occasions the injury is a nuisance. Newark Pl. Road & Ferry Co. v. Elmer *ex rel.* Van Wagenen, 9 N. J. Eq. 755.

If when the draw in a railroad bridge across navigable water is closed it is a complete obstruction to the navigation of the river by tugboats as they are usually and generally constructed, it is a nuisance *per se*, and no notice is necessary to be given the company to abate, for it is its duty to do so when it is necessary or proper for the river to be so used. Gates v. Northern P. R. Co. 64 Wis. 64, 24 N. W. 494.

The obstruction of a stream of water running into the Savannah river from 75 to 200 feet in width and 14 feet in depth, which is held to be a navigable stream, is a nuisance which may be abated, at the instance of any person applying therefor, without notice and demand, before action brought, to the person erecting or causing the nuisance to abate the same. Charleston & S. R. Co. v. Johnson, 73 Ga. 306.

A dam constructed in a small stream navigable for the floatage of logs is not an obstruction or nuisance if it makes the use of the stream beneficial and available to others, furnishes equal, or greater, facilities for floating logs than before its erection, so that logs can be driven down with equal, or with greater, speed than before, more certainty of making a clean drive and getting logs when wanted for use, and without greater expense. A. C. Conn Co. v. Little Suamico Lumber Mfg. Co. 74 Wis. 652, 43 N. W. 660.

Failure to maintain buoys over submerged piers in process of construction, so as to warn vessels of danger, is negligence for which the one whose duty it is to maintain the buoy will be liable. Casement v. Brown, 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672.

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The burden of proving that an obstruction to navigation is lawful is upon the defendant, or party causing the obstruction. Cantrell v. Knoxville, C. G. & L. R. Co. 90 Tenn. 638, 18 S. W. 271.

But not every structure in the channel of a navigable river will be abated as a nuisance. St. Louis v. Knapp, S. & Co. Co. 2 McCrary, 516, 6 Fed. 221.

The courts cannot pronounce a simple obstruction in a navigable river to be a nuisance; it is a fact to be found. Harlan & H. Co. v. Paschall, 5 Del. Ch. 435.

The question whether or not the erection of an obstruction in a navigable river is such an abridgment of the rights of navigation as to constitute a nuisance, and, if so, whether the public benefits resulting from its use are sufficient to offset the effects of this abridgment, so as to render it no nuisance, is one for the jury to determine from the facts in the case. Pilcher v. Hart, 1 Humph. 524.

VIII. *Remedies.*

a. *Abatement.*

If an obstruction to navigation constitutes a nuisance one injured thereby may abate it.

It is a settled principle of the common law that whatever obstructs navigation in a navigable stream is a public nuisance which may be removed and abated by any citizen. McLean v. Mathews, 7 Ill. App. 599.

But it is not the duty of those using, for rafting purposes, a stream obstructed by a railroad drawbridge, which is a nuisance, to temporarily abate such nuisance by opening the draw to permit the passage of their tug boats, since such action would impose on them the duty of closing the draw, thereby rendering them responsible for the nuisance to other persons navigating the river in a similar manner, and also the further responsibility of notifying approaching trains from either way to stop until the draw is closed. Gates v. Northern P. R. Co. 64 Wis. 64, 24 N. W. 494.

Bridges set upon rivers without authority may be taken down by the commissioners of sewers. Callis, Sewers, 89.

But the master of a steamboat, who desires to enter a bayou, the mouth of which is obstructed by a raft driven therein from the river by the force of the wind, is not justified in cutting loose the raft as an obstruction to navigation, whereby most of the logs are carried away and lost, when the raft had occupied such position but a short time, and its owner is actively endeavoring to obtain the assistance of a boat to take it in tow. Lallande v. The C. D. Jr., Newberry Adm. 501, Fed. Cas. No. 8,000.

Obstructions to navigation of a navigable stream, erected without authority of law, are nuisances which may be abated by a private person; and, where a bridge is constructed which obstructs a navigable stream, damages cannot be recovered against a person who removes part of the bridge for the purpose of allowing his boats to pass. Selman v. Wolfe, 27 Tex. 68.

As a navigable river is a public highway, any person whose use of the river is impaired by an obstruction placed therein without lawful authority may remove the same as a public nuisance. Ferguson v. Union S. Co. 10 Vict. L. Rep. 279.

In case a dam is so erected as to interfere with the right of floating logs on a stream, which is given by statute, a log owner may remove such portion of it as is necessary to permit the logs to pass, without being liable for the trespass. Little v. Ince, 8 U. C. C. P. 528.

But the mere fact that the statute requires dams to be constructed in such a way as to permit the passage of timber through them does not justify one who tears down a dam to permit his timber to pass, in case it is not shown that the stream is a common public highway. Shipman v. Clothier, 8 U. C. Q. B. 592.

An obstruction due to another's negligence, in a stream which is floatable only in time of high water, may be removed by one using the stream in the most speedy manner required by the circumstances, and he is only liable for gross negligence or wilful destruction. Beach v. Schoff, 28 Pa. 195, 70 Am. Dec. 122.

Where the court laying out a road locates it across a navigable river without authority, anyone having occasion to navigate the river may destroy the bridge to facilitate his passage, although it has stood in the same place for more than fifty years. Arundel v. M'Culloch, 10 Mass. 70.

The owner of a raft which has lodged in a floatable stream cannot recover if, after a reasonable delay, another whose raft is delayed above cuts away so much of the first as is necessary to effect a passage. Philiber v. Matson, 14 Pa. 306.

Persons descending a navigable creek in a boat may remove a common nuisance consisting of a boat lying broadside across the stream with her ends firmly lodged against the opposite banks, though the boat was placed there by accident, and not by design. King v. Sanders, 2 Brev. 111.

One interested in the navigation of a river cannot destroy a dam placed across it under authority of the legislature in such a way as to interfere with navigation, where the authorization of the dam contemplated such interference, and provided a full and adequate remedy against this by imposing upon the proprietors a duty in relation thereto, and, in case of their failure, upon certain public authorities. Com. v. Tolman, 149 Mass. 229, 3 L. R. A. 747, 21 N. E. 377.

A private individual cannot abate a public nuisance consisting of a fence across a navigable stream, unless he has some special interest in the abatement different from, and greater than, the interest of the community. Griffith v. Holman, 23 Wash. 347, 54 L. R. A. 178, 63 Pac. 239.

When a statute authorizing the construction of a dam on a navigable stream also provides the remedy to be had when navigation is impeded thereby, the common-law remedy of abatement cannot be used. Spigelmoyer v. Walter, 3 Watts & S. 540.

The power of a state court to order the removal or modification of a bridge on the ground that it is a public nuisance impeding the navigation of the river, which is wholly within the state, is not taken away by the act of Congress requiring the approval of the Secretary of War as a condition of the erection of a bridge over a navigable river. Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357.

b. *Injunction.*

Equity may issue an injunction to restrain a private nuisance by the narrowing of an ancient water course, though the plaintiff has not established his title at law. Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526.

A Federal court cannot restrain the erection of a bridge over one of its public rivers by authority of a state law which does not conflict with a commercial regulation of Congress. Easton v. New York & L. B. R. Co. 9 Phila. 475.

That a statute provides a remedy to compel

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the removal of an erection in a tidal river will not deprive the court of authority to prohibit the erection of such obstruction. People v. Vanderbilt, 38 Barb. 282.

The eastern channel of the Mississippi river between Bloody island, opposite St. Louis and the mainland, is in fact and within the meaning of the law navigable, and its obstruction is therefore a nuisance which courts of equity will abate. People v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339.

A bridge company may be enjoined from placing its piers other than at right angles with the course of the river, if such placing will be of least obstruction to the navigation of the river. Thompson v. Paterson & H. R. R. Co. 9 N. J. Eq. 526.

An injunction is properly granted at the suit of bridge owners to restrain proceedings to condemn the right to use such bridge for a telegraph line, where the plan for the use thereof outlined in the petition is such as will obstruct navigation by interfering with the operation of draws maintained in the bridge in pursuance of an act of Congress authorizing its construction and requiring it to be built with suitable draws and in such manner as not to unnecessarily interfere with navigation. Pacific Mut. Teleg. Co. v. Chicago & A. Bridge Co. 36 Kan. 118, 12 Pac. 560.

A private bridge erected without authority over the channel between Quantuc bay and East bay, forming part of Great South bay, and being navigable waters of the United States, is a continuing obstruction, and presents a proper case for equitable relief. Whitehead v. Jessup, 53 Fed. 707.

Upon the question of restraining the erection of a bridge over the Hudson river at the suit of the master of a vessel engaged in the navigation of the river, the court was equally divided, in Albany Bridge Case, 2 Wall. 403, *sub nom.* Coleman v. Hudson River Bridge Co. 17 L. ed. 876.

A railroad company will be temporarily enjoined from erecting, under state legislative authority, a bridge across the Connecticut river near its mouth, and which it is alleged will obstruct the free navigation of the river, where the injunction will not interfere with the enjoyment by the railroad of its franchise, and since large and hazardous expenditures will be thereby prevented. Baird v. Shore Line R. Co. 6 Blatchf. 276, Fed. Cas. No. 758.

The erection of a bridge across the Wallamet river at Portland, Oregon, will be enjoined at the suit of a riparian owner injured thereby, as an obstruction to navigation, contrary to the act of Congress (11 Stat. at L. 383) declaring the navigable waters of the state common highways and forever free, where it will obstruct the navigation of the river except for the space of 100 feet on either side of the pivot pier, which openings are too narrow to admit the safe and convenient passage of sea-going vessels or the larger class of river boats, except in favorable conditions of wind and weather. Hatch v. Wallamet Iron Bridge Co. 7 Sawy. 127, 6 Fed. 780.

An injunction against a railroad company maintaining a bridge over a navigable stream from which, after the filing of the bill to restrain the obstruction of the stream thereby, it removes a beam so as to leave the stream open to navigation to such an extent as to allow the free passage of all water craft running thereon, will be granted restraining it from placing or putting any other obstructions over such stream than as they exist at the time of the granting thereof. Charleston & S. R. Co. v. Johnson, 78 Ga. 306.

The United States may obtain an injunction to prevent the construction of a bridge across a navigable river where special and irreparable injury will be inflicted upon its property thereby. United States v. Railroad Bridge Co. 6 McLean, 517, Fed. Cas. No. 16,114.

But the construction of a railroad bridge across both channels of a river so as to connect an island with both banks of the stream will not be enjoined, in a suit by the United States, as an irreparable injury to public land upon the island, where a ferry is the only means of communication, and the proposed railway would increase the value of the island and its products. United States v. Railroad Bridge Co. 6 McLean, 517, Fed. Cas. No. 16,114.

So a United States court will restrain, by injunction, the erection of a bridge under state authority which would injure interstate commerce and tax the public by increased freight because of difficulty in passing the draw, when a steam ferry can amply accommodate the traffic. Devoe v. Penrose Ferry Bridge Co. 5 Clark (Pa.) 313.

Equity will not enjoin the obstruction of the navigation of a stream unless the obstruction will amount to a public nuisance. Gilbert v. Morris Canal & Bkg. Co. 8 N. J. Eq. 495.

So where the construction and maintenance of a dam across a river and the appropriation of its waters for the purpose of irrigation will not substantially diminish the navigable capacity of the stream within its present limits of navigability an injunction restraining such acts will not be granted. United States v. Rio Grande Dam & Irrig. Co. (N. M.) 65 Pac. 276.

Where the legislature has determined that a dam can be erected so as at least not materially to obstruct navigation, a writ of injunction against the erection of a dam will not be granted. State v. Eau Claire, 40 Wis. 533; Atty. Gen. v. Eau Claire, 37 Wis. 400.

An injunction will not be granted to restrain the construction of a bridge without a draw over a stream navigable only during high water, and which, while at one time recognized as navigable between certain points by acts of the legislature, is omitted entirely from later acts and the political Code declaring certain rivers and waterways to be navigable, under a statute expressly prohibiting the construction of bridges without draws across navigable streams so as to obstruct navigation, since the statute applies only to such streams as are generally navigable in fact, or declared navigable by the legislature. Cardwell v. Sacramento County, 79 Cal. 347, 21 Pac. 763.

The erection of a bridge across the Hudson river at Troy by a bridge company will not be enjoined as an obstruction to navigation at the suit of the owner of vessels enrolled and licensed for the coasting trade, where the evidence shows that the three piers, which occupy but 42 feet of the entire width of 672 feet, will not create shoals or bars, and that the bridge will stand 32 feet above tide water, and be equipped with two draws 111 feet in width. Silliman v. Troy & W. T. Bridge Co. 11 Blatchf. 274, Fed. Cas. No. 12,853.

The erection of a drawbridge, designed for railroad traffic and the convenience of the general public, across the Hudson river, by a railroad company acting under state authority, will be provisionally enjoined if there be any reasonable ground for believing that the bridge may finally be held to be an obstruction to navigation, and subject to abatement as such. Silliman v. Hudson River Bridge Co. 4 Blatchf. 74, Fed. Cas. No. 12,851.

But in Silliman v. Hudson River Bridge Co. 4 Blatchf. 395, Fed. Cas. No. 12,852, Hall, J.,

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said the construction by a railroad company of a drawbridge across a navigable river should not be enjoined as an obstruction to navigation unless the impending injury is irreparable and the right of the claimant to relief is free from serious doubt; nor should it be restrained unless the state statute authorizing it is repugnant to the Constitution or laws of the United States, or deprives the claimant of some right secured thereby.

If a corporation has exceeded its powers by the maintenance of piers, dams, and booms and the running of logs in a navigable river, a court of equity will not decree such improvements a nuisance and compel their removal, or interfere by injunction at the suit of a private individual, until his right has been established at law, and it appears that no adequate compensation can be afforded in damages. Heerman v. Beef Slough Mfg. Boom. L. D. & Transp. Co. 8 Biss. 334, 1 Fed. 145.

An injunction will not issue to restrain the erection of a dam across a floatable stream when done according to the authorization of the proper officials without allegation of fraud or other illegal conduct. McLaughlin v. Hope Mfg. Co. 103 N. C. 100, 9 S. E. 307.

Injunction will not lie to prevent construction of a bridge with a draw insufficient in size to accommodate the commerce of the river after the bridge has been completed. Atty. Gen. v. New Jersey R. & Transp. Co. 8 N. J. Eq. 136.

An injunction will not be granted against an interstate bridge over navigable waters when there is no purpresture: and the structure, which is for a public purpose and for the public advantage, is completed, when no impediment to navigation is created thereby, and when it has been built bona fide, and there is cogent evidence of acquiescence on the part of the state in the construction which the builders have put upon the law under which they have acted. Atty. Gen. v. Delaware & B. R. Co. 27 N. J. Eq. 1.

In Pentney v. Lynn Paving Comrs. 13 Week. Rep. 983, 12 L. T. N. S. 818, a bill to restrain the commissioners, under the town's improvement act, from arching over portions of a navigable fleet, which arching had already been done so as to obstruct the navigation, the court held that the acts of the defendant were unauthorized, but, instead of granting a mandatory injunction, substituted damages as a compensation in lieu of it.

The obstruction to navigation caused by a bridge across a stream must be plainly a nuisance to warrant a court of the United States in ordering its removal. Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311.

An injunction will not be granted restraining the construction of a bridge across a navigable river where the evidence does not clearly show that, if erected, it would be an obstruction to the navigation thereof. Hutchinson v. Thompson, 9 Ohio, 52.

The erection of a proposed drawbridge will not be restrained on the ground that it will obstruct navigation, where the testimony is so nearly balanced as not to incline to either side. Works v. Junction R. Co. 5 McLean, 425, Fed. Cas. No. 18,046.

A temporary injunction restraining the erection of a bridge across navigable water will not be granted where the affidavits filed by the defendants show that the bridge will not be an obstruction necessarily amounting to a nuisance; but its construction will be permitted, subject to abatement, if it ultimately proves a nuisance injuriously affecting the complainant's private interest. Northern P. R. Co. v. 59 L. R. A.

Barnesville & M. R. Co. 2 McCrary, 224, 4 Fed. 172.

An injunction *pendente lite* will not be granted restraining the proprietors of a distillery from discharging refuse mash through the common sewer into the waters of a navigable river to the detriment of navigation and wharf owners, where the effect of the order would be to entirely stop the defendant's business, and it is denied that the mash from the distillery lessens the depth of water. Manhattan Gaslight Co. v. Barker, 7 Robt. 523, 36 How. Pr. 233.

A state cannot maintain a suit in the circuit court of the United States to restrain defendants from extending a dyke into the waters of a navigable river whereby it is alleged the use of the river for navigation will be seriously obstructed. Wisconsin v. Duluth, 2 Dill. 406, Fed. Cas. No. 17,902.

The obstruction of navigable waters will be enjoined at the suit of the United States, although such act is also made a criminal offense. North Bloomfield Gravel Min. Co. v. United States, 32 C. C. A. 84, 59 U. S. App. 377, 88 Fed. 664.

A suit may be maintained by the United States in the Federal courts to restrain the placing of obstructions in navigable waters within the district, and to compel their removal. United States v. Milwaukee & St. P. R. Co. 5 Biss. 420, Fed. Cas. No. 15,779.

c. *Other remedies.*

The power to regulate commerce is in Congress, and its legislation must prescribe the remedy for an obstruction to the commerce of a navigable river. The judicial power cannot act until Congress prescribes the rule. United States v. Railroad Bridge Co. 6 McLean, 517, Fed. Cas. No. 16,114.

The power to regulate commerce, conferred on Congress, authorizes it to keep open and free all navigable streams from the ocean to the highest ports of delivery or entry, if no higher, and protect the intercourse between two or more states on all our tide waters; and it may impose punishments for such obstructions as crimes. United States v. New Bedford Bridge, 1 Woodb. & M. 401, 483, Fed. Cas. No. 15,867.

The obstruction of the waters of a navigable river within the ebb and flow of the tide by the construction of a bridge is not a crime cognizable by the Federal courts when it was built under the authority of a state enactment, where such statute does not conflict with the Federal Constitution, a treaty, or an act of Congress declaring such obstruction a crime. *Ibid.*

For the obstruction of a navigable river within the ebb and flow of the tide by the construction of a bridge so that vessels licensed for the coasting trade cannot pass through the draw or as high up the harbor as formerly because of deposits, no prosecution as for a crime can be maintained in the absence of any provision of the Federal Constitution or laws of Congress declaring it to be so; but the owners of such vessel, when obstructed and delayed by means of the bridge, might, probably, have redress in damages, or an injunction against it. *Ibid.*

The obstruction of a navigable river within the ebb and flow of the tide and forming part of a port, by the construction of a bridge across it, or by throwing stone and gravel into its bed, is not punishable as a crime because by acts of Congress the port has been made a port of entry and a customhouse established there. *Ibid.*

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In Texas, it is unlawful and a penal offense to obstruct the navigation of a stream by the erection or the maintenance of a dam across it. Gulf, C. & S. F. R. Co. v. Tacquard, 3 Tex. App. Civ. Cas. (Willson) § 141, p. 179.

An action on the case lies for an injury occasioned by the obstructing of any navigable stream if it is a public highway, although it may not be such in the common-law sense of the term. Martin v. Bliss, 5 Blackf. 35, 32 Am. Dec. 52.

The proceedings to abate a toll bridge built under color of authority from the state permitting only vessels below a certain size to pass through its draw, as a public nuisance, should be, by way of an information or some proceedings in the nature of a quo warranto, filed by the attorney general, or an indictment by the grand jury, or, if such state is estopped by its grant, by similar proceedings in the Federal courts instituted by the attorney general or by the district attorney. Dover v. Portsmouth Bridge, 17 N. H. 200.

A prosecution under 27 Stat. at L. 110, chap. 158, § 3, for the obstruction of a navigable water of the United States cannot be maintained unless such waters were substantially useful for some purpose of interstate commerce. Leovy v. United States, 34 C. C. A. 392, 92 Fed. 344.

Mandamus is a proper remedy to compel a railroad company in crossing a navigable stream to construct its road according to the method provided in its charter, and to remove obstructions arising from an improper construction. State *ex rel.* Blake v. Northeastern R. Co. 9 Rich. L. 247, 67 Am. Dec. 551.

An action in the nature of *denunciation de nouvel œuvre*, cannot be maintained to secure the removal of a wharf which has been constructed to the injury of navigation, as such an action is to secure protection against a work commenced and still in progress by which, if completed, injury will be inflicted. Brown v. Gugy, 10 Jur. N. S. 525, 2 Moore P. C. C. N. S. 341, 10 L. T. N. S. 45, 12 Week. Rep. 492.

H. P. F.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

Re Edward D. PAGE.

(46 C. C. A. 160, 107 Fed. 89.)

A seat in a stock exchange, owned by one who has no unsettled contracts with, or claims against him in favor of, other members, under which circumstances the rules of the exchange permit a sale of the seat, is within the provision of the bankruptcy act that the trustee shall be vested, by operation of law, with the bankrupt's title to all property which, prior to the filing of the petition, he could by any means have transferred.

(March 22, 1901.)

PETITION by a bankrupt for review of proceedings in the District Court of the United States for the Eastern District of Pennsylvania approving an order made by a referee directing the sale of a seat in the stock exchange as an asset of the bankrupt. *Affirmed.*

The facts are stated in the opinion.

Argued before *Dallas* and *Gray*, Circuit Judges, and *Bradford*, District Judge.

Mr. **George W. Jacobs, Jr.**, for petitioner.

Mr. **Henry R. Edmunds**, for respondent:

A seat in a stock exchange is property.

Hyde v. *Woods*, 94 U. S. 523, 24 L. ed. 264; *Re Werder*, 15 Fed. 789, *Sparhawk* v. *Yerkes*, 142 U. S. 12, 35 L. ed. 917, 12 Sup. Ct. Rep. 104; *Ager* v. *Murray*, 105 U. S. 126, 26 L. ed. 942; *Stephens* v. *Cady*, 14 How. 528, 14 L. ed. 528; *Powell* v. *Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Belton* v. *Hatch*, 109 N. Y. 593, 17 N. E. 225; *Habenicht* v. *Lissak*, 78 Cal. 351, 5 L. R. A. 713, 20 Pac. 874; *Weaver* v. *Fisher*, 110 Ill. 140.

The court may order a sale of the seat in the exchange, subject to the rules of the exchange.

Re Ketchum, 1 Fed. 840; *Grocers' Bank* v. *Murphy*, 11 N. Y. Week. Dig. 538; *Scott* v. *Ives*, N. Y. Daily Reg. (1879); *Re Warder*, 10 Fed. 275; *Allan* v. *New York Cotton Exchange*, N. Y. Daily Reg. (1880); Dos Passos, Stock Brokers, p. 97.

Bradford, District Judge, delivered the opinion of the court:

The question before us for decision arises on a petition for a review of certain proceedings in bankruptcy in the district court for the eastern district of Pennsylvania. Edward D. Page was adjudicated by that court a voluntary bankrupt November 16, 1899, being at the time a member of the Philadelphia Stock Exchange, an unincorporated society. He became such member in 1880, paying for his seat or membership about $5,500. It is now valued at $8,000. His membership or seat was not included as an asset in the schedules attached to his petition in bankruptcy. The trustee in bankruptcy, however, caused the seat to be appraised and on his petition the referee ordered that the same be sold at public auction, subject to the constitution and by-laws of the exchange regulating membership therein. The district court upon review approved the order made by the referee and directed the trustee to proceed with the sale. The case is now before us on the petition of the bankrupt, and the precise point for determination is whether or not title to the membership or seat vested in the trustee. Section 70 of the bankruptcy act of 1898 provides, among other things, that, subject to a certain proviso and exceptions not material to the present inquiry, the trustee

NOTE.—As to nature of property interest in seat in stock exchange, see also, in this series, Lowenberg v. Greenebaum (Cal.) 21 L. R. A. 399, and cases in *note* thereto.

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of the estate of a bankrupt shall, upon his appointment and qualification, be vested by operation of law with the title of the bankrupt, as of the date of the adjudication, to all "property which, prior to the filing of the petition, he could by any means have transferred." The provisions of the constitution of the exchange relating to membership and its transfer are as follows:

Article 5.

Sec. 4. A committee on admissions, consisting of five members, to which all applications for membership, transfer of membership, and readmissions of suspended members shall be referred. It shall be its duty to inquire into the general standing of the applicant, and make a report thereon to the governing committee within one month of the presentation of the application. Until the committee makes a report favorable to the admission of the applicant, he shall not be voted for as a member, unless upon the written application of seven (7) members of the governing committee to the president, made within five (5) days after the committee's report has been presented; in which case the governing committee may, by a two-thirds vote, reverse the report of the committee, and such reversal shall have the same effect as if the committee's report had originally been favorable. If a report be favorable, the name of the candidate shall be posted in the stock exchange, and notice given that a ballot will be taken at the next stated meeting of the governing committee in order that every member of the exchange may have an opportunity of objecting to the candidate's election; such objection shall be in writing to the president of the governing committee. The election of candidates for membership shall be held by the governing committee, but no election shall be valid unless at least eighteen (18) ballots be cast; and if five (5) ballots be cast against a candidate he shall be declared not elected.

Article 11.

Sec. 1. The number of members shall be limited to two hundred and thirty (230).

Sec. 4. Any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with or claim against him by any member of the stock exchange, for transactions arising in or relating to the business of banker or a stock or exchange broker; but, where the arbitration committee shall determine that any claims or contracts exist, the governing committee may, except in cases of insolvency, refuse to permit the membership to be sold, until such claims or contracts are, in its opinion, satisfactorily settled. The proceeds of the membership, if sold, shall, after deducting all charges due to the exchange, to be determined, in cases of controversy, by the arbitration committee, belong to its owner's creditors in the exchange, in proportion to the amount of their respective claims, determined by the arbitration committee, as hereinbefore provided in § 5, art. 5, and be paid accordingly; and the remainder, if any, shall be paid to the owner.

Sec. 5. When a member dies, his membership shall, within one year thereafter, be sold or transferred; if, however, he be indebted to any member of the stock exchange, then, on the written request of two thirds of the creditors in interest, said membership shall be sold, at the discretion of the committee on admissions, and the proceeds thereof, after deducting all charges due to the exchange, to be determined in case of controversy by the arbitration committee, shall be paid to its owner's creditors who are members of the exchange, in proportion to the amount of their respective claims, determined as hereinbefore provided in § 5, art. 5, as to disputes between living members; and the remainder, if any, shall be paid to the legal representatives of the deceased. The membership of a deceased member shall be liable for all dues and assessments which may be made by the exchange from the day of his death until such time as his membership is transferred.

Sec. 8. Membership in the exchange shall, *ipso facto*, terminate in either of the following cases:

1. Fraud in any transaction arising out of the member's business as a banker or broker.

2. Conviction, by a jury, of any infamous offense or felony. And the commission of the offense shall be ascertained in each case, after notice and opportunity for hearing, by a vote of two thirds present (being a majority of the whole number) of the governing committee.

3. Suspension from the stock exchange for any cause, and inability for one year thereafter to comply with the constitution, by-laws, and rules as to eligibility for reinstatement.

Sec. 9. Upon such termination of membership, the said membership shall be sold, at the discretion of the governing committee, and the proceeds, after deducting all charges due the exchange and all debts due to creditors in the exchange,—which amounts shall be determined by the arbitration committee,—shall be paid to the expelled member, his heirs or assigns.

Article 12.

Sec. 6. Any member who shall be declared a bankrupt shall, *ipso facto*, be suspended from the stock exchange; but a suspended member, presenting a certificate of discharge under the United States bankrupt law, becomes eligible under the rules for re-instating suspended members.

Sec. 7. If any suspended member fails to settle with all his creditors within six months from the time of his suspension, his membership may be disposed of by the committee on admissions, and must be sold at the end of twelve months; and the proceeds, after deducting all charges due to the exchange, to be determined, in cases of controversy, by the arbitration committee, shall belong and be paid to his creditors in the exchange in accordance with § 3.

Sec. 11. The proceeds arising from the sale of the membership of an insolvent shall be divided *pro rata* by the arbitration com-

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mittee among the creditors recorded, as in § 3, and if any balance remain it shall be paid over to the insolvent.

The by-laws do not contain any provision relating to membership or its transfer. The cases principally relied on by the bankrupt, in support of his contention that title to the seat or membership did not pass to the trustee, relate to the Philadelphia Stock Exchange, and are *Thompson* v. *Adams*, 93 Pa. 55, and *Pancoast* v. *Gowen*, 93 Pa. 66. The court, in the former case, said that "the seat is not property in the eye of the law, it could not be seized in execution for the debts of the members," and, in the latter, that "a seat in the board of brokers is not property subject to execution in any form." In *Thompson* v. *Adams* it appears that Richards took the legal title to a seat or membership in the exchange, Thompson furnishing to him the purchase money. Richards died indebted to sundry members of the exchange in amounts exceeding in the aggregate such purchase money, and was at the time of his death the only known owner, legal or equitable, of the seat. Nor had his creditors in the exchange any knowledge or notice that his seat had been paid for with the money of another. Pursuant to the provisions of the constitution the seat was sold by the secretary for a sum less than Richards' indebtedness to the members of the exchange, and the point to be determined was whether Thompson was entitled, as against such creditors, to the whole or any portion of the proceeds of sale. It was held that he was not; the constitution providing that when a member died his seat might be sold by the secretary, and that the balance of the proceeds after satisfying the claims of the members of the board should be paid to his legal representatives. In *Pancoast* v. *Gowen* an attachment execution was issued on a judgment obtained by Pancoast against Houston and was served upon the members of the Philadelphia Stock Exchange as garnishees, who admitted that the defendant owned a seat in the exchange but averred that "at the service of this writ they held no property of any kind, attachable at the suit of the plaintiff, belonging to Joseph L. Houston, the seat belonging to him not being property, except between members of the Philadelphia Stock Exchange." It was held that the seat was not subject to the attachment execution. The points actually determined in these two cases do not support the unqualified *dictum* contained in one of them that "the seat is not property in the eye of the law." In *Barclay* v. *Smith*, 107 Ill. 349, 47 Am. Rep. 437, it was held that a certificate of membership in the board of trade of the city of Chicago was not property liable to be subjected by a creditor's bill to the payment of the debts of the holder. The language of the court certainly went very far. Although the certificate of membership was "regarded in the market as worth $4,000," it was said that it did not come within any definition of property, and was not property at all, but a "mere privilege conferred upon the member." In *Weaver* v. *Fisher*, 110 Ill. 146, it was held, however, that a bill in chancery would lie to compel the surrender of a certificate of membership in the Chicago board of trade which had been procured with the complainant's money, but taken in the name of the defendant, who was her agent. The court, among other things, said: "It is misapprehension to suppose, as counsel for plaintiff in error seem to, that we held in *Barclay* v. *Smith*, 107 Ill. 349, 47 Am. Rep. 437, that there are no property rights of any kind in a certificate of membership in the board of trade of the city of Chicago. We simply there held that such a certificate is not property which is liable to be subjected to the payment of the debts of the holder by legal proceedings. . . . It cannot be said, here, that we must, from the nature of this corporation, hold there can be no pecuniary value in a certificate of membership, because the proof shows the contrary with absolute certainty. It has a regular pecuniary market value, notwithstanding the conditions to which the transfer of its title is subject."

The material inquiry before us is, not whether the seat could have been attached or taken in execution, but whether it was not property which Page prior to his bankruptcy could have transferred. The bankrupt act vests in the trustee the title, not only to the property of the bankrupt which prior to the filing of the petition "might have been levied upon and sold under judicial process against him," but, as has been stated, to property which prior to that time "he could by any means have transferred." The membership or seat of the bankrupt in the exchange certainly was of pecuniary value to him, and, subject to the restrictions and limitations of the constitution, could have been transferred by him to another. Section 4 of article 11 provides that "any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with or claim against him by any member of the Stock Exchange, for transactions arising in or relating to the business of banker or a stock or exchange broker." It appears that the bankrupt had, at the time of the adjudication, no such unsettled contracts or claims against him, and that the value of his seat or membership amounted to a substantial sum of money. It is true that the approval of the proper authorities in the exchange was necessary to a valid transfer of the membership, and that, as such approval might or might not be withheld, this requirement might prevent a transfer to a given person. This contingency possibly affected the value of the seat for the purposes of sale, but, while restricting, did not destroy, its transferability. The membership was more than a mere privilege. It was property vested in Page and transferable to any person meeting the approval of the exchange. On principle we perceive no reason why the seat of the bankrupt was not embraced in "property which prior to the filing of the petition he could by any means have transferred." We are aware that in the case of *Re Suth-*

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erland, 6 Biss. 526, Fed. Cas. No. 13,637, Judge Blodgett held that under the bankruptcy act of 1867 membership in the Chicago board of trade was not an asset which passed to an assignee in bankruptcy. The authorities to the contrary, however, are quite conclusive. *Hyde* v. *Woods*, 94 U. S. 523, 24 L. ed. 264; *Re Ketchum*, 1 Fed. 840; *Re Warder*, 10 Fed. 275; *Re Werder*, 15 Fed. 789; *Sparhawk* v. *Yerkes*, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104.

The order of the court below under review is affirmed.

Affirmed by Supreme Court of United States January 5, 1903.

CALIFORNIA SUPREME COURT.

Bernard D. MURPHY *et al.*
v.
Charles F. CURRY, Secretary of State.

(.....Cal.....)

A statute forbidding the printing of the name of a candidate for office in more than one column, and, in case of nomination of the same person by more than one party, forcing him to choose on which ticket his name shall be printed, and directing that, on failure to make such choice, it shall be printed on the ticket first filed, with the words "No nomination" on the others, is an unconstitutional interference with the rights of political parties and candidates.

(*Harrison, McFarland, and Garoutte, JJ., dissent.*)

(October 14, 1902.)

APPLICATION for a writ of mandamus to compel respondent to certify a nomination for member of Congress. *Granted.*

The facts are stated in the opinion.

Messrs. **William B. Bosley** and **John J. Barrett**, for petitioners:

Political parties have the right freely to nominate candidates of their own choosing. *Britton* v. *San Francisco City & County Election Comrs.* 129 Cal. 337, 51 L. R. A. 115, 61 Pac. 1115.

Under our Constitution every political party, being a voluntary association of electors, has the right to nominate whomsoever it may please, and to have its nomination made equally as effective legally as the nomination of any other party.

Eaton v. *Brown*, 96 Cal. 371, 17 L. R. A. 697, 31 Pac. 250.

If at any time persons who are not members of any given political party attempt to interfere with its organization, or attempt to appropriate its name, or to hold a convention and nominate candidates in its name, an action lies, at the instance of the proper officers of the party, to restrain the usurpation.

Craig v. *Brown*, 114 Cal. 480, 46 Pac. 870.

Mr. **U. S. Webb**, Attorney General, for respondent.

Messrs. **Thomas V. Cator** and **James F. Tevlin**, *amici curiæ.*

Henshaw, J., delivered the opinion of the court:

Plaintiffs pray for a writ of mandate directing the secretary of state to certify to the registrar of voters of the city and county of San Francisco the nomination of Edward J. Livernash as the candidate of the Democratic party for member of the house of representatives from the fourth congressional district. Mr. Livernash had received the nomination from the Union Labor party, and also from the Democratic party. Each of the parties filed with the secretary of state, as required by law, a certificate, in due form, of the nomination of Mr. Livernash. The Union Labor party's certificate was the first filed. The certificates were in accord and complied with the provisions of §§ 1189 and 1192 of the Political Code. Section 1197 of the same Code contains the following provisions: "Where a nominee has been assigned to, or has chosen, another column, pursuant to the provisions of this act, the title of such office shall be printed in such party column, and underneath such title shall be printed in brevier capital type the words 'No nomination.' . . . The name of a candidate shall be printed only once upon the ballot, and if any candidate is nominated by more than one certificate of nomination, he must by a writing, signed and verified by him and filed with the officer where the certificate of nomination is filed, choose which of such party designations he desires to have his name printed under. Such writing, if filed with the secretary of state, must be filed at least twenty-seven days before the day of election. . . . and if any such candidates shall not have so chosen, his name shall be placed upon the ballot under the designation of the party named in the certificate of his nomination which was first filed." Mr. Livernash declined to make the election contemplated by the law, and the secretary of state, relying upon the plain language of the statute, has refused to certify to the registrar of voters that Mr. Livernash has been nominated by the Democratic party. If the provisions of the law above quoted are valid, Mr. Livernash's name will appear upon the ballot but once, and that under the party designation of the "Union Labor Party," while under the party designation "Democratic Party," and in the space set apart for the printing of the name of the

NOTE.—As to constitutionality of statute permitting candidate to have his name appear but once on official ballot, see also, in this series, Todd v. Kalamazoo Election Comrs. (Mich.) 29 L. R. A. 330; State *ex rel.* Bateman v. Bode (Ohio) 34 L. R. A. 498; and State *ex rel.* Runge v. Anderson (Wis.) 42 L. R. A. 239.

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nominee for the house of representatives, will be printed "No nomination." It is insisted by petitioner that the provisions of the law which work this result are illegally discriminating, and violative of §§ 11 and 21 of article 1 of the Constitution of this state.

The course of the secretary of state, respondent herein, is justified, not only by the letter of the law, but by the decisions of the courts of last resort of at least three states which have had the same question under consideration. The Michigan supreme court, in *Todd* v. *Kalamazoo Election Comrs.* 104 Mich. 474, 29 L. R. A. 330, 62 N. W. 564, 64 N. W. 496, the Ohio supreme court, in *State ex rel. Bateman* v. *Bode*, 55 Ohio St. 224, 34 L. R. A. 498, 45 N. E. 195, and the supreme court of Wisconsin, in *State ex rel. Kunge* v. *Anderson*, 100 Wis. 523, 42 L. R. A. 239, 76 N. W. 482, have one and all decided that statutes essentially similar to ours were not unconstitutional, unreasonable, or discriminating. The only difference of consequence between our law and that which those courts had under review is that ours requires the printing in the blank space reserved for the name of the candidate the words "No nomination," while by the other statutes the space is left blank. In the one case, therefore, the law puts before the voter the positively misleading, and, indeed, untruthful, statement that the party has made no nomination, while in the other, by a vacancy, it merely ignores the fact of such nomination. This, however, is a minor consideration, and the legal principles which should govern are as applicable to the one statute as to the other. Notwithstanding the great respect justly owing to the decisions of the courts to which we have referred,—a respect which is here fully accorded,—we cannot yield assent to the reasoning upon which their conclusions are based. It is said that the law is uniform in its operation, because it applies equally to each and every candidate; that as no candidate can have his name placed upon the ballot but once, and as no candidate can come before the people as having received the nomination of more than one political party, therefore the uniformity required by law is observed and preserved. Such discrimination as may be shown to exist is said to be inevitable and not necessarily objectionable, while, as to the qualification feature,—the qualification which compels the nominee to elect the party under whose designation his name shall be placed,—it is said that the right of the individual to vote for the candidate of his choice is in no way interfered with. The conception of the court in reaching these conclusions is best expressed by the following quotation from the carefully considered case of *State ex rel. Runge* v. *Anderson*, 100 Wis. 523, 42 L. R. A. 239, 76 N. W. 482. There it is said: "Mere party fealty and party sentiment, which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care. It deals with the individual right of the citizen to vote for the candidates of his choice, and if that be not impaired, and reasonable opportunity be furnished for equal representation on the official ballot under a party designation, no unjust discrimination can successfully be claimed. Men are supposed to stand for principles when placed in nomination by political parties, and, when the candidates of one party are identical with those of another, it is supposed, and not unreasonably, that for the time being, at least, though there be two organizations, there is but one platform of principles, and that one party designation on the official ballot will satisfy all legitimate requirements of both. The confusion and uncertainty that would arise in such a case from the double printing of names furnishes a strong reason for prohibiting it, and that, with the other reasons mentioned, strongly supports the wisdom of the prohibition as a proper legislative regulation."

Throughout the opinions in all these cases it would seem that attention has been paid to the right of the individual voter, which, after all, is only incidentally here involved, to the exclusion of the rights of political parties and of the rights of the nominees whom they have selected. If it be conceded that there is no vital impairment of the right of the individual voter in prohibiting the name of the nominee from being placed upon the ballot more than once, even when the nominee is the chosen candidate of more than one recognized political party, this by no means disposes of the rights of the political parties, or of the rights of the nominees of such parties, with the exercise of which the legislature has seen fit to interfere. It may be that in the ideal democracy, where intelligence is universal and knowledge widespread, the state, if it adopted the secret ballot, would do no more than print the designation of the offices to be filled, leaving blank spaces for the voters, within which they could indicate the man or men of their choice. But under our system the state has gone much farther than this. It has recognized the existence of different political parties; has prescribed the machinery by which, and by which alone, they can hold conventions and select their nominees; has prescribed rules and regulations touching the form and matter of the official ballot, and upon that official ballot has arranged that political parties and their nominees shall have their appropriate places, and that there shall be conveyed to all the voters the information as to each nominee that he is the chosen candidate of at least one political party. But having gone so far, and having made of itself an information bureau, it becomes the duty of the state to convey information that is exact,—that is fair to all political parties, and fair to the nominees of all political parties, as well as fair to the voter at the polls. Therefore, to the enactment of a valid law upon such matters, by uniformity of operation, justice must be done to all political parties and to all their nominees; and this, we think, the law under consideration fails to do, for the following reasons:

It certainly must be true that a political party in convention assembled may nomi-

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nate whomsoever it pleases for any office, provided that person have the proper legal qualifications. It is a drastic interference with the rights of such political parties to refuse any recognition to any of its nominees because, and only because, some other political party has likewise seen fit to nominate him. Nor do we find any answer to this in the language above quoted from the Wisconsin supreme court, to the effect that "men are supposed to stand for principles when placed in nomination by political parties, and, when the candidates of one party are identical with those of another, it is supposed, and not unreasonably, that for the time being, at least, though there be two organizations, there is but one platform of principles, and that one party designation on the official ballot will satisfy all legitimate requirements of both." Such a supposition, even if it have any foundation in fact, is not a legal presumption; nor is it a supposition which should be allowed in any way to control the rights of political parties in their councils and determinations. There is nothing in the law to prevent the Republican and the Democratic parties, or any other two or more political parties, from selecting the same man as their candidate for any political office known to the Constitution of the United States or state; and, if any confusion of political principles should thereby result, that is a matter wholly for the political parties themselves, and not at all for either the legislature or the courts. There can be no solid foundation in reason, therefore, for depriving one political party of the right to have placed upon its ballot the names of its nominees, solely because some other political party has seen fit to select the same men. From the moment that the legislature, under the Australian ballot law, saw fit to recognize political parties as entities, and to circumscribe their spheres of action, it became its duty to treat all justly and impartially; and it is unjust, discriminating, and illegal to deprive in this instance the Democratic party of the right to place the name of its nominee for the house of representatives upon the official ballot,—an injustice which is accentuated by the fact that in addition to this refusal the state officially conveys the false information to its voters that the Democratic party has made no nomination whatsoever for the office.

Nor when the rights of the nominee are considered will this law be found any more satisfactory. It is not a question of "party fealty" or "party sentiment," and it only disposes of those rights by sweeping them away to say that "mere party fealty and party sentiment which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care." It is admitted that any nominee has the right to insist that his name shall be placed upon the official ballot, not only in its appropriate place, but with suitable printed words, to inform the voter that he is the nominee of a particular political party. Mr. Livernash, in the case at bar, has the unquestioned right, under our election laws, to insist that his name shall appear upon the ballot as the nominee of the Democratic party, and he may compel the enforcement of this right by mandate. In this instance, therefore, the state has seen fit to recognize the desire of men to be known as members of a particular political organization, and has given them a right enforceable at law. Why, if it be the nominee's right to have the information conveyed to the voters, and if it be the state's duty to convey the information that he is the choice of one political party, should the law deprive him of the right to have the electors know that he is the choice of more than one party? The answer to this question will be found in what must have been the intent of the lawmakers,—to prevent the combination or fusion of two or more political parties by their selection in common of the same candidates. But until it is pointed out to us that such a combination or such a fusion is violative of the Constitution of the United States or of this state, or is against public policy, it must be held that the legislature herein has sought to exercise illegal control over political parties and their nominees, and in so doing has aimed an unwarranted blow at a vital principle of our republican government. If it be conceded, as we think it must, that a political party has the right to nominate (with a limitation of legal qualification) anyone for office whom it sees fit to select, it follows that the nominee, under our present ballot system, has the corresponding right to have his name placed upon the ticket as the nominee of such political party or parties, and upon the state is imposed the correlative duty of seeing that this is done. Whether it be done by printing the name of the same candidate under the designation of each political party whose nomination he has received, or whether it be done, as heretofore it has been done, by printing the name once, followed by the names of the different parties which have selected him, is immaterial; but it is certain that in some appropriate way the political parties, and the nominees of those parties, and the electors may insist that the ballot shall show, not only the names of the candidates, but of what and of how many recognized political parties they may be the nominees. These views, we think, are in strict accord with the principles enunciated by this court in *Eaton* v. *Brown*, 96 Cal. 371, 17 L. R. A. 697, 31 Pac. 250, and *Britton* v. *San Francisco City & County Election Comrs.* 129 Cal. 337, 51 L. R. A. 115, 61 Pac. 1115.

We conclude, therefore, that the provision of the law forbidding a nominee's name to be placed upon the official ticket but once, and the provision of the law requiring the nominee of more than one political party to make his election, and the further provision of the law forbidding his name to appear upon the ticket excepting as the nominee of one political party, and the further provision of the law requiring that the words "No nomination" shall be placed in the blank space reserved for a candidate's name, under the indicated circumstances, are each

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and all illegal and void, and that the petitioner is entitled to his writ as prayed for.

Let the writ issue accordingly.

We concur: **Van Dyke**, J.; **Temple**, J.

Beatty, Ch. J., concurring:

I concur. It is not the duty, and, in my opinion, not the proper function, of the state, to furnish information to voters as to the party connections or political proclivities of the candidates whose names appear upon the official ballot. The task of supplying that character of information is one which might with perfect justice and much greater wisdom be left to other agencies. But when the state does assume in its legislation the necessity or utility of printing upon the face of the ballot a statement showing what parties have nominated the several candidates, that statement should contain the whole truth, and, above all things, it should not be made obligatory upon the officials charged with the duty of preparing the ballot to print on its face the false statement that a party which has made a nomination for a particular office has in fact made no nomination. Such a provision is a plain violation of the principle upon which the statute is framed. The voters of the state, or certain classes of voters, either need or do not need the information. If they do not need it, there should be no pretenses of giving it. If they do need it, there should be no perversion or suppression of the truth. The existing law assumes that the information is needed, but commands its agents to furnish false information. What is the motive or policy which requires the names of party candidates to be printed upon a distinctive party ticket? Evidently it is intended as a guide to those voters, who, being personally ignorant of the merits or qualifications of the rival candidates, would exercise their choice in favor of the candidate named by their party convention. The law itself assumes the existence of such a class of voters, and, in the nature of things, the class must be a large one. To deprive one candidate of the votes he would receive from this class of voters, by making the ballot declare that his party has made no nomination, is an injustice to him and to the electors of his party. The right to be chosen to a public office is as much a constitutional right as the right of suffrage, and to deprive any person possessing the constitutional qualifications for office of the opportunity of competing with other candidates upon equal terms is a denial of his constitutional rights. Each competitor is entitled to receive, not only the votes of every elector who supports him upon the ground of personal preference, but of all who would support him as their party nominee. And if the same person is nominated by more than one party, he has the same right to have that fact appear upon the ballot as other candidates have to appear as the nominees of one party. The rights of the electors are the same as the rights of the candidates, and the rights of the parties spring from the rights of the electors. All our election laws recognize, in their substance and spirit, that the only effective political action under a free constitution is that which is exercised by combination of voters through the medium of party organization, and it follows that any discrimination against parties or their candidates is a discrimination against the electors composing the party. These considerations condemn the provision here assailed, and they condemn it upon constitutional grounds. In the case of *Eaton* v. *Brown*, 96 Cal. 375, 17 L. R. A. 697, 31 Pac. 251, this court said of a similar provision in an earlier statute: "Upon these grounds we hold that this provision destroys the just and equal and uniform operation which in an election law, of all others, is demanded no less by the express terms of our fundamental law than by the genius and spirit of our institutions." The law there under consideration gave an opportunity to every elector to cast his vote for the candidates of his choice, but it subjected certain classes of voters to the alternative of partial disfranchisement or to the risk of total disfranchisement unless they marked their ballots in a different and more inconvenient method than that prescribed for other classes of voters. This would have constituted no valid objection to the law, in the estimation of the judges who concurred in the decisions cited from the supreme courts of Michigan, Ohio, and Wisconsin, and referred to in Justice Henshaw's opinion, all of which proceed upon the principle that an election law is not unconstitutional if it gives every elector an opportunity of expressing his choice, although, as between different classes of electors, it may give some a better opportunity than it allows to others, or, in other words, it is open to no constitutional objection, if, while assuming the necessity of imparting certain information to the voters, it gives correct information to some and false information to others. Those decisions, also, are partly based upon the absence of any constitutional provision expressly granting to candidates the right to have their names printed more than once on the official ballot. I have not taken the time to look up the date of the adoption of the Constitutions under which those cases arose, but if, like our own, they were adopted long before the official ballot was heard of, it is not strange that they contain no provisions regulating its form or contents. Certainly it is a circumstance of no importance that no specific provisions on the subject are to be found in our Constitution, if, as held in *Eaton* v. *Brown*, 96 Cal. 375, 17 L. R. A. 697, 31 Pac. 251, and *Britton* v. *San Francisco City & County Election Comrs.* 129 Cal. 337, 51 L. R. A. 115, 61 Pac. 1115, its general provisions in regard to uniformity and regularity of laws are broad enough to embrace such discriminations as were there condemned.

For these reasons, as well as for the reasons stated by Justice Henshaw, I concur in the judgment awarding a peremptory writ.

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Harrison, J.: I dissent.

McFarland, J., dissenting:

I dissent, and think that the writ should be denied. If other duties permit, I will hereafter state the grounds of my dissent.

Garoutte, J., dissenting:

I dissent from the conclusion declared in this case. Nearly three fourths of the states of this Union at the present time conduct their elections under some form of the Australian ballot law. In every one of those states a provision is found in the law similar to that which is here declared unconstitutional. It is thus apparent that the importance of such a provision in the law is recognized and established. And every time the validity of that provision has come before the highest courts of the various states it has been declared constitutional. Those cases are cited in the main opinion, and are from the highest courts of Michigan, Ohio, and Wisconsin. And in the past few days we read in the public press that this provision of the law has been sustained by the appellate court of Kansas. It appears to be conceded by the main opinion that this provision is not unconstitutional as interfering with the rights of the individual voter. This concession being made, then, to my mind, there is nothing left in this case. For I do not appreciate the proposition advanced in the main opinion to the point that a political party has constitutional rights. I have not been able to find that either the Constitution of the state or the United States in any way refers to political parties. The question here before the court is as to the power of the legislature in prescribing the form of the ballot, and as intimated in *Britton* v. *San Francisco City & County Election Comrs.* 129 Cal. 337, 51 L. R. A. 115, 61 Pac. 1115, heretofore cited, if such had been the question in that case the conclusion would have been the other way. For it is there said: "This is not a mere matter of regulation, as in the case of the election ballot." Here the question is simply a mere matter of regulation as to the form of the election ballot. Under this provision, all parties are treated alike, all candidates are treated alike, and all voters under the provisions of the law are treated alike. Under those conditions, I do not see how the law can be declared unconstitutional. If the general reasoning found in the main opinion in this case, as well as in the *Britton Case*, be constitutionally sound, then the whole Australian ballot law of this state will be set aside the first time an assault upon constitutional grounds is made upon it. For I find by that law that parties polling less than a certain percentage of the votes cast at the last general election are not entitled to hold conventions, and have their candidates go upon the ballot as nominees of those conventions.

For the foregoing reasons, I dissent from the conclusion declared.

GEORGIA SUPREME COURT.

H. D. NORRELL, *Plff. in Err.*,
v.
AUGUSTA RAILWAY & ELECTRIC COMPANY.

(.....Ga.....)

***1. Prescription does not run against a municipal corporation** in regard to land held for the benefit of the public.

2. Accordingly, where a certain strip of land is conveyed to a municipal corporation for use as a public street, and the authorities accept the deed, but open and use but one half, longitudinally, of the land, adverse possession of the remainder by a private individual cannot ripen into a prescriptive title, although such possession is under a deed from the dedicator subsequent to the deed to the municipality.

(August 9, 1902.)

*Headnotes by SIMMONS, CH. J.

ERROR to the Superior Court for Richmond County to review a judgment in favor of defendant in an action brought to recover damages for the alleged wrongful appropriation of plaintiff's property by defendant railway. *Affirmed.*

The facts are stated in the opinion.

Mr. **E. H. Callaway,** for plaintiff in error:

Statutes of prescription run against counties and municipalities.

1 Am. & Eng. Enc. Law, 2d ed. pp. 878, 880; *Wheeling* v. *Campbell*, 12 W. Va. 36; *Flinn* v. *Detroit*, 93 Mich. 590, 53 N. W. 815; *Schock* v. *Falls City*, 31 Neb. 599, 48 N. W. 468; *Pella* v. *Scholte*, 24 Iowa, 283, 95 Am. Dec. 729; *Webber* v. *Chapman*, 42 N. H. 326, 80 Am. Dec. 111; *Bosworth* v. *Mt. Sterling*, 12 Ky. L. Rep. 157, 13 S. W. 920; *Ft. Smith* v. *McKibbin*, 41 Ark. 45, 48 Am. Rep. 19.

The freehold in a highway must be taken to belong to the adjoining proprietors as a general rule, but this presumption is rebuttable.

Savannah v. *Steam Boat Co.* R. M. Charlt. (Ga.) 342; 15 Am. & Eng. Enc. Law, 2d ed. pp. 415–420; *Silvey* v. *McCool*, 86 Ga. 3, 12 S. E. 175.

When lots or lands are dedicated for public use, and after a lapse of fifteen or twen-

NOTE.—As to rights acquired as against the public by adverse possession of highway or city street, see also, in this series, Meyer v. Graham (Neb.) 18 L. R. A. 146, and *note;* Teass v. St. Albans (W. Va.) 19 L. R. A. 802; Webb v. Demopolis (Ala.) 21 L. R. A. 62; St. Paul & D. R. Co. v. Duluth (Minn.) 43 L. R. A. 433; and McClellan v. Weston (W. Va.) 55 L. R. A. 898.

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ty years no steps have been taken to appropriate a portion of such lots to such use, the presumption of law is that the donations have been declined, and that these lots have reverted to the grantor.

Still v. *Griffin*, 27 Ga. 506; *Bayard* v. *Hargrove*, 45 Ga. 342; *Harrison* v. *Augusta Factory*, 73 Ga. 448; *Hanbury* v. *Woodward Lumber Co.* 98 Ga. 54, 26 S. E. 477.

The acceptance of dedicated property must take place within a reasonable time, or the public will be estopped from asserting any rights to the land.

9 Am. & Eng. Enc. Law, 2d ed. p. 50; *Still* v. *Griffin*, 27 Ga. 502.

It does not necessarily follow, because a part of the offer has been accepted, in cases of dedication, that the whole has been.

9 Am. & Eng. Enc. Law, 2d ed. p. 50; *State* v. *Trask*, 6 Vt. 355, 27 Am. Dec. 554; *Jordan* v. *Chenoa*, 166 Ill. 530, 47 N. E. 191; *Alton* v. *Meeuwenberg*, 108 Mich. 629, 66 N. W. 571.

Though the municipality takes the fee in the land dedicated, yet it is held only for the purposes for which it is dedicated. It cannot be aliened or applied to other uses. The fee acquired by the municipality is a base one, determinable whenever the public use of the land is abandoned or becomes impossible.

Alton v. *Illinois Transp. Co.* 12 Ill. 38, 52 Am. Dec. 479; *Lee* v. *Mound Station*, 118 Ill. 312, 8 N. E. 759; *Wood* v. *National Waterworks Co.* 33 Kan. 590, 7 Pac. 233; *Portland & W. Valley R. Co.* v. *Portland*, 14 Or. 188, 58 Am. Rep. 299, 12 Pac. 265; *Matthiessen & H. Zinc Co.* v. *La Salle*, 117 Ill. 414, 2 N. E. 406, 8 N. E. 81; *Union Elevator Co.* v. *Kansas City Suburban Belt R. Co.* 135 Mo. 353, 36 S. W. 1071; *Wirt* v. *McEnery*, 21 Fed. 233.

Although, as against the municipality, the state legislature has supreme control over land dedicated to public use, yet it has not the power to alien such lands or to authorize their use for purposes not contemplated by the dedicator.

9 Am. & Eng. Enc. Law, 2d ed. p. 81; *Normal School Dist. No. 3 Bd. of Regents* v. *Painter*, 102 Mo. 464, 10 L. R. A. 493, 14 S. W. 938; *Hurd* v. *Harvey County*, 40 Kan. 92, 19 Pac. 325; *Dubuque* v. *Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Hoadley* v. *San Francisco*, 50 Cal. 265; *Lamar County* v. *Clements*, 49 Tex. 347; *Portland* v. *Whittle*, 3 Or. 126; *Cook* v. *Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Warren* v. *Lyons City*, 22 Iowa, 351; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850, 41 Am. St. Rep. 311; *Wilcoxon* v. *Harrison*, 32 Ga. 480; *Jackson* v. *Dougherty County*, 99 Ga. 185, 25 S. E. 625.

Mr. **Boykin Wright**, for defendant in error:

The great weight of authority places cities in the same category with the state, especially with respect to streets.

Elliott, Roads & Streets, §§ 416, 417, 882–884; *Meyer* v. *Lincoln*, 33 Neb. 566, *sub nom. Meyer* v. *Graham*, 18 L. R. A. 148, 50 N. W. 763; *Ralston* v. *Weston*, 46 W. Va. 549, 33 S. E. 326; *Groves* v. *State*, 116 Ga. 516, 42 S. E. 756; *Archer* v. *Salinas City*, 93 Cal. 43, 16 L. R. A. 145; *Pillsbury* v. *Brown*, 82 Me. 450, 9 L. R. A. 94, 19 Atl. 858; *Harrison County* v. *Seal*, 66 Miss. 129, 3 L. R. A. 659, 5 So. 622; *Mitchell* v. *Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Baltimore* v. *Frick*, 82 Md. 77, 33 Atl. 435; *Ulman* v. *Charles Street Ave. Co.* 83 Md. 130, 34 Atl. 366; 1 Am. & Eng. Enc. Law, 2d ed. pp. 878 *et seq.* and notes.

When streets are dedicated to a city the city need not use all of the lands so dedicated at once, but only as public exigencies require it.

Meier v. *Portland Cable R. Co.* 16 Or. 500, 1 L. R. A. 856, 19 Pac. 610; *Meyer* v. *Lincoln*, 33 Neb. 566, *sub nom. Meyer* v. *Graham*, 18 L. R. A. 148, 50 N. W. 763; *Archer* v. *Salinas City*, 93 Cal. 43, 16 L. R. A. 145; *Harrison County* v. *Seal*, 66 Miss. 129, 3 L. R. A. 659, 5 So. 622; *Pillsbury* v. *Brown*, 82 Me. 450, 9 L. R. A. 94, 19 Atl. 858; *Southern P. R. Co.* v. *Ferris*, 93 Cal. 263, 18 L. R. A. 510, 28 Pac. 828; Elliott, Roads & Streets, §§ 882–884; *Reilly* v. *Racine*, 51 Wis. 526, 8 N. W. 417; *Derby* v. *Alling*, 40 Conn. 410; *State* v. *Leaver*, 62 Wis. 387, 22 N. W. 576.

Simmons, Ch. J., delivered the opinion of the court:

Suit was brought by Norrell against the Augusta Railway & Electric Company. The defendant demurred to the petition, and the court sustained the demurrer. The plaintiff excepted. From the petition it appeared that in 1840 Edward Thomas owned certain land immediately north of the right of way of the Georgia railroad, this land being then beyond the limits of the city of Augusta, but since 1870 within the limits. Thomas by deed conveyed to the county authorities having charge of the county roads a strip of land 70 feet in width off of the south of his land, this strip lying between the railroad right of way and the remaining lands of Thomas, and extending for some 160 feet east and west. This strip was definitely and fully described in the deed, which expressed as its consideration the benefits the grantor and his heirs and assigns expected to derive from the opening of a road thereon. The deed stated that the grantor conveyed this land "on which to locate and open a public road from the city of Augusta to the Turknett Springs road." The county authorities accepted this deed, and immediately proceeded to locate a road upon the strip conveyed. This road was opened only 35 feet wide, occupying the half of the strip which was next to the remaining lands of the grantor. The road so opened was known as "Railroad avenue." The unused strip, 35 feet wide, lay next to the railroad right of way the entire length of the strip. The possession of this portion, unused by the county authorities, was retained by Thomas, who, in 1845, made a deed of his lands to Hight, and included therein "all right, title, and interest of the [grantor] to a narrow strip of land between said railroad and said Rail-

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road avenue or public road, so far as said narrow strip of land fronts the land herein conveyed only." Hight went into possession under this deed, and retained possession until 1861, when he conveyed to plaintiff's father all of the land conveyed to him by Thomas, including the strip between the railroad and the public road. By subsequent instruments, this property was conveyed to the plaintiff. The possession of the plaintiff and his predecessors in title was continuous from the time of Edward Thomas to the year 1900. During part of this time, plaintiff used the land between the railroad and the public road as a wood yard, and one of his tenants erected a shanty on it. During all of this time the public road was never widened. In 1900, the city council of Augusta authorized the defendant to lay a spur track across Railroad avenue from an adjoining cross street. The defendant laid the track upon a portion of the strip which was in the possession of the plaintiff, took possession of the entire unused strip, and used part of it for piling and storing iron rails. This was done over the remonstrance of the plaintiff, who thereupon filed this petition. The petition alleged that the land in dispute was worth $1,000, and prayed, as actual and vindictive damages, for the defendant's trespass, $2,000.

1, 2. That prescription does not in any case run against the state itself is no longer open to question. *Glaze* v. *Western & A. R. Co.* 67 Ga. 761; *Kirschner* v. *Western & A. R. Co.* 67 Ga. 760. There is also no doubt that, when the city limits of Augusta were extended so as to include this land, the road became a city street, and the city succeeded to the rights and jurisdiction of the county over it. We are also clear that by the acceptance of the deed the authorities accepted the entire tract conveyed by Thomas, and there can arise in this case no question as to an acceptance of only such part of the land as was actually used. The entire tract was accepted by the acceptance of the deed, and the failure to use all of it immediately was not such an act as could be construed as an abandonment of the unused portion. Nor does the petition present a case in which the doctrine of estoppel could be invoked, and the city estopped to set up its title. We are therefore squarely confronted with the question whether prescription will run against a municipal corporation so that adverse possession of a part of a street may bar the city of the right to recover it. This question has many times been passed upon by various courts, but has never been expressly decided by this court. Though this court did, in *Augusta* v. *Burum*, 93 Ga. 68, 73, 26 L. R. A. 340, 19 S. E. 820, 822, in an action against a municipal corporation, say: "Although . . . in Georgia the maxim, *Nullum tempus occurrit regi*, had been abrogated, we are quite certain that no statute of limitations or prescription of any kind could so operate as to abridge in any manner the exercise of the legitimate legislative powers of the state, conferred by the people for the common welfare of all. In this sense, at least, the kindred maxim, *Nullum tempus occurrit reipublicæ*, is still of force, and it is applicable to a city council so far as its legislative powers conferred upon it by statute are concerned, as well as to the state itself; the city government being, in this respect, a part of the lawmaking power of the commonwealth." After a careful consideration of the question, we are of opinion that the better view is that prescription does not run against a municipal corporation in regard to land held by it for the benefit of the whole public. While it may be entirely proper to apply the doctrine of adverse possession and prescription to a city in matters in which it is concerned in a capacity which is private rather than governmental in its nature, we think that adverse possession by an individual of property held by a city for the benefit and use of the whole public should not be allowed to ripen into a prescriptive title. The city is in some respects not a division of the state, but it is at least an agent of the state, exercising, within certain limits, governmental functions and powers. If prescription does not run against the state, it should not run against a city in respect to rights which are intrusted to the city for the benefit of the public generally, and as to which it exercises governmental powers. A municipal corporation is intrusted with the care and control of its streets for the use and benefit, not of its own inhabitants merely, but of the whole public, and prescription, which does not run against the state, should not run against its trustee. Every unauthorized encroachment upon a street, by which its use is in danger of impairment, is a public nuisance, and cannot be justified or sanctified by the lapse of time, however great. See Tiedeman, Mun. Corp. § 312. The doctrine of prescription is based on a presumption, after long-continued adverse possession, that the possession is under a grant. Where the land so held is part of a city's streets, and the city has no power to make a grant, it would seem that this presumption should not arise. Courts will not presume a grant where no grant is possible. For these reasons, we believe that the better doctrine is as above stated, though there are not a few very respectable authorities to the contrary. For summaries of the decisions on this question and some of its immediate branches, see Dill. Mun. Corp. 4th ed. §§ 673–675; 1 Am. & Eng. Enc. Law, 2d ed. pp. 878 *et seq.*; *notes* to *Meyer* v. *Graham* (Neb.) 18 L. R. A. 146.

It follows that the city of Augusta had title to the land in dispute in the present case, and that the plaintiff was himself a trespasser, and had no title. The defendant went into possession under authority from the owner, and the plaintiff certainly cannot recover damages for the defendant's use of the land in so far as the same was authorized, and a proper use of a highway. It was contended, however, that piling up and storing iron rails is not a proper use of a street, and that the defendant is at least

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liable for maintaining such a nuisance. The facts alleged in the petition show that this alleged nuisance is maintained directly in front of plaintiff's residence, and immediately across the opened street therefrom, and that it is unsightly; but it does not appear that it interferes with his ingress or egress, or that he suffers any other special injury. Be that as it may, the petition seeks damages for a trespass upon land belonging to the plaintiff, and under such a petition the plaintiff cannot recover damages as for the maintenance of a nuisance in a public highway. The court below was, therefore, right in sustaining the demurrer to the petition.

Judgment affirmed.

All the Justices concur, except **Lewis**, J., absent on account of sickness.

SAVANNAH, FLORIDA, & WESTERN RAILWAY COMPANY
v.
L. L. BOYLE.

(.....Ga.....)

***1. Whenever a carrier, through its agents and servants, knows, or has opportunity to know, of a threatened injury** to a passenger from a third person, whether such person is a passenger or not, or when the circumstances are such that injury to a passenger from such a source might reasonably be anticipated, and proper precautions are not taken to prevent the injury, the carrier is liable for damages resulting therefrom.

2. The presence upon a train of two negro tramps, secreted and stealing a ride thereon, would not alone be sufficient to cause the employees in charge of the train to suspect that such tramps were armed with deadly weapons, and to anticipate that when brought into the train under arrest they might endeavor to escape, and, while an employee was attempting to prevent the escape, make a murderous assault with such weapons upon one to whom the railroad company owed the duty of protection, and who was taking no part in the effort to prevent the escape.

(July 18, 1902.)

CROSS-WRITS of error to the Superior Court for Liberty County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence; the defendant excepting to the overruling of its demurrer, and plaintiff excepting to the granting of a nonsuit. *Reversed.*

The facts are stated in the opinion.

Messrs. **Twiggs & Oliver,** for plaintiff:

Where a railroad company, without any express contract, undertakes to carry an express messenger in a car provided by it for the use of the express company, it owes to him the same duty to use every reasonable precaution to carry him safely that it owes to an ordinary passenger.

5 Am. & Eng. Enc. Law, p. 512; *Pennsylvania Co.* v. *Woodworth*, 26 Ohio St. 585; *West Memphis Packet Co.* v. *White*, 99 Tenn. 256, 38 L. R. A. 427, 41 S. W. 583; *Savannah, F. & W. R. Co.* v. *Quo*, 103 Ga. 125, 40 L. R. A. 483, 29 S. E. 607; *Pittsburgh, C. & St. L. R. Co.* v. *Shields*, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. 658; *Richmond & D. R. Co.* v. *Jefferson*, 89 Ga. 554, 17 L. R. A. 571, 16 S. E. 69.

Messrs. **W. L. Clay, Shelby Myrick,** and **W. G. Charlton,** for defendant:

The facts do not show negligence in the absence of allegations in the petition of knowledge on the part of the railroad company or its employees of the dangerous character of the tramps, or of the facts which would have put a reasonably prudent conductor or other employee in charge of the train on notice that such tramps were dangerous parties.

4 Elliott, Railroads, p. 2584; *Sira* v. *Wabash R. Co.* 115 Mo. 127, 21 S. W. 905; *Spohn* v. *Missouri P. R. Co.* 87 Mo. 74; *Louisville & N. R. Co.* v. *McEwan*, 17 Ky. L. Rep. 406, 31 S. W. 465; *Felton* v. *Chicago, R. I. & P. R. Co.* 69 Iowa, 577, 29 N. W. 618; *Pounder* v. *Northeastern R. Co.* [1892] 1 Q. B. 385; *New Orleans, St. L. & C. R. Co.* v. *Burke*, 53 Miss. 200, 26 Am. Rep. 689; *Putnam* v. *Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190; *Kinney* v. *Louisville & N. R. Co.* 99 Ky. 59, 34 S. W. 1066; *Gulf, C. & S. F. R. Co.* v. *Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652; *Clarke* v. *Louisville & N. R. Co.* 20 Ky. L. Rep. 1839, 49 S. W. 1120.

Cobb, J., delivered the opinion of the court:

Boyle sued the railway company, alleging in his petition substantially the following facts: The plaintiff was an express messenger, and his duties required him to ride upon the train of the defendant, and the defendant received him upon its train in that capacity. On a day named, two negro tramps secreted themselves on the front platform of the car in which plaintiff was riding at the discharge of his duties, and, being discovered by the conductor, were taken in charge by him and the baggage master, and placed in that portion of the coach set apart for the use of the express company, where the plaintiff was attending to his duties as messenger. The conductor and baggage master did not search the tramps, did not place a guard over them, and did

*Headnotes by COBB, J.

NOTE.—As to liability of carrier for assault upon passenger by striker, mob, or third persons, see Fewings v. Mendenhall (Minn.) 55 L. R. A. 713, and *note*.

As to liability for assault by fellow passenger, see, in this series, Illinois C. R. Co. v. Minor (Miss.) 16 L. R. A. 627, and *note;* Richmond & D. R. Co. v. Jefferson (Ga.) 17 L. R. A. 571; West Memphis Packet Co. v. White (Tenn.) 38 L. R. A. 427; and Tall v. Baltimore Steam Packet Co. (Md.) 47 L. R. A. 120.

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not securely bind them, but attempted to detain them in the coach by negligently and carelessly tying one of the two ends of a short rope around one wrist of each tramp, leaving a play of about 4 feet between them, thus permitting the free use of their entire bodies. The tramps attempted to escape from the train by jumping from the side door of the car, and were resisted and restrained by the baggage master, who happened to be passing at the time. In the struggle which resulted, both tramps drew revolvers, which they had secreted about their clothing, and one of them discharged his revolver at plaintiff, who was 6 feet away; the ball striking plaintiff in the left knee joint, he at the time taking no part in the struggle between the tramps and the baggage master. During the struggle, the baggage master and both tramps fell to the floor, and one of the tramps raised on his knees, and fired again at plaintiff, but the ball did not strike plaintiff, but went through the top of the car. As a result of the wound in the knee joint, plaintiff suffered great pain and agony, was prevented from attending to his regular duties for a period of some weeks, and was forced to incur large expense in medical attention, etc. It is alleged that the injuries resulting to plaintiff "were due entirely to the gross and inexcusable negligence and want of caution and foresight" on the part of the defendant, its servants and employees in charge of the train, in placing the tramps in the car, in failing to search and take from them the revolvers concealed in their clothing, in failing to securely bind them, and in failing to extend to plaintiff such other and further protection as was necessary to prevent the injuries; all of which, it is alleged, it was the duty of the defendant to have done. It is also alleged that the plaintiff did not in any way consent to or contribute to his injuries by participating in the struggle between the baggage master and the tramps, or otherwise. To this petition, the defendant interposed a general demurrer, to the overruling of which it excepted. The case subsequently proceeded to trial, and upon motion of the defendant the judge granted a nonsuit. To this judgment, the plaintiff excepted. The exception which complains of the overruling of the demurrer will be first disposed of.

There does not seem to be any serious controversy between counsel as to what is the law of this case. It is conceded that the duty which the railway company owed to the plaintiff was the same duty which it would owe to a passenger under similar circumstances. It is the duty of a railway company to protect its passengers from insult or injury at the hands of fellow passengers, or of third persons, when the circumstances are such that a person in the exercise of that degree of diligence known to the law as extraordinary care would see, or should apprehend, that the passenger was in danger of insult or injury; and when the circumstances are such that the employees in charge of the train, in the exercise of the degree of diligence above referred to, should have foreseen that an insult or injury was to be reasonably apprehended, and failed or refused to use the means at hand to protect the passenger therefrom, the railway company is liable to the passenger for any damages he sustains as a consequence of such failure or refusal. "The general rule," says the American & English Encyclopædia of Law (vol. 5, 2d ed.), p. 553, "would seem to be that whenever a carrier, through its agents or servants, knows, or has opportunity to know, of a threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper precautions, or to use proper means, to prevent or mitigate such injury, the carrier is liable." Mr. Elliott in his work on Railroads (vol. 4, § 1639), in referring to the duty of protection against third persons or other passengers which railroad companies owe to their passengers, says: "It is their duty to use proper care and vigilance to protect them from injuries by such persons, that might reasonably have been foreseen and anticipated." Mr. Fetter, in referring to the subject now under consideration, says: "Knowledge of the passenger's danger, or of facts and circumstances from which that danger may reasonably be inferred, is necessary to fix the carrier's liability in this class of cases." 1 Fetter, Carr. Pass. § 98. Mr. Hutchinson says: "The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable." Hutchinson, Carr. § 596. See also: *Spohn* v. *Missouri P. R. Co.* 87 Mo. 74; *Felton* v. *Chicago, R. I. & P. R. Co.* 69 Iowa, 577, 29 N. W. 618; *Sira* v. *Wabash R. Co.* 115 Mo. 127, 21 S. W. 905; *Louisville & N. R. Co.* v. *McEwan*, 17 Ky. L. Rep. 406; *West Memphis Packet Co.* v. *White*, 99 Tenn. 256, 38 L. R. A. 427, 41 S. W. 583; *Richmond & D. R. Co.* v. *Jefferson*, 89 Ga. 554, 17 L. R. A. 571, 16 S. E. 69.

This is not a case where the passenger claims damages for the reason that the conductor and other employees in charge of the train failed or refused to protect him after it became apparent that the injury might result to him from the presence upon the train of a third person; but the plaintiff's case depends upon whether the circumstances alleged in the petition were such that the employees in charge of the train, in the exercise of extraordinary care for his protection,—that is, using the utmost vigilance and care, or that extreme care and caution which very prudent persons exercise,—should have foreseen that the tramps who had been arrested by them, and brought into that part of the coach in which the plaintiff's duty required him to ride, were armed with deadly weapons, and would attempt to

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escape, and, while making their attempt, would discharge the deadly weapons at one who was taking no part in the efforts made by an employee to prevent such escape. If an extremely prudent employee would have foreseen that this would have probably happened, then it was the duty of the employees on the train to take all reasonable precautions to prevent such an occurrence, and it would have been their duty to search the tramps to see if they were armed, and to have securely bound them. If there was nothing in the circumstances under which the tramps were arrested, or in their manner when brought into the train, to cause an extremely prudent person to apprehend that they were dangerous characters, and would probably resort to violence in order to escape from the train, and nothing to indicate to such a person that they were probably armed with deadly weapons, then a failure to search the persons of the tramps, and to securely bind them, would not be such negligence on the part of the employees in charge of the train as to render the company liable to the plaintiff. There is nothing alleged in the petition as to the character of these tramps. It does not appear whether they were known or unknown to the employees in charge of the train. There is nothing in the allegations showing that the employees should, on account of their knowledge or past experience, as extremely prudent persons, have known or apprehended that tramps engaged in stealing a ride upon the train at the place where, and the circumstances under which, these were discovered, were probably dangerous characters, and their presence a menace to passengers and others to whom the railway company owed the duty of protection. The allegations are simply that the persons were negroes, that they were tramps, and that they were engaged in stealing a ride upon the train. Is even an extremely prudent person bound to presume that a negro tramp stealing a ride upon a train is such a dangerous person that he should not be permitted to stay upon the train unsearched and unbound? Simply because a person is a negro, he is not to be necessarily deemed dangerous. On the contrary, experience has demonstrated that as a rule negroes are not dangerous persons. Is a tramp necessarily a dangerous person? The word "tramp" indicates "a foot traveler; a tramper; often used in a bad sense for a vagrant, or wandering vagabond." Webster, International Dict. It is defined by the Standard Dictionary to be "an idle wanderer; itinerant beggar; vagrant; vagabond." Because a man is a tramp, he is not necessarily dangerous. The idea conveyed to the mind by the word is that simply of an idle, worthless fellow who wanders about the country seeking to secure a living without toil. Simply because these men were negro tramps, it was not to be inferred, even by an extremely prudent person, that they were characters so dangerous as to make it altogether unsafe for any person to be lodged in the same car with them. But it is said that these negro tramps were violating the law. This is true. To steal a ride upon a train is a crime in this state, but it is only a misdemeanor. While it may be that even an ordinarily prudent person would have reason to apprehend that negro tramps under arrest for a misdemeanor would escape, if afforded a reasonable opportunity, still an extremely careful person could not reasonably apprehend that in making such an attempt they would, in order to effectuate it, make a murderous assault with a deadly weapon either upon one who made an effort to thwart this attempt, or upon another who was taking no part in such effort. It is true that the petition alleges in general terms that the defendant was guilty of negligence, but it also sets forth what is claimed by the pleader to be the act of negligence, and the only act of negligence alleged is the failure of the company's servants to search the tramps for weapons and to securely bind them, or place a guard over them. The conclusion of the pleader that this is negligence does not prevent the court from passing upon the question as to whether the facts alleged show the company to have been negligent. There is nothing in the allegations of the petition from which it appears that the employees in charge of the train, in the exercise of that high degree of care which the railway company owed to the plaintiff to protect him from injury at the hands of those who might be upon its train, with its consent or with its knowledge, could and should have foreseen that the two negro tramps would, after having been arrested and brought into the train, attempt to escape, and in so doing commit a murderous assault upon those endeavoring to prevent the escape, or upon others who were taking no part in such efforts. The petition fails to set forth a cause of action, and should have been dismissed on demurrer. The judgment overruling the demurrer will therefore be reversed.

In reference to the exception of the plaintiff that the court erred in granting a nonsuit, as it appeared that the evidence supported the averments of the petition substantially as laid, the court should not have granted a nonsuit. See *Flewellen* v. *Flewellen*, 114 Ga. 403, 40 S. E. 301, and cases cited; *Fleming* v. *Roberts*, 114 Ga. 634, 40 S. E. 792. But as the conclusion is now reached that the petition should have been dismissed on demurrer, while the judgment granting the nonsuit will be reversed, direction will be given that the effect of this reversal shall not be to reinstate the case, which will have been dismissed when the judgment of this court reversing the judgment overruling the demurrer shall have been entered in the court below.

Judgment in one case reversed; the other, reversed with direction.

All the Justices concur, except **Lewis, J.**, absent on account of sickness.

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TRAVELERS' INSURANCE COMPANY, *Plff. in Err.*,
v.
Ada Virginia AUSTIN.

(.....Ga.....)

*1. **A paymaster of a railroad company, traveling upon business of the company from station to station** on the line of the company, and stopping between stations for the purpose of paying off employees of the company wherever they may be, is not, while so doing, a "passenger," within the meaning of a clause in a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a passenger car using steam as a motive power.

2. **A coach specially equipped and used as a pay car,** and not a vehicle for the transportation of passengers, is not, in contemplation of the contract alluded to in the preceding headnote, a passenger car; and this is so although it had formerly been used as a passenger car, and was capable of being so used again.

(August 8, 1902.)

ERROR to the City Court of Macon to review a judgment in favor of plaintiff in an action brought to enforce the amount alleged to be due on an accident insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. **Dessau, Harris, & Harris,** for plaintiff in error:

The contract must be interpreted with reference to the particular business.

Ga. Code, § 3675 (2); *King* v. *Travelers' Ins. Co.* 101 Ga. 64, 28 S. E. 66; *Ætna L. Ins. Co.* v. *Vandecar,* 30 C. C. A. 48, 57 U. S. App. 446, 86 Fed. 289; *Williams* v. *Preferred Mut. Acci. Asso.* 91 Ga. 698, 17 S. E. 982.

A passenger, in the legal sense of the word, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier as to the payment of fare, or what is accepted as an equivalent therefor.

Schepers v. *Union Depot R. Co.* (Mo.) 2 Am. & Eng. R. Cas. N. S. 21, note; Rapalje & L. Law Dict. *Passenger;* 2 Am. & Eng. Enc. Law, p. 742.

An employee performing duty on the train is not a passenger.

Prather v. *Richmond & D. R. Co.* 80 Ga. 427, 9 S. E. 530.

A paymaster is an employee.

Southwestern R. Co. v. *Singleton,* 67 Ga. 306, 66 Ga. 252; *Hallett* v. *New York, L. E. & W. R. Co.* 42 App. Div. 123, 58 N. Y. Supp. 943; *Minty* v. *Union P. R. Co.* 2 Idaho, 437, 4 L. R. A. 409, 21 Pac. 660; *Berliner* v. *Travelers' Ins. Co.* 121 Cal. 458, 41 L. R. A. 467, 53 Pac. 918; *McNulty* v. *Pennsylvania R. Co.* 182 Pa. 479, 38 L. R. A. 376, 38 Atl. 524; *Tunney* v. *Midland R. Co.* L. R. 1 C. P. 291.

An employee while traveling on the company's business is not understood to be a passenger.

Texas & P. R. Co. v. *Smith,* 31 L. R. A. 321, 14 C. C. A. 509, 30 U. S. App. 176, 67 Fed. 524; *McQueen* v. *Central Branch Union P. R. Co.* 30 Kan. 689, 1 Pac. 139; *Northern P. R. Co.* v. *Charless,* 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; *O'Brien* v. *Boston & A. R. Co.* 138 Mass. 387, 52 Am. Rep. 279; *Vick* v. *New York C. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36; *Abend* v. *Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616; *McCauley* v. *Tennessee Coal I. & R. Co.* 93 Ala. 356, 9 So. 611; *O'Connell* v. *Baltimore & O. R. Co.* 20 Md. 212, 83 Am. Dec. 549; *Louisville & N. R. Co.* v. *Stuber,* 108 Fed. 934; 2 Wood, Railways, p. 1045; 5 Am. & Eng. Enc. Law, 2d ed. p. 516, note.

The plaintiff's husband was not actually in or upon a railway passenger car at the time of the accident, as provided in the policy.

Ætna L. Ins. Co. v. *Vandecar,* 30 C. C. A. 48, 57 U. S. App. 446, 86 Fed. 289.

Messrs. **Roland Ellis and Robert Hodges** for defendant in error.

Fish, J., delivered the opinion of the court:

The plaintiff in error issued to Austin, the deceased husband of the defendant in error, an accident insurance policy, which provided for the payment of certain indemnities in the event of accidental injuries to the insured, and of $5,000 to his widow in case of his death as a result of such injuries. The policy contained a stipulation that, "if such injuries are sustained while riding as a passenger, and being actually in or upon any railway passenger car using steam, cable, or electricity as a motive power, . . . the amount to be paid shall be double the sum specified in the clause under which claim is made." Austin was paymaster and cashier of a railroad company. It was his duty to pay the salaries of the employees of the company, and to that end he made periodical trips over the line of the railroad in what was known as a "pay car." This car had originally been one of the regular sleeping cars in use on the railroad, but had been altered so as to make it serve the purpose before indicated. It was described by one of the witnesses as follows: "In the front end there was a

*Headnotes by FISH, J.

Note.—For other cases in this series as to railroad employees or officers as passengers, see Texas & P. R. Co. v. Smith (C. C. App. 5th C.) 31 L. R. A. 321, and *note;* Doyle v. Fitchburg R. Co. (Mass.) 33 L. R. A. 844; McNulty v. Pennsylvania R. Co. (Pa.) 38 L. R. A. 376; Iannone v. New York, N. H. & H. R. Co. (R. I.) 46 L. R. A. 730; Louisville & N. R. Co. v. Weaver (Ky.) 50 L. R. A. 381; Whitney v. New York, N. H. & H. R. Co. (C. C. App. 1st C.) 50 L. R. A. 615; Chattanooga Rapid Transit Co. v. Venable (Tenn.) 51 L. R. A. 886; Peterson v. Seattle Traction Co. (Wash.) 53 L. R. A. 586; and Sanderson v. Panther Lumber Co. (W. Va.) 55 L. R. A. 908.

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cooking stove, and all of the things for cooking. In the center of the car there were regular Pullman berths to sleep twelve people; and in the observation end, which we used for paying off, it had two large windows and a settee, and some nice chairs, and a table that we used for a dining table. In the part exclusive of the kitchen and observation end, where the money was paid out, there were regular seats, the same that any other passenger or sleeping car has." It was also equipped with an iron safe in which money was kept, and with guns and ammunition for the protection of the property in the car. On occasions the equipment of the car was changed, and it was put into service as a regular sleeping car. The pay train did not run on a regular schedule, but stopped at any station or between stations, wherever it was necessary to pay out money. Austin would frequently count out money between stations, preparatory to paying it at the next stop. While on one of these trips the pay car was derailed and overturned, and a rifle hanging in a rack in the car was thrown to the floor and discharged, killing Austin. His widow demanded double indemnity under the clause of the policy before quoted. This was refused, and she brought suit for $10,000. The insurance company, in its answer, admitted liability for $5,000, and made a tender of that amount in full of all claims against it, which was refused, and the case went to trial. There was practically no conflict in the testimony of the witnesses, the material portions of which have been substantially set out above; the only evidence introduced by the insurance company being an extract from the proof of death submitted by Mrs. Austin, to the effect that the injury which caused her husband's death was received while he was engaged in discharging his duties as cashier and paymaster of the Georgia Southern & Florida Railroad Company. At the conclusion of the evidence, counsel for the defendant made a written motion to direct a verdict in its favor on the controlling issue in the case, *viz.*, the right of the plaintiff, under the evidence, to recover double indemnity. This motion was denied, and the case went to the jury, who found for the plaintiff the full amount sued for. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. From the foregoing it will be seen that the single question presented for determination by this case is whether or not, under the admitted facts, Austin was, at the time of receiving the injuries which caused his death, riding as a passenger upon a railway passenger car, within the meaning of that clause of his policy of insurance, which provided that he should receive double indemnity in the event that he should be accidentally injured or killed while so riding. This question may be subdivided into two branches: First, Was he a passenger? and second, Was the car in which he was riding a passenger car? "A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as an equivalent therefor." 5 Am. & Eng. Enc. Law, 2d ed. p. 486. "One may be both a passenger and an employee of a railroad company,—an employee when passing over the road at a time when actually engaged in performing duties for the company, but a passenger while not so engaged, but riding from one place to another, even though continuing all the while, in a popular sense, in the employ of the company." Id. 516. It is not denied that Austin was an employee of the railroad company at the time he was killed. The question is, Was he also a passenger? The mere fact that he was not a part of the operating force or train crew engaged in the act of propelling the train does not, as seems to be contended by counsel for the defendant in error, invest him with that character. He was certainly "passing over the road at a time when actually engaged in performing duties for the company." His case cannot be analogized to that of an official or an attorney who travels over the road for the purpose of reaching a point where duties are to be performed for the company, and who, while so traveling, is engaged in the performance of no duty whatever. While the pay train was going from one station or point to another, the paymaster was as much on duty as is the flagman of a passenger or freight train, whose sole duty it is to keep a lookout for other trains when the train on which he is riding has stopped between stations. In the case of *Prather* v. *Richmond & D. R. Co.* 80 Ga. 427, 9 S. E. 530, the deceased husband of the plaintiff was one of a gang employed on the defendant's material train to load and unload cars, and it was his duty "to do anything to insure the careful working of the train." He was killed while the train was moving from one point to another, and at a time when he had no active duty to perform. The question arose whether or not he was a coemployee of those who were actually operating the train. This question was decided in the affirmative, our present chief justice, who delivered the opinion, using the following language, which we think is directly applicable to the case at bar: "The fact that he had no active duty to perform while riding from one point of work to another did not make him any the less an employee during those times. He could not be an employee whilst at work at one mile post, and, having finished there, get on the car to go to the next mile post, and while riding the mile become a passenger, and at the end of the mile become an employee again." If the reasoning there employed be correct, the case cited settles beyond all question that Austin was not, in legal contemplation, a passenger; and hence that his widow is not entitled to recover the double indemnity for which she sues. This view is not in conflict with any of the cases cited in the brief of counsel for the defendant in error. A case upon which special stress seems to be laid is that of *Berliner* v.

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Travelers' Ins. Co.. 121 Cal. 458, 41 L. R. A. 467, 53 Pac. 918, where the supreme court of California held that the plaintiff was entitled to recover double indemnity under a clause in a policy of accident insurance almost identical with the one now under consideration, although the insured, at the time of the accident, by invitation of an officer of the railroad company, was riding upon the engine of the train on which he was traveling; it being ruled that the fact of his riding upon the engine did not deprive him of his character of passenger. That case, however, cannot properly be compared to the one now under consideration, because the relationship of the insured to the railroad company in the two cases was widely different. Berliner, so far as appears from the published report, was not employed by or connected with the railroad. Apparently he had paid his fare before beginning his journey. The court in that case takes special occasion to say, on page 465, 121 Cal. page 470, 41 L. R. A., and page 921, 53 Pac., that, if he had been riding on the train as an employee of the railroad company, the insurance company would not be liable under the clause providing for double indemnity. In the case of *Jones* v. *St. Louis S. W. R. Co.* 125 Mo. 666, 26 L. R. A. 718, 28 S. W. 883, it was held that the porter of a Pullman sleeping car occupied the position of a passenger of the railroad company in respect to the careful running and management of the train; but in that case the porter was not employed by the railroad company, as was the paymaster in this case. On the other hand, in the well-considered case of *McQueen* v. *Central Branch Union P. R. Co.* 30 Kan. 689, 1 Pac. 139, it was held that a plaintiff in the employment of a railroad company, painting depots, bridges, tanks, and switches along the line of the road, and who was transported over the road, to discharge the duties of his employment, in a small steam car used by officers and employees of the railroad company, was not a passenger within the true sense of that term, nor entitled to the rights of a passenger. That case is in principle directly parallel with the case now before us, and, while not binding on us, its reasoning is satisfactory to us as authority for the position that we take. To the same effect, see *Kansas P. R. Co.* v. *Salmon*, 11 Kan. 83. The reason for making a distinction in the contract of insurance between passengers riding as such and employees of a railroad company in the discharge of their duties is not far to seek. The law throws greater protection around passengers than employees, and requires of railroad companies greater diligence in providing for their safety. Consequently, the risk of insuring a passenger is not so great as that of insuring an employee. With this in view, the true test to be applied to determine whether one injured in a railroad accident can recover from an insurance company double indemnity is to inquire whether, presuming that a right of action exists against the railroad company, the plaintiff would be entitled to sue that company in the capacity of a passenger or an employee. In *Austin's Case* to ask that question is to answer it, for it is clear that the railroad company owed him no other duty than that of employer to employee, and, if liable to his widow, is only so on the ground of that relationship.

2. The evidence shows that the car in which Austin was riding at the time of the accident was a coach specially equipped for use by the officers and employees of the railroad company as a pay car. It was not in any sense a passenger car, within the meaning of the contract of insurance, any more than a mail or baggage car could be so considered. It was used for a particular purpose, and that purpose was not the transportation of passengers. That it had formerly been used as a passenger car, and was capable of being so used again, can make no difference, in view of the fact that at the time of the accident it was used for an altogether different object. The testimony of a witness that it was a passenger car was improperly admitted, being merely his conclusion from a given state of facts, and is unavailing in the face of other evidence, which described the car in detail, and negatived such a conclusion.

The foregoing disposes of the case on its merits favorably to the contentions of the plaintiff in error. It follows that the charges of the court which were not in consonance with the principles here laid down were erroneous; that the trial judge should have directed a verdict in favor of the insurance company as to the double indemnity; and that the verdict returned for the plaintiff for the full amount sued for was contrary to law and the evidence, and should have been set aside on motion for new trial.

Judgment reversed.

All the Justices concur, except **Lewis, J.**, absent on account of sickness.

SOUTHERN RAILWAY COMPANY, *Plff. in Err.*,
v.
Louis WEBB.

(.....Ga.....)

***1. While the general rule is that if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the**

*Headnotes by COBB, J.

NOTE.—For a case in this series very similar in its facts to the above, see Cincinnati, H. & D. R. Co. v. Kassen (Ohio) 16 L. R. A. 674.

As to effect of intervening cause on liability for negligence, see cases in *notes* to Smith v. Kanawha County Ct. (W. Va.) 8 L. R. A. 82; and Smithwick v. Hall & U. Co. (Conn.) 12 L. R. A. 279; also Pennsylvania R. Co. v. Hammill (N. J. L.) 24 L. R. A. 531; Goodlander Mill. Co. v. Standard Oil Co. (C. C. App. 7th C.) 27 L. R. A. 583; and Stone v. Boston & A. R. Co. (Mass.) 41 L. R. A. 794.

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cause of the misfortune, the former must be considered as too remote, still, if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such as its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act.

2. **There was no error in any of the rulings complained of** which required the granting of a new trial. The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

(August 7, 1902.)

ERROR to the City Court for Richmond County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's son. *Affirmed.*

The facts are stated in the opinion.

Mr. **Joseph B. Cumming,** for plaintiff in error:

If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer.

Ga. Code, § 3912; *Perry* v. *Central R. Co.* 66 Ga. 751; 16 Am. & Eng. Enc. Law, p. 436; *Hoag* v. *Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Macon* v. *Dykes,* 103 Ga. 847, 31 S. E. 443; *Central R. Co.* v. *Price,* 106 Ga. 176, 43 L. R. A. 402, 32 S. E. 77; *Central R. Co.* v. *Edwards,* 111 Ga. 528, 36 S. E. 810.

An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate—that is, the proximate—cause of an injury.

16 Am. & Eng. Enc. Law, pp. 444, 445; *Louisiana Mut. Ins. Co.* v. *Tweed,* 7 Wall. 44, 19 L. ed. 65; *Washington* v. *Baltimore & O. R. Co.* 17 W. Va. 190; *Louisville & N. R. Co.* v. *Kelsey,* 89 Ala. 287, 7 So. 648.

The facts testified to raise only a mere conjecture, excite only a suspicion; and such conjectures are not sufficient to sustain a verdict.

Gainesville, J. & S. R. Co. v. *Edmondson,* 101 Ga. 747, 29 S. E. 213.

Messrs. **C. Henry Cohen** and **Henry C. Hammond,** for defendant in error:

The act of a third person—independent, negligent, innocent, or unavoidable act—contributing to the original wrongful act, will not prevent a recovery.

Watson, Damages for Personal Injuries, § 58; *McDonald* v. *Snelling,* 14 Allen, 296, 92 Am. Dec. 768; *Pastene* v. *Adams,* 49 Cal. 87; *Spitze* v. *Baltimore & O. R. Co.* 75 Md. 166, 23 Atl. 307; *Hill* v. *Winsor,* 118 Mass. 251; *Lowery* v. *Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608; *Weick* v. *Lander,* 75 Ill. 93; *Hughes* v. *McDonough,* 43 N. J. L. 459, 39 Am. Rep. 603.

The fact that deceased would not have been killed but for the "other engine" will not discharge defendant.

Atlanta v. *Wilson,* 59 Ga. 544, 27 Am. Rep. 396; *Sheridan* v. *Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490; *Byrne* v. *Wilson,* 15 Ir. C. L. Rep. 332; Watson, Damages for Personal Injuries, § 64; *Smith* v. *New York, S. & W. R. Co.* 46 N. J. L. 7; *Harris* v. *Union P. R. Co.* 4 McCrary, 454, 13 Fed. 591; *McElroy* v. *Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 794; *Union R. & Transit Co.* v. *Shacklet,* 119 Ill. 232, 10 N. E. 896; *Eaton* v. *Boston & L. R. Co.* 11 Allen, 500, 87 Am. Dec. 730.

When defendant negligently threw its passenger out of its car, leaving him helpless on the track, it should have anticipated that he would be run over and killed,—especially if the track on which he was thrown was subject to use, not only by defendant's trains, but by those of various independent railways.

Watson, Damages for Personal Injuries, § 71; *Lane* v. *Atlantic Works,* 111 Mass. 136; *Pittsburgh Southern R. Co.* v. *Taylor,* 104 Pa. 315, 49 Am. Rep. 580; *Seale* v. *Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602; *Campbell* v. *Stillwater,* 32 Minn. 308, 50 Am. Rep. 569, 20 N. W. 320; *Burrell Twp.* v. *Uncapher,* 117 Pa. 353, 11 Atl. 619; *Carterville* v. *Cook,* 129 Ill. 152, 4 L. R. A. 721, 22 N. E. 14; *Lowery* v. *Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608; *Colorado Mortg. & Invest. Co.* v. *Rees,* 21 Colo. 435, 42 Pac. 42; *Chicago, R. I. & P. R. Co.* v. *Sutton,* 11 C. C. A. 251, 27 U. S. App. 310, 63 Fed. 394.

The question of proximate cause is one of fact peculiarly for the jury.

Watson, Damages for Personal Injuries, chap. 15; *Grand Trunk R. Co.* v. *Ives,* 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Herbert* v. *Southern P. Co.* 121 Cal. 227, 53 Pac. 651; *Andrews* v. *New York & N. E. R. Co.* 60 Conn. 293, 22 Atl. 566; *Gardner* v. *Friederich,* 25 App. Div. 521, 49 N. Y. Supp. 1077; *Schumaker* v. *St. Paul & D. R. Co.* 46 Minn. 39, 12 L. R. A. 257, 48 N. W. 559; *Milwaukee & St. P. R. Co.* v. *Kellogg,* 94 U. S. 469, 24 L. ed. 256.

The sudden lurching of a moving train, whereby a passenger is thrown from the car, has been held to raise a presumption of negligence.

Lavis v. *Wisconsin C. R. Co.* 54 Ill. App. 636; *Coudy* v. *St. Louis, I. M. & S. R. Co.* 85 Mo. 79; *Dougherty* v. *Missouri R. Co.* 81 Mo. 325, 51 Am. Rep. 239; *Murphy* v. *St. Louis, I. M. & S. R. Co.* 43 Mo. App. 342; *Murphy* v. *Coney Island & B. R. Co.* 36 Hun, 199.

The sudden stoppage, causing a passenger to fall, raises a presumption of negligence.

Wylde v. *Northern R. Co.* 14 Abb. Pr. N. S. 213; *Clow* v. *Pittsburgh Traction Co.* 158 Pa. 410, 27 Atl. 1004; *Dillingham* v. *Wood,* 8 Tex. Civ. App. 71, 27 S. W. 1074; *Consolidated Traction Co.* v. *Thalheimer,* 59 N. J. L. 474, 37 Atl. 132; *Miles* v. *King,* 18 App. Div. 41, 45 N. Y. Supp. 379; *Zimmerman* v. *Long Island R. Co.* 14 App. Div. 562, 43 N.

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Y. Supp. 883; *North Chicago Street R. Co.* v. *Southwick*, 165 Ill. 494, 46 N. E. 377; *McCurrie* v. *Southern P. Co.* 122 Cal. 558, 55 Pac. 324; *Costigan* v. *Warren, B. & S. Street R. Co.* 174 Mass. 553, 55 N. E. 317; *Clark* v. *Smith*, 72 Vt. 138, 47 Atl. 391; *Central R. Co.* v. *Lippman*, 110 Ga. 665, 50 L. R. A. 673, 36 S. E. 202; *Garland* v. *Southern R. Co.* 111 Ga. 852, 36 S. E. 595; *Brown* v. *Matthews*, 79 Ga. 1, 4 S. E. 13.

Cobb, J., delivered the opinion of the court:

This was an action by the father of John W. Webb against the Southern Railway Company for damages alleged to have been sustained by the plaintiff on account of the homicide of his son. The trial resulted in a verdict in favor of the plaintiff, and the defendant complained that the court erred in refusing to grant it a new trial.

1. The petition alleged that John W. Webb was a passenger on one of the trains of the defendant; that while in one of the cars of the train, in the exercise of all ordinary care and diligence, and just as he was about to take a seat near the rear door of the car, the train was negligently, suddenly, forcibly, and with great violence jerked, jarred, and jolted, and as a result Webb was suddenly and without fault on his part thrown through the rear door of the car, and fell across the platform at the end of the car into the track on a bridge over which the train was passing at the time the jolt took place; that he was stunned by the fall, and rendered insensible; and that while upon the track in a stunned, insensible, and injured condition, and unable to walk or protect himself, he was negligently run over and killed by another engine passing along the track over the bridge. There was evidence authorizing the jury to find that Webb was a passenger upon a train of the defendant, and that while this train was going over a bridge a sudden and violent jolt occurred, sufficient to throw one from his feet who was standing in the train, and which had the effect of jostling the passengers and throwing down bundles from the racks of the car; that Webb was seen upon the train just before this jolt occurred, and he was then near the rear door of the car; that he was not seen afterwards by anyone who was in the car; that shortly after the train upon which he was last seen had passed over the bridge an engine belonging to the Georgia Railroad Company ran over and killed Webb, who was lying across the track on the bridge just at the point where the train was when the jolt occurred; that, while the defendant had no control over this engine, the engines of the Georgia Railroad Company had a right to use this track, and it was known to the defendant that the engines of that company might pass along the track at any time when it was not otherwise in use. While the evidence was conflicting as to some of the points above referred to, there was ample evidence authorizing the jury to find all of the facts above stated. It is contended by the counsel for the plaintiff that from this evidence the jury could have inferred that Webb was thrown from the rear door of the car upon the track, and was there in a stunned condition at the time the engine ran over him. Counsel for the railway company contends that the jury were not authorized to draw any such inferences, and that the plaintiff has failed to establish the case made in the petition, but that, even if this position is not correct, and the jury were authorized to infer, from the facts above referred to, that Webb was thrown from the inside of the car through the rear door of the same upon the track, and stunned by the fall, still the plaintiff could not recover, for the reason that the negligence of the defendant which resulted in Webb's being hurled upon the track was not the proximate cause of his death, but that the immediate cause of his death was the intervention of another independent agency,—that is, the running of the engine of the Georgia Railroad Company upon the tracks at that point.

As we have reached the conclusion, for the reasons which will be hereafter stated, that the jury were authorized to infer, from the facts above detailed, that Webb was negligently thrown from the inside of the car through the rear door upon the track, it becomes necessary to determine whether this negligence on the part of the defendant was so far the proximate cause of the death of Webb that the defendant would be liable, notwithstanding the death was not actually brought about by the fall from the train, but by the running of the engine which ran over and killed him while he was lying in an insensible condition upon the track. See, in this connection, Hopkins, Personal Injuries, §§ 14–16. "No branch of the subject of personal injuries presents greater difficulty than the determination of liability for a specific loss, with reference to its naturalness and proximity as a consequence of the wrongful act complained of." Watson, Damages for Personal Injuries, § 25. As was said by Elbert, J., in *Pullman Palace Car Co.* v. *Barker*, 4 Colo. 344, 34 Am. Rep. 89: "What is the proximate cause of an injury in a legal sense is often an embarrassing question, involved in metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life." Chief Justice Shaw, in *Marble* v. *Worcester*, 4 Gray, 397, said: "The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said, of mystery." In *Scott* v. *Hunter*, 46 Pa. 195, 84 Am. Dec. 542, Strong, J., said: "Indeed, it is impossible, by any general rule, to draw a line between those injurious causes of damage which the law regards as sufficiently proximate and those which are too remote to be the foundation of an action." In *Smith* v. *Western U. Teleg. Co.* 83 Ky. 114, Judge Holt remarked: "The line between proximate and remote damages is exceedingly shadowy; so much so that the one fades away into the other, rendering it often very difficult to determine whether there is

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such a connection between the wrong alleged and the resulting injury as to place them, in contemplation of law, in the relation of cause and effect." It has been said that, notwithstanding the maze of doubt and difficulty with which this subject seems to be involved, still it is impossible to take a more practical and simple view than the observations of learned jurists would indicate: that the practical administration of justice prefers to disregard the intricacies of metaphysical distinctions and subtleties of causation, and to hold that the inquiry as to natural and proximate cause and consequence is to be answered in accordance with common sense and common understanding. Watson, Damages for Personal Injuries, § 28. From the author just cited we quote the following: "A natural consequence is one which has followed from the original act complained of in the usual, ordinary, and experienced course of events; a result, therefore, which might reasonably have been anticipated or expected. Natural consequences, however, do not necessarily include all such as, upon a calculation of chances, would be found possible of occurrence, or such as extreme prudence might anticipate but only those which ensue from the original act, without any such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from." § 33. "From the very outset, the practical distinction between causes and consequences should be borne in mind in this particular; a consequence of an original cause may, in turn, become the cause of succeeding consequences. But such a cause should not, manifestly, be regarded as an intervening cause, which will relieve from liability the author of the original cause, but rather as only a consequence along with the other consequences. A tortious act may have several consequences, concurrent or successive, for all of which the first tort feasor is responsible. It is not intervening consequences, but intervening causes, which relieve. The test is to be found, it has been said, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the original wrong as a result which might reasonably have been foreseen as probable, legal liability continues." § 58. "Some authorities have formulated rules on this subject designed for general application,—as that the defendant is not responsible where there has intervened the wilful wrong of a third person, or is liable where such act is of a negligent character merely. But the better doctrine is believed to be that whether or not the intervening act of a third person will render the earlier act too remote depends simply upon whether the concurrence of such intervening act might reasonably have been anticipated by the defendant." § 71. In *Pittsburgh Southern R. Co.* v. *Taylor*, 104 Pa. 315, 49 Am. Rep. 580, Mr. 59 L. R. A. Justice Paxson said: "In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." In *Lane* v. *Atlantic Works*, 111 Mass. 139, Colt, J., said: "The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." In *Seale* v. *Gulf, C. & S. F. R. Co.* 65 Tex. 278, 57 Am. Rep. 602, Chief Justice Willie said: "What character of intervening act will break the causal connection between the original wrongful act and the subsequent injury is also left in doubt by the decisions. If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken." See also *Colorado Mortg. & Invest. Co.* v. *Rees*, 21 Colo. 435, 42 Pac. 42, 45; 21 Am. & Eng. Enc. Law, 2d ed. pp. 486 *et seq.*

Treating it as established in the present case that Webb was upon the track of the defendant in an insensible condition as a result of the negligence of the defendant, is it reasonable or unreasonable to hold that the defendant should have apprehended that a person in this condition, in such a place, might be injured or killed by the running of an engine upon the track? Was the defendant bound to anticipate that injury or death might result to a person in such a condition in such a place? The track was under the control of the defendant, and, if Webb had been killed by an engine of the defendant which came along the track after the train from which Webb was thrown had passed, the defendant would have been liable, although the employees in charge of the engine had been wholly free from negligence. *South Carolina R. Co.* v. *Nix*, 68 Ga. 572. In that case Mr. Chief Justice Jackson said: "Suppose there had been a prosecution for murder, who would be found guilty thereof,—the conductor of the train who did the deed of throwing him off and under, or the conductor of the other train who ran unconsciously over him? Clearly, he who did the intentionally wrongful act, and whose act caused his death." The principle upon which the ruling in the *Nix Case* is founded is that a railway company is bound to know that its

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tracks may be used at any time by the engines and trains of the company, and is bound to anticipate and apprehend any consequence that may result to one who, on account of its negligence, is left in a condition in which and in a place where he is liable to be injured by the running of such trains. If a railway company is bound to anticipate and apprehend that one left in a helpless condition in a perilous place upon its tracks through its negligence may be injured by one of its own engines or trains running thereon, is it not equally bound to so anticipate and apprehend any injury which might result to such a person from an engine of another company, which the first company knew had a right to and did actually use the tracks from time to time? It would, indeed, bring about a curious result if the defendant would be liable in such a case only when the second engine or train was owned by it. It must be kept in mind that in such cases no negligence is claimed against the persons in charge of the second train or engine. They are blameless. If there is any liability, it results from the negligence of those in charge of the train which left the person killed in a perilous situation upon the track. It would seem that ownership of the second engine or train would be entirely immaterial, and the only question to be considered would be whether the first company knew, or ought to have known, that the second engine or train, no matter by whom owned, had a right to, or did actually from time to time, use the track at the place at which the person was killed. When a railway company negligently leaves a person upon its track in a helpless condition, it will certainly be held liable for any injurious consequences which may result to such a person growing out of the running of trains along the track, without regard to the ownership of such trains, if the company knew or ought to have apprehended that the trains would pass along the track at that point. The present case is very similar to the case of *Byrne* v. *Wilson*, 15 Ir. C. L. Rep. 332. That was a case brought in 1862, under Lord Campbell's act, by William Byrne, as administrator of Mary Byrne, against a person who was alleged to be the proprietor of certain omnibuses, and as such engaged in the business of a common carrier of passengers. Mary Byrne was a passenger in one of the omnibuses, and through the negligence of the servants of the defendant the omnibus was precipitated into the lock of a canal, and Mary Byrne was there in an insensible condition, when the keeper of the lock turned the water therein, and she was drowned. It was held that, although the death of Mary Byrne was not caused immediately by the act of the defendant, it was such a consequential result of that act as entitled her representative to maintain an action. Lefroy, Ch. J., said (p. 340): "It was not the negligence of the defendant that was the immediate occasion of her death, but it was the negligence of the defendant that put her into a position by which she lost her life, as a consequential injury resulting from that negligence; and although that death was not caused immediately by the act of the defendant, nor was the immediate and instantaneous result of his negligence, yet it was the consequential result of the defendant's act, and enables her representative to maintain this action." The defendant knew that the Georgia Railroad Company had a right to use these tracks. It also knew that it might use them at any time. When, therefore, Webb was negligently thrown upon the tracks, and left there in a helpless condition, the defendant was bound to apprehend and anticipate that injurious consequences would likely result to him from the use of the track by the servants and agents of the Georgia Railroad Company in charge of its engines and trains. This being so, the negligence of the defendant which resulted in leaving Webb helpless upon its tracks was in law the proximate cause of his death, notwithstanding his death was actually brought about by another agency.

We do not think this ruling is in conflict with any of the cases cited in the brief of counsel for the plaintiff in error. In *Perry* v. *Central R. Co.* 66 Ga. 746, the plaintiff had deposited his luggage in a car of the defendant, intending to go upon the train as a passenger, and left the car, and engaged in conversation with another person in the depot. While so engaged, his attention was called to the fact that the train had moved off, and he ran until he reached the end of the car shed. While passing through the gateway of the car shed, he came in contact with the engine of another company, which was coming into the shed, and as a consequence received serious injuries. It was held that the negligence of the railroad company in starting its train without giving a signal was not the proximate cause of the injury which the plaintiff subsequently received by running against the engine of another train in his effort to catch the defendant's train. The defendant could not have foreseen, nor was it bound to anticipate or apprehend, that, as a result of its negligence in starting its train without a signal a passenger would, in attempting to catch the train, run against the engine of another train, and receive serious injuries. In the case of *Macon* v. *Dykes*, 103 Ga. 847, 31 S. E. 443, a street car company had negligently constructed its track so that the rails were above the surface of the street. The plaintiff, while driving a horse attached to a two-wheel road cart, attempted to drive across the track at an angle of about 45 degrees. The wheels of his cart came in contact with the iron rails of the track, slipped along the track, and made a scraping noise, which caused the horse to take fright and run away. The cart collided with a wagon, and plaintiff was thrown to the ground and seriously injured. Although the street car company may have been negligent in the way it constructed its track, it certainly could not have foreseen that, as a result of this

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negligence, a scraping noise would be made, and that this noise would frighten a horse, and the horse would run away, and the vehicle to which he was hitched would collide with a wagon, and the plaintiff would, as a result, be injured. Of course, if the cart had been overturned as a result of the tracks being built too high above the surface of the street, and injury had resulted from an accident of this character, the case would have been different. In *Central R. Co.* v. *Price*, 106 Ga. 176, 43 L. R. A. 402, 32 S. E. 77, the plaintiff was a passenger who had been carried wrongfully beyond her station, and when this fact was discovered she was requested to alight at another station, which she did, and was carried to a hotel by the conductor. While at the hotel a lamp in her room exploded, and as a consequence she sustained damage. It was held that the railway company was not liable for the injury thus sustained. The defendant could not have foreseen, apprehended, or anticipated that the plaintiff would suffer injuries of the character received by her at the hotel; and hence its negligent act in carrying her beyond her station could not be said to be the proximate cause of the injuries thus received. In *Central R. Co.* v. *Edwards*, 111 Ga. 528, 36 S. E. 810, the plaintiff was a brakeman on a freight train, and was ordered by the conductor to jump off the train for the purpose of changing the switch. In obedience to this order, the plaintiff jumped from the car on which he was standing, and, being unable to see the ground beneath him, his right foot was caught in a frog of the switch, the frog not having been blocked so as to prevent such an accident, and the wheels of the car ran over and crushed his foot. The distinction between that case and the present will be apparent when the following language of Mr. Justice Little in the opinion in that case is considered: "The direct and proximate cause of the injury which the plaintiff sustained was his jumping from the train, and, if he is entitled to recover damages from the defendant company therefor, it is because of some negligence on the part of said company which caused the jump from which the injury resulted, or negligence in not protecting the place where in fact he did jump. As we have seen, it is not charged in the petition that the railroad company was, through its conductor, negligent in directing the plaintiff to jump from the car at the time he did." It was held that the failure to block the switch was not an act of negligence.

In the determination of the question just presented we have been very much aided by the carefully prepared brief of counsel for the defendant in error. The brief shows, not only laborious research, but ability and power of discrimination, and we take occasion to express our appreciation of the valuable aid thus brought to us in the decision of this puzzling question.

2. The motion for a new trial contains numerous assignments of error on rulings upon the admissibility of evidence. Several grounds complain that the court erred in allowing testimony to be offered for the purpose of impeachment, which related to matters which were immaterial and irrelevant. While the judge seems to have permitted the cross-examination of different witnesses laying the foundation for impeachment to take a very wide range, we cannot say that any evidence he admitted was altogether irrelevant. But, even if it was, the error thus committed would not be sufficient to have required the granting of a new trial. The defendant offered in evidence a chain of title showing that the South Carolina & Georgia Railroad Company was the proprietor of the tracks at the point where the injury occurred and the yards adjacent thereto, and also offered a contract between the city council of Augusta and this railroad company; the purpose in offering this evidence being to show that the engine of the Georgia Railroad Company was upon the tracks at the point where Webb was injured, not by permission of the defendant, but in its own right under a contract made with the city council and the predecessor in title of the South Carolina & Georgia Railroad Company. This evidence was rejected, and error is assigned upon this ruling. It was immaterial who owned the tracks and the yards adjacent thereto. The defendant was shown to be in control of the tracks at the place where the injury occurred, and also the adjacent yards in the state of South Carolina. It was immaterial whether the Georgia Railroad Company ran its engine over the track by its own right or by permission of the defendant. It did not matter under whose authority the engine was operated upon the track. The only material question was whether the defendant knew or should have known that the Georgia Railroad Company was in the habit of using the tracks at that point. There was evidence authorizing the jury to find that such was the case. What has just been said disposes of that ground of the motion which complains that the court erred in allowing a witness, who was an employee in charge of the Georgia Railroad engine, to testify, in effect, that the engine was on the tracks by permission of the defendant. Even if the judge committed any error in any of the rulings complained of in the motion for a new trial, we do not think, after a careful examination of the motion for a new trial and the entire record in the case, that there should be a reversal of the judgment for any of the reasons assigned in the motion.

It remains only to dispose of that assignment of error which complains that the verdict was not warranted by the evidence. It was earnestly argued by counsel for the plaintiff in error that there was no evidence authorizing a finding for the plaintiff. It was contended that, as the petition alleged that Webb was thrown through the rear door of the car across the platform at the end of the car and onto the tracks, and, as a result, was stunned and rendered insensible, the plaintiff cannot recover upon a gen-

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eral presumption of negligence against the company, but his recovery must be based upon evidence authorizing the jury to find that he was injured in the manner described in the petition; that is, by being thrown from the inside of the car through the door across the platform onto the tracks. Under the view we have taken of the case, it is unnecessary to determine whether a recovery could be had if the evidence failed to show to the satisfaction of the jury that Webb was thrown from the car in the manner described in the petition. There was abundant evidence authorizing the jury to find that Webb was upon the train as a passenger, and that while he was upon the train there was a jolt of the train, which was sudden, unusual, and violent, its character being such that the passengers were jostled in their seats, bundles were thrown from the seats and racks, and a person in the aisle of the car would probably have been thrown from his feet. There was no one who saw Webb actually thrown through the door to the platform and upon the track. The last that was seen of him, which was just before the jolt came, he was making his way towards the rear of the car, looking for a seat, and had reached a point near the door of the car. Nothing more was seen of him until he was found in a mangled condition by the employees in charge of the railroad engine which had run over him. All of the evidence in the record which bears upon the question as to whether Webb was thrown from the car as described in the petition is contained in the testimony of the witness Shinall, and we quote the exact language of this testimony: "We got on at Broad street together. John Webb got on the first step between the coaches, and I got on the next one, and he was on the platform; and I turned and went towards the back end of the car, and had a couple of bundles in my hand. As I was going along, Mr. Pardue asked me what I was doing there, and I sat on the side of the car, and was talking to him, when John Webb came through the train and passed by us, and went on toward the rear of the train. At or about that time the train stopped inside of the bridge all at once. I mean, by stopping all at once, it was going along 10 or 15 miles an hour, and all at once it stopped. It was a hard jerk. It would have jerked a man down if he had been standing on his feet. That occurred right immediately after I saw Mr. Webb standing up near the rear of the train. It was not more than a minute, or something like that. I was talking to Mr. Pardue, and then the jerk came, and people was making remarks about the jerk coming, and still I did not pay no attention to him. I did not know anything was the matter with him at that time. I did not find out for certain what had become of him until the next morning. After I got off at Bath, I asked for him, but nobody had seen him. I don't think I changed my position on that seat after I saw him. It is just a short run from Augusta to Bath, and I sat there talking to Mr. Pardue. The reason I didn't look around for John Webb, I was talking, and never put my mind on it. I thought maybe he was sitting behind us." To sustain the verdict it is not necessary for us to hold that this testimony of Shinall required a finding that Webb was hurled through the rear door of the car by the jerk of the train. If the jury could legitimately infer from this testimony that such was the case, we have no right to disturb their verdict after it has been approved by the trial judge. The able and learned counsel for the plaintiff in error presented the case to us in such a way that, if we had been sitting as a jury, or even as a court of appeals, with power to pass upon the weight of testimony, we would probably have decided with him at the close of his argument. It is, however, not within our province to pass upon cases like a jury, nor have we any desire to do so. Our authority extends simply to determining whether, under a given state of facts, the jury could legitimately arrive at a given result. While we do not think it is probable that Webb was thrown through the door of the car in the manner claimed, still it is possible that this took place, and under the evidence disclosed by the record we think the jury were authorized to so find. There is some mystery about the case, but, as was said by Mr. Chief Justice Bleckley in *Central R. Co.* v. *Rouse*, 77 Ga. 407, 3 S. E. 308, "juries have no more important function than to solve mysteries." The jury have solved this mystery to their own satisfaction. The trial judge has approved their solution, and we have no authority to interfere.

The judgment must be affirmed.

All the Justices concur except **Lewis, J.**, absent on account of sickness.

W. B. NEW, *Plff. in Err.*,
v.
SOUTHERN RAILWAY COMPANY.

(.....Ga.....)

***1. A contract whereby a father hires his minor son to another,** and releases him from all liability for "damages for any injuries sustained" by the son while in the employer's service, will, when such contract can, under the facts of a case arising thereunder, be properly treated as valid and binding, defeat a recovery by the father for the loss of the value of the son's services during minority, even where such loss is occasioned by the homicide of the minor.

2. Such a contract, though made with a railway company, is valid and binding to the extent of exempting the

*Headnotes by LUMPKIN, P. J.

NOTE.—As to validity of contract by next of kin of minor employee, releasing employer from liability for damages resulting from negligence, see also, in this series, Tarbell v. Rutland R. Co. (Vt.) 56 L. R. A. 656.

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latter from liability for negligent acts of itself or servants, which are not criminal.

(August 7, 1902.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's son. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Arnold & Arnold,** for plaintiff in error:

The contract did not cover a case of death, and, being a contract in derogation of the ordinary rights of the parties, it is to be strictly construed against the company.

Georgia R. & Bkg. Co. v. *Clarke,* 97 Ga. 706, 25 S. E. 368.

The contract, so far as undertaking to waive any right of action for damages growing out of the death of this minor is concerned, is absolutely void.

A contract between employer and employee, stipulating against the employer's liability for negligence, is void, as being in contravention of public policy.

Tarbell v. *Rutland R. Co.* 73 Vt. 347, 56 L. R. A. 656, 51 Atl. 6.

Section 115 of the Penal Code provides that any negligence of a railroad employee, resulting in bodily injury to any person, but not death, shall be considered criminal negligence, and punished as provided. Of course, therefore, this negligence being criminal, no contract stipulating against liability for it could stand.

Cook v. *Western & A. R. Co.* 72 Ga. 48.

The act of 1895 declared void a contract exempting the master from liability for negligence.

Messrs. **Dorsey, Brewster, & Howell** and **Sanders McDaniel,** for defendant in error:

There is nothing in the fact that plaintiff in error swore that he did not read the contract when he signed it to lessen the binding force of it upon him.

Shedden v. *Heard,* 110 Ga. 461, 35 S. E. 707; *Boynton* v. *McDaniel,* 97 Ga. 400, 23 S. E. 824; *Radcliffe* v. *Biles,* 94 Ga. 480, 20 S. E. 359; *Chicago Bldg. & Mfg. Co.* v. *Summerour,* 101 Ga. 820, 29 S. E. 291.

The contract or release signed by New is valid and binding. The act of 1895 in no way complicates the subject, since that refers in terms to contracts between masters and servants, this being a contract between a railroad company and a father.

Western & A. R. Co. v. *Bishop,* 50 Ga. 465; *Western & A. R. Co.* v. *Strong,* 52 Ga. 461; *Galloway* v. *Western & A. R. Co.* 57 Ga. 512; *Fulton Bag & Cotton Mills* v. *Wilson,* 89 Ga. 318, 15 S. E. 322.

The negligence charged against defendant in error in this case is not criminal negligence.

The true legal construction of the contract or release made by New with defendant in error is not that the company contracted to release itself from liability for its negligence. It did not do so. But that New merely manumitted his son, transferring to the son all the rights that the father might have.

Soldanels v. *Missouri P. R. Co.* 23 Mo. App. 516; *Jenness* v. *Emerson,* 15 N. H. 486; *Shute* v. *Dorr,* 5 Wend. 204; *Canovar* v. *Cooper,* 3 Barb. 115.

If defendant in error had broken its contract and refused to pay the wages earned by the son, the son would have had the right to sue for them, and not the father.

Soldanels v. *Missouri P. R. Co.* 23 Mo. App. 516; Schouler, Dom. Rel. §§ 267A, 268; Wood, Mast. & S. § 25; *Ream* v. *Watkins,* 27 Mo. 516.

Lumpkin, P. J., delivered the opinion of the court:

The Southern Railway Company employed as a switchman Looney Oscar New, the minor son of W. B. New. The latter entered into a written contract with the company, by which he, among other things, stipulated as follows: "I further hereby agree and consent that said company is by these presents released and forever acquitted from all or any claim or liability to me for damages for any injuries sustained by said Looney Oscar New while in its employment; and also that said company may pay all wages and other moneys due or growing out of said employment direct to him, and receive acquittance therefor from him in his own name." The minor was killed while in the service of the company, and the father brought an action for the value of his services up to the time when he would have attained majority. After the plaintiff had closed, the defendant introduced in evidence the above-mentioned contract, and the court directed a verdict in its favor, on the ground that this contract "barred any right of the plaintiff to recover." To this W. B. New excepted. The case, as here presented and argued, turns upon the two questions dealt with in the discussion which follows.

1. It was insisted in behalf of the plaintiff in error that, as the contract purported to relieve the company only from such damages as might arise from "injuries" sustained by the minor, it did not apply to damages resulting to the father from the son's death. While "injury" and "death" are by no means synonymous, it is certainly true that, relatively to a father seeking to recover for the lost services of his minor child, it is immaterial whether the tort from which his loss originated was one which occasioned the child physical injury, destroying his ability to labor, or one which, by causing his death, brought about the same result. So far as the alleged right of W. B. New to have compensation from the company was concerned, the killing of his son by it was, to all practical intents and purposes, the same as the injuring of him by it; for the gist of his action was the loss of the son's services. See *Frazier* v. *Georgia R. & Bkg. Co.* 101 Ga. 70, 28 S. E. 684. The company, in contracting with New for a release from damages for injuries sustained by the son, was manifestly seeking to

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free itself from damages which, but for the contract, the father might claim because of such injuries; and in this view it is without doubt proper to construe the term "injuries," used in the contract, as having been intended to apply to any and all kinds of bodily harm, whether resulting in partial or total disability of the minor or in his death.

2. The remaining and more important contention of counsel for the plaintiff in error is that, inasmuch as the contract, if enforced, will, in effect, relieve the company of liability for the consequences of its own negligence, it is for this purpose, at least, void, as being contrary to public policy. Our ruling on this branch of the case is expressed in the second headnote. In the case of *Western & A. R. Co.* v. *Bishop*, 50 Ga. 465, this court held that a contract between a railroad company and its employee, exempting the former from damages resulting from its own negligence, was, save as to "any criminal neglect of the company or its principal officers," valid. In that case the action was by an employee for personal injuries. The ruling therein made was followed and applied in *Western & A. R. Co.* v. *Strong*, 52 Ga. 461, which was an action by a widow for the homicide of her husband; and it was decided that, as the contract was binding upon him, her right of action was cut off. A similar case—that of *Hendricks* v. *Western & A. R. Co.*—appears in the same volume, page 467. The correctness of the rule laid down in *Bishop's Case* was recognized in that of *Galloway* v. *Western & A. R. Co.* 57 Ga. 512, which was also an action for personal injuries, brought by an employee against the company. These cases were all decided before the passage of the act of February 15, 1876, "to Define and Punish Criminal Negligence," the provisions of which have been codified (Penal Code, § 115) as follows: "If any person employed in any capacity by any railroad company doing business in this state shall, in the course of such employment, be guilty of negligence, either by omission of duty or by any act of commission, in relation to the matters intrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he shall be guilty of criminal negligence, and shall be punished by confinement in the penitentiary not less than one nor more than two years, in the discretion of the court." In the case of *Cook* v. *Western & A. R. Co.* 72 Ga. 48, which was an action by a widow for the homicide of her husband, this court, in a decision rendered by two justices, held, in effect, that, after the passage of the above-mentioned act, any negligence on the part of a railroad company or of its servants from which the death of an employee resulted was necessarily "criminal negligence." It seems, however, that the two justices by whom the case was decided entirely overlooked the fact that the act of 1876 expressly exempted from the operation of its provisions all cases in which deaths were caused. It is clear that the purpose of the general assembly in passing this act was to create a new class of criminal offenses, which should embrace all acts of negligence on the part of railroad employees, whether of commission or of omission, from which serious bodily injury, "but not death," might result; and equally clear that there was no intention to change existing laws with respect to unlawful homicide, or the punishment therefor. We are, therefore, satisfied that a grave error was committed in making the *Cook Case* turn upon the act of 1876, which really had no bearing upon it. The court distinctly recognized the correctness of the settled rule that a railroad company could lawfully stipulate for exemption from liability to an employee for damages resulting from acts of negligence not criminal, but made a mistake in holding that the act of 1876 rendered any negligent act of a railroad employee from which death resulted *per se* felonious. Under a proper application of the rule just stated, the case should have been made to turn upon the question whether or not, under the law as it stood, without reference to the act of 1876, the negligence causing Cook's death was criminal and indictable. As this decision was not rendered by a full bench, it is not binding as authority; and, as it was manifestly based upon an erroneous view with respect to the true intent and meaning of the act of 1876, it will not be followed. This court, in *Fulton Bag & Cotton Mills* v. *Wilson*, 89 Ga. 318, 15 S. E. 322, upon a review of the cases above mentioned, reaffirmed the rule, in so far as the same was not modified by the act of 1876 touching railroad employees, that, "as between employer and employee, the latter in the contract of hiring may assume all risks appertaining to the service, save such as arise from criminal negligence." We have endeavored to show that the act referred to has no application at all to an action against a railroad company for a homicide, and that when, in defense to a suit, a contract like that relied on in the present case is set up by the company, its efficacy should be made to depend upon whether or not the act causing the death was criminal, without regard to the provisions of § 115 of the Penal Code, which was, as above stated, codified from the act of 1876. The evidence in the present case did not, so far as this court is informed, show that any employee of the company was guilty of a criminal act from which the death of the plaintiff's son resulted. In this connection the bill of exceptions merely discloses that "the testimony for the plaintiff tended to support the declaration as to the allegations of negligence." We have carefully read these allegations, and they neither declare, nor even intimate, that any employee of the defendant was guilty of a criminal or indictable act. It must, therefore, be assumed that no such acts were proved, and it follows that the plaintiff in

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error has not made it appear that the court below erred in not holding that the contract into which he entered was, as applied to the facts proved, void, because contrary to the public policy of this state. If the plaintiff in error had brought up all the evidence, and an examination of it showed that, as matter of law, the defendant's employees were guilty of criminal negligence, the question before us would be altogether different.

As the contract relied on, had it been between the deceased and the company, would certainly, but for the act of 1895, which will presently be more fully noticed, have been binding, to the extent herein laid down, upon him, it must, to that extent, be binding upon the father, unless the act just referred to contains something requiring a holding to the contrary. It is "An Act to Declare All Contracts between Master and Servant, Made in Consideration of Employment, Whereby the Master is Exempted from Liability to the Servant, Arising from the Negligence of the Master or His Servants, as Such Liability is Now Fixed by Law, Void as against Public Policy." Acts 1895, p. 97. The provisions of this act now appear in Civil Code, § 2613, which reads as follows: "All contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant arising from the negligence of the master or his servants, as such liability is now fixed by law, shall be null and void, as against public policy." Whatever change the passage of this act made in existing laws, it is certain that by its express terms it applies exclusively to "contracts between master and servant." It cannot, therefore, by construction, be applied to any other contracts. To attempt to do so would be an effort to legislate, which we have neither the inclination nor the authority to do.

It is proper to remark, before concluding, that this court cannot assume that the court below, without undertaking to pass upon the evidence bearing on the question of negligence, directed the verdict complained of on the theory that the effect of the contract was to manumit the plaintiff's son, and therefore deprive the father of all right to the son's services during his minority, and consequently of all right to compensation for the loss thereof. There is nothing in the bill of exceptions from which it could even be inferred that the court based its action in directing the verdict upon any such view of the contract. Indeed, it does not appear that the court undertook to pass at all upon the question whether or not the contract did operate to manumit the minor; and, as such was not its effect, it is certainly not to be presumed that the court erroneously held to the contrary, and in this way arrived at the conclusion that the plaintiff was not entitled to recover.

Judgment affirmed.

All the Justices concur, except **Lewis, J.**, absent on account of sickness.

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GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY, *Plff. in Err.*, *v.* J. L. CARTLEDGE.

(.....Ga.....)

*1. **That, after an occurrence resulting in injury to one person,** another who is sought to be held accountable therefor took additional precautions to prevent others from being likewise injured, can neither justly nor logically be regarded as an admission on his part that he was negligent in not sooner observing such precautions. Prior decisions by this court virtually to the contrary reviewed and overruled.

2. **It affirmatively appearing from the evidence in the present case that the proximate cause** of the plaintiff's injury was his own independent act, for which there was no necessity, and which was in no way brought about by any default on the part of the defendant company, he was not entitled to recover.

(August 7, 1902.)

ERROR to the Macon City Court to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Hall & Wimberly** and **R. C. Jordan,** for plaintiff in error:

The negligence of the defendant railway company, if it was negligent at all, was not the proximate cause of the injury, but the negligence of the plaintiff himself in pushing out the grab when there was no necessity for so doing was the proximate cause; and, this being true, he is not entitled, in law, to recover.

Hardwick v. *Georgia R. & Bkg. Co.* 85 Ga. 507, 11 S. E. 832; *Wolf* v. *East Tennessee, V. & G. R. Co.* 88 Ga. 210, 14 S. E. 199; *East Tennessee, V. & G. R. Co.* v. *Head,* 92 Ga. 723, 18 S. E. 976; *Sundy* v. *Savannah Street R. Co.* 96 Ga. 819, 23 S. E. 841; *Blackstone* v. *Central R. Co.* 105 Ga. 380, 31 S. E. 90, 112 Ga. 762, 38 S. E. 79.

A passenger who exposes any portion of his body outside of the car in which he is riding, and is injured by contact with some object outside which would not otherwise have caused injury to him, cannot recover of

*Headnotes by LUMPKIN, P. J.

NOTE.—For other cases in this series as to subsequent precautions as admission or proof of negligence in case of accident, see Goshen v. England (Ind.) 5 L. R. A. 253; Terre Haute & I. R. Co. v. Clem (Ind.) 7 L. R. A. 588; Shinners v. Proprietors of Locks & Canals (Mass.) 12 L. R. A. 554; Standard Oil Co. v. Tierney (Ky.) 14 L. R. A. 677; Skottowe v. Oregon Short Line & U. N. R. Co. (Or.) 16 L. R. A. 593; Anderson v. Chicago, St. P. M. & O. R. Co. (Wis.) 23 L. R. A. 203; Willey v. Boston Electric Light Co. (Mass.) 37 L. R. A. 723; Green v. Ashland Water Co. (Wis.) 43 L. R. A. 117; Limberg v. Glenwood Lumber Co. (Cal.) 49 L. R. A. 33; and Spees v. Boggs (Pa.) 52 L. R. A. 933.

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the railroad company for such injury, even though the object may be too close to the track, and cars, as they pass.

Georgia P. R. Co. v. *Underwood*, 90 Ala. 49, 8 So. 116; *Moore* v. *Edison Electric Illuminating Co.* 43 La. Ann. 792, 9 So. 433; *Dun* v. *Seaboard & R. R. Co.* 78 Va. 645, 49 Am. Rep. 388; *Favre* v. *Louisville & N. R. Co.* 91 Ky. 541, 16 S. W. 370; *Richmond & D. R. Co.* v. *Scott*, 88 Va. 958, 16 L. R. A. 91, 14 S. E. 763; *Clarke* v. *Louisville & N. R. Co.* 101 Ky. 34, 36 L. R. A. 123, 39 S. W. 840.

It was error for the court to admit testimony to the effect that the semaphore post had been moved further back since the accident.

Thompson v. *Toledo, A. A. & N. M. R. Co.* 91 Mich. 255, 51 N. W. 995; *Hammargren* v. *St. Paul*, 67 Minn. 6, 69 N. W. 470; *Jennings* v. *Albion*, 90 Wis. 22, 62 N. W. 926; *Greenville Oil & Cotton Co.* v. *Davenport* (Tex. Civ. App.) 37 S. W. 624; *Columbia & P. S. R. Co.* v. *Hawthorne*, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591; *Beard* v. *Gould*, 107 Iowa, 476, 78 N. W. 201; *Shinners* v. *Proprietors of Locks & Canals*, 154 Mass. 168, 12 L. R. A. 554, 28 N. E. 10; *Giffen* v. *Lewiston* (Idaho) 55 Pac. 545; *Warren* v. *Wright*, 103 Ill. 302; *Howe* v. *Medaris*, 183 Ill. 295, 55 N. E. 724; *Chicago* v. *Richardson*, 75 Ill. App. 198; *Nalley* v. *Hartford Carpet Co.* 51 Conn. 524, 50 Am. Rep. 47; *Louisville & N. R. Co.* v. *Bowen*, 18 Ky. L. Rep. 1099, 39 S. W. 31; *Motey* v. *Pickle Marble & Granite Co.* 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155; *Hudson* v. *Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; *Western & A. R. Co.* v. *Rogers*, 104 Ga. 224, 30 S. E. 804; *Payne* v. *Troy & B. R. Co.* 9 Hun, 526; *Baird* v. *Daly*, 68 N. Y. 547; *Louisville & N. R. Co.* v. *Malone*, 109 Ala. 509, 20 So. 33; *Dougan* v. *Champlain Transp. Co.* 56 N. Y. 1; *Ducey* v. *New York, N. H. & H. R. Co.* 168 Mass. 480, 47 N. E. 418.

Messrs. **Guerry & Hall** and **M. F. Hatcher** for defendant in error.

Lumpkin, P. J., delivered the opinion of the court:

This was a suit for damages against the railway company by Cartledge, who set forth in his petition the following allegations of fact: "On the 30th day of June, 1900, he was in the employment of the United States government in the railway mail service, and was, in the course of his employment, on said day riding upon the train and in a car of the said company." On that day, "while on the railroad train of said company in the discharge of his duties as mail clerk on his car furnished by said road . . . the mail grab, which was fastened on the outside of said car, came in contact with a post standing upon the platform of said railway company at the station house at Sofkee." The result was that the "mail grab was turned from its fastenings to the side of said car and thrown down and upon the left hand of petitioner, who was at that time inside the car, where he had the right and where it was his duty to be, and where he then was in the exercise of all the care incumbent upon him. . . . Petitioner's hand was terribly mutilated, wounded, and crushed; the bone in the first finger of said hand being broken [and] made permanently useless." The injury thus sustained by him "was caused by the negligence of said railroad company in erecting the said post too near the track of said railroad company, and allowing it to remain there." A recovery was had by the plaintiff in the court below, and the company is here complaining of a judgment denying it a new trial.

1. At the time of the plaintiff's injury the post above referred to "stood 13 or 14 inches from the side of the passing coach. The plaintiff was permitted to testify, over the objection of the defendant, that this post had been moved further back since the accident;" the objection urged against the admission of this testimony being that it was not "competent evidence for the purpose of showing negligence on the part of the defendant." Tested by rulings heretofore made by this court, this testimony was clearly admissible. In *Augusta & S. R. Co.* v. *Renz*, 53 Ga. 126, it was held that, "upon the trial of a suit against a street railroad company for an injury sustainerd by careless driving over a sharp curve and sudden elevation, it was competent to show that the defendant had altered the curve since the accident." A similar ruling was announced in *Central R. & Bkg. Co.* v. *Gleason*, 69 Ga. 201. In *Savannah, F. & W. R. Co.* v. *Flannagan*, 82 Ga. 580, 9 S. E. 471, the question arose whether or not it was competent for the plaintiff to prove that after the homicide of her husband, who was run over and killed by an engine belonging to the defendant, "the engines of the company were run more slowly along the street which was the scene of the accident." Commenting upon the relevancy of evidence which had been introduced to establish that such was the fact, Chief Justice Bleckley, who delivered the opinion of the court, said (p. 589, 82 Ga., p. 472, 9 S. E.): "There is much authority to the contrary, . . . but we think consistency with our own decisions requires us to hold that it was admissible." Doubtless influenced by the intimation thus thrown out that the question presented, were it an open one, would admit of some doubt, counsel for the plaintiff in error in the present case asked and were granted leave to review these decisions. We have accordingly given them careful consideration, with the result that we are constrained to announce, after mature deliberation, that our faith in their correctness, which in the past had already been much shaken, has succumbed to the conviction that they cannot be defended either upon principle or by the weight of authority. We find upon investigation that they are not in accord with the rule which obtains in England. See *Hart* v. *Lancashire & Y. R. Co.* 21 L. T. N. S. 261. Nor are they in harmony with the consensus of judicial opinion which prevails

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in this country. See *Columbia & P. S. R. Co.* v. *Hawthorne*, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591, and cases cited on page 207, 144 U. S., page 406, 36 L. ed. and page 593, 12 Sup. Ct. Rep.; *Atchison, T. & S. F. R. Co.* v. *Parker*, 5 C. C. A. 220, 12 U. S. App. 132, 55 Fed. 595; *Barber Asphalt Paving Co.* v. *Odasz*, 8 C. C. A. 471, 20 U. S. App. 326, 60 Fed. 71; *Motey* v. *Pickle Marble & Granite Co.* 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 156; *Southern P. Co.* v. *Hall*, 41 C. C. A. 50, 100 Fed. 761; *Louisville & N. R. Co.* v. *Malone*, 109 Ala. 510, 20 So. 33; *Sappenfield* v. *Main Street & Agri. Park R. Co.* 91 Cal. 49, 27 Pac. 590; *Hager* v. *Southern P. Co.* 98 Cal. 309, 33 Pac. 119; *Limberg* v. *Glenwood Lumber Co.* 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176; *Nally* v. *Hartford Carpet Co.* 51 Conn. 524, 50 Am. Rep. 47; *Harvey* v. *Alturas Gold Min. Co.* (Idaho) 35 Pac. 819; *Holt* v. *Spokane & P. R. Co.* (Idaho) 35 Pac. 39; *Giffen* v. *Lewiston* (Idaho) 55 Pac. 545; *Bloomington* v. *Legg*, 151 Ill. 10, 37 N. E. 696; *Howe* v. *Medaris*, 183 Ill. 288, 55 N. E. 724; *Terre Haute & I. R. Co.* v. *Clem*, 123 Ind. 16, 7 L. R. A. 588, 23 N. E. 965; *Wabash County* v. *Pearson*, 129 Ind. 456, 28 N. E. 1120; *Chicago & E. R. Co.* v. *Lee*, 17 Ind. App. 216, 46 N. E. 543; *Cramer* v. *Burlington*, 45 Iowa, 627; *Hudson* v. *Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; *Beard* v. *Guild*, 107 Iowa, 476, 78 N. W. 201; *Standard Oil Co.* v. *Tierney*, 92 Ky. 368, 14 L. R. A. 677, 17 S. W. 1025; *Downey* v. *Sawyer*, 157 Mass. 418, 32 N. E. 654; *Dacey* v. *New York, N. H. & H. R. Co.* 168 Mass. 479, 47 N. E. 418; *Washington, C. & A. Turnp. Co.* v. *Case*, 80 Md. 36, 30 Atl. 571; *Thompson* v. *Toledo, A. A. & N. M. R. Co.* 91 Mich. 256, 51 N. W. 995; *Hammargren* v. *St. Paul*, 67 Minn. 6, 69 N. W. 470; *Ely* v. *St. Louis, K. C. & N. R. Co.* 77 Mo. 34; *Hipsley* v. *Kansas City, St. J. & C. B. R. Co.* 88 Mo. 348; *Alcorn* v. *Chicago & A. R. Co.* 108 Mo. 81, 18 S. W. 188; *Corcoran* v. *Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Getty* v. *Hamlin*, 127 N. Y. 636, 27 N. E. 399; *Clapper* v. *Waterford*, 131 N. Y. 382, 390, 30 N. E. 240; *Lowe* v. *Elliott*, 109 N. C. 581, 14 S. E. 51; *Skottowe* v. *Oregon Short Line R. Co.* 22 Or. 430, 16 L. R. A. 593, 30 Pac. 222; *Farley* v. *Charleston Basket & Veneer Co.* 51 S. C. 222, 241, 28 S. E. 193, 401; *Illinois C. R. Co.* v. *Wyatt*, 104 Tenn. 432, 58 S. W. 308; *Gulf, C. & S. F. R. Co.* v. *McGowan*, 73 Tex 356, 11 S. W. 336; *Missouri P. R. Co.* v. *Hennessey*, 75 Tex. 155, 12 S. W. 608; *Fordyce* v. *Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181; *Bell* v. *Washington Cedar Shingle Co.* 8 Wash. 27, 35 Pac. 405; *Carter* v. *Seattle*, 21 Wash. 585, 59 Pac. 500; *Anderson* v. *Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L. R. A. 203, 58 N. W. 79; *Jennings* v. *Albion*, 90 Wis. 22, 62 N. W. 926; *Green* v. *Ashland Water Co.* 101 Wis. 259, 43 L. R. A. 117, 77 N. W. 722. See also authorities cited and commented on in note appended to the case of *St. Louis & S. F. R. Co.* v. *Weaver* (Kan.) 57 Am. Rep. 183–187.

In the New York Reports instances are to be found where some of the tribunals of that state at one time strayed from the path which all good courts should travel; but the true doctrine was expounded by its court of appeals in the case of *Baird* v. *Daly*, 68 N. Y. 547, and has since been consistently observed. More recently there have been other converts to the new faith which we now feel called upon to embrace. Notable among these is the supreme court of Minnesota; it having in the case of *Morse* v. *Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358, formally reviewed all of its prior decisions bearing on the point under consideration and pronounced them unsound, saying of the rule which had been laid down: "We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." We may also point to the fate which befell an early Colorado case (*Kansas P. R. Co.* v. *Miller*, 2 Colo. 442), the ruling in which is no longer given recognition by the courts of that state. *Colorado Electric Co.* v. *Lubbers*, 11 Colo. 505, 19 Pac. 479; *Denver & R. G. R. Co.* v. *Morton*, 3 Colo. App. 155, 32 Pac. 345. The supreme court of New Hampshire has also reversed its position on the question. See *Aldrich* v. *Concord & M. R. Co.* 67 N. H. 250, 29 Atl. 408, in which that court overruled a prior decision in the case of *Martin* v. *Towle*, 59 N. H. 31, to the effect that it was competent for the plaintiff to prove that, after he was injured by the overturning of a carriage belonging to the defendant, the latter discharged the driver thereof. So far as we have been able to ascertain, the courts of but two states still adhere to the view that one who is sought to be held accountable for an injury sustained by another cannot take additional precautions to prevent others from being likewise injured, without thereby tacitly admitting that such precautions should sooner have been adopted. *Atchison, T. & S. F. R. Co.* v. *McKee*, 37 Kan. 592, 15 Pac. 484; *Consolidated Kansas City Smelting & Ref. Co.* v. *Tinchert*, 5 Kan. App. 130, 48 Pac. 889; *McKee* v. *Bidwell*, 74 Pa. 218; *Lederman* v. *Pennsylvania R. Co.* 165 Pa. 118, 30 Atl. 725. Speaking for the supreme court of Kansas, Mr. Justice Valentine, in the case of *St. Louis & S. F. R. Co.* v. *Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408, undertook to defend the rule laid down in prior decisions therein cited; but the argument he advanced in its support impresses us as being far from convincing. Pennsylvania's pioneer case on this line is that of *Pennsylvania R. Co.* v. *Henderson*, 51 Pa. 315, wherein the correctness of the ruling announced was assumed without any discussion whatever. It was subsequently held in *West Chester & P. R. Co.* v. *McElwee*, 67 Pa. 311, that, "in an action for death by negligence from cars striking a cart on scales near to a railroad track, evidence was proper that after the accident the track was removed to a greater distance." With Quaker directness and simplicity, the question as to the admissibility of such evidence was dismissed with the re-

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mark (pp. 314, 315): "If the proximity of the track to the buildings did not increase the danger, why was it moved?" Doubtless it was moved in order to insure greater safety in the future,—an act in and of itself perfectly legitimate, and prompted by a motive which was highly commendable. It may not be extravagant to say this action on the part of the company was something more than commendable, if at the time it had reason to apprehend that the ruling just referred to might be made. No one situated as was this company should be placed "in the embarrassing attitude of being compelled to choose between the risk of another accident by maintaining the *status quo*," and the equally uninviting alternative of taking proper steps to remove the danger, and thereby "making evidence against himself which would act prejudicially to his defense in the minds of the jury." *Illinois C. R. Co.* v. *Wyatt*, 104 Tenn. 434, 58 S. W. 308. "The effect of declaring such evidence competent is to inform a defendant that, if he makes changes or repairs, he does it under penalty; for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. . . . True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting from experience and availing themselves of new information has nothing to commend it, for it is neither expedient nor just." *Terre Haute & I. R. Co.* v. *Clem*, 123 Ind. 18, 19, 7 L. R. A. 588, 23 N. E. 965. To the same effect, see the admirable opinion delivered by Mitchell, J., in *Morse's Case*, 30 Minn. 468, 16 N. W. 358, and the irresistible argument on the same line presented by Watts, J., in *Texas & P. R. Co.* v. *Burns*, 4 Tex. Law Rev. 54, 56, and quoted approvingly in *McGowan's Case*, cited 73 Tex. 356, 11 S. W. 336. We do not hope to conceal the fact that, in thus concentrating our attack upon the decisions pronounced by the Kansas and Pennsylvania courts, instead of bringing prominently into view and assailing the prior decisions of this, our own court, we have yielded to an ordinary impulse of human nature. We do now, however, distinctly announce that those decisions are now overruled.

2. The only evidence introduced on the trial of the present case was the testimony of the plaintiff himself. He gave a clear and straightforward account of how he met with his injury, which was, in brief, as follows: He was attempting to pass "some mail under the grab" to the assistant postmaster at Sofkee, who "came out of his office just as the train was moving from the station, and the mail grab came in contact with a post that stood very close to the side of the car. . . . The grab was wrenched from the side of the car," and plaintiff's left hand was caught by it and mashed against the car. The hand which was injured "was resting on top of the mail catcher." He held the mail in his "right hand, and stooped down to hand it under the catcher to the assistant postmaster, and the catcher came in contact with the post." A mail grab is made of iron, and "fits in a fastening on the side of the mail car, across the door, and works loose." It consists of a horizontal bar extending across the doorway, and a grab or "catch bar," operated by means of a handle from the inside of the car, which, when the contrivance is used in collecting mail at stations where the train does not stop, "pokes out and catches the mail bag as it hangs" on a crane erected near the track. It was the custom of the plaintiff to "deliver mail at Sofkee on the 'Shoo-Fly' trains by hand, and not with a sack." The assistant postmaster, who was also the agent of the railway company, had "to receive the mail at the car door." Plaintiff "had no right to leave [his] car and go and deliver the mail," his duty requiring him to be "at all times" in his car. "The reason [he] did not deliver the mail before the train started to pulling off was that the agent was inside of his office," and did not come to receive the mail till the train began to move. The post above mentioned was a semaphore post, and not a mail post. "There was no mail crane at that point. The grab is used for the purpose of taking the mail bag from the crane, and for no other purpose." The assistant postmaster "was standing 5 or 6 feet [from] the semaphore post when" the plaintiff "handed him the mail." Plaintiff rested his left hand "on the catcher, and handed the mail under the catcher with" his right hand; "was in a stooping position." He "had to stoop," and he rested his "hand on this grab as a support, and handed the mail underneath it, and in that condition this grab came in contact with the semaphore post." He "had to push this grab out 13 or 14 inches from the car in order for it to strike the post. It could not have possibly come in contact with the post unless it was pushed out, the post being off 13 or 14 inches. It would not have caught the post unless" the plaintiff had his "hand on it, and unless [he] pushed it out, either accidentally or purposely." He "had seen the semaphore post frequently," but had "never taken any particular notice of how close it was" to the track, "and didn't know how close it was." The plaintiff "had two newspapers to deliver" to the assistant postmaster at Sofkee; "could not have thrown them out, because they were not marked to 'throw out.'" In view of this evidence, it may be conceded, not only that the railway company was negligent as alleged, but that the plaintiff, though he had frequently seen the post, was not himself guilty of any negligence in not taking note of its dangerous proximity to the track, and governing his actions accordingly. At the same time, however, he could not possibly have been injured had he not, "either accidentally or purposely," pushed the "catch bar" out some 13 or 14 inches from the side of the car, when there was no necessity to do so, nor, indeed, any occasion for him to make any

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use whatever of the contrivance known as the "grab." This being so, his own independent act, whereby the accident was brought about, is to be regarded as the proximate cause of his injury, and the company cannot be held accountable therefor. See *Hardwick* v. *Georgia R. & Bkg. Co.* 85 Ga. 507, 11 S. E. 832; *Lindsay* v. *Southern R. Co.* 114 Ca. 896, 41 S. E. 46; *Richmond & D. R. Co.* v. *Scott*, 88 Va. 958, 16 L. R. A. 91, 14 S. E. 763, 52 Am. & Eng. R. Cas. 405, note; *Baltimore & O. S. W. R. Co.* v. *Sims* (Ind. App.) 63 N. E. 485.

It follows that the trial judge erred in leaving to the jury the question of the company's liability, and in refusing to instruct them, at the instance of its counsel, to the effect that if they believed the injury to the plaintiff could not have occurred "but for his own conduct in pushing out the mail grab, whether intentional or by accident," he would not be entitled to recover.

Judgment reversed.

All the Justices concur, except **Lewis, J.**, absent on account of sickness.

OKLAHOMA VINEGAR COMPANY, *Plff. in Err.*, v. CARTER *et al.*

(.....Ga.....)

*1. **When two parties have entered into a written contract** for the purchase and sale of goods, neither a countermand of the order for the shipment of the goods, nor a notice by the purchaser to the seller that he will not accept and receive them, is effectual to cause a rescission of the contract. Such a result cannot be accomplished without the assent of the seller.

2. **The notice indicated above, under the common law, operates as a breach of the contract** by the vendee, and in such a case the remedy of the vendor is in an action to recover damages for such breach. Under the statute, the vendor, after the purchaser refuses to take and pay for the goods, may, in an action, recover the price of the goods, where it appears that after default of the purchaser he stored and retained them for such purchaser. Under the evidence the statutory remedy was not available to the plaintiff in the present case, and his only remedy was a suit to recover damages for the breach of the contract. His action, as brought, to recover the contract price of the goods, was not maintainable.

(August 7, 1902.)

ERROR to the Douglas City Court to review a judgment in favor of defendants in an action brought to recover the value of certain goods alleged to have been bought by and delivered to defendants. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Quincey & McDonald,** for plaintiff in error:

When this order was signed by defendants in error, being already signed by plaintiff in error, plaintiff in error had a right to ship the goods so ordered and collect therefor, irrespective of the countermand made by defendants in error.

Ga. Code, § 3551; *Webber* v. *Minor*, 6 Bush, 463, 99 Am. Dec. 688; *Kadish* v. *Young*, 108 Ill. 177, 43 Am. Rep. 548; *Cook* v. *Brandeis*, 3 Met. (Ky.) 555.

Messrs. **Perry & Tipton,** for defendants in error:

The breach coming while the contract is executory, the only measure is "the loss actually sustained by reason of the breach, and this generally is the difference between the price fixed by the contract and the market value of the goods at the time and place of delivery."

1 Am. & Eng. Enc. Law, pp. 576–581; Tiffany, Sales, Hornbrook Series, §§ 123, 125, p. 231.

Section 3551 of the Code applies only in cases where the contract of sale has been fully executed.

Ga. Code, § 3551; *Camp* v. *Hamlin*, 55 Ga. 259; *Butler* v. *Lawshe*, 74 Ga. 352; *Dunn* v. *State*, 82 Ga. 27, 3 L. R. A. 199, 8 S. E. 806; *Miller* v. *Moore*, 83 Ga. 684, 6 L. R. A. 374, 10 S. E. 360; *McCord* v. *Laidley*, 87 Ga. 221, 13 S. E. 509; *Maddox* v. *Wagner*, 111 Ga. 146, 36 S. E. 609.

Little, J., delivered the opinion of the court:

The Oklahoma Vinegar Company brought an action on an account against the firm of Carter & Ford to recover the sum of $72. The action was predicated on an order given in writing by Carter & Ford, a copy of which was attached to the petition, which is as follows:

Order No. 838, Date 3/6, 1901.
Oklahoma Vinegar Co.:—
Ship to Carter & Ford, Postoffice Willacoochee, State Ga. R. R. point on B. & W. R. R. Terms Apr. 1st 60, or 3% off for cash in ten days. Ship at once [Here follows a list of articles, one of which is cherry phosphate.] Frt. prepaid. We guarantee that our fruit phosphates are not subject to any special tax, either state or county, or internal revenue; also that they will not intoxicate. We guarantee to replace all sour or spoiled goods, free of expense.

Oklahoma Vinegar Co.
Customer sign here: Carter & Ford.
Salesman sign here: R. B. Lashman.
This order not subject to countermand.

The defendants answered, denying indebtedness as alleged, setting up that they never received the goods. They admitted that they signed the order, but said that they did so under a misapprehension, and that the same was canceled in a very short time after it

*Headnotes by LITTLE, J.

NOTE.—As to rights of one who completes contract in disregard of notice to desist, see also, in this series, Davis v. Bronson (N. D.) 16 L. R. A. 655, and *note;* also Gibbons v. Bente (Minn.) 22 L. R. A. 80.

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was signed. For further plea they set up that if plaintiff had any right of action at all in the premises, which they deny, it was for damages on breach of contract, and it could not recover on open account, and this action should be dismissed. The case was submitted by agreement to be heard by the judge without the intervention of a jury on the following agreed statement of facts: "The defendants, Carter & Ford, by and through R. L. Ford, the junior member of said firm of Carter & Ford, gave the salesman of the plaintiff, the Oklahoma Vinegar Company, the order [heretofore set out]. A few minutes after giving the order the said Ford saw William Moore and purchased a whole barrel of cherry phosphate from him, that bore the same name, and that he judged, from the taste and general appearance, to be the same goods as the sample shown him by the salesman of plaintiff, which samples he tasted, and from which he gave the order, for which whole barrel he paid Moore one dollar and a quarter, and that he immediately went to the salesman of the plaintiff and countermanded the order, and notified him that he would not accept the goods if shipped. The said Ford also immediately mailed, under special delivery postage, a letter to the plaintiff, countermanding the said order, and notifying that they [the defendants] would not accept and receive the goods ordered, and this letter was received by the plaintiff before the goods were separated from the common stock and delivered to the railroad for shipment; that after this the plaintiff delivered the goods ordered to the railroad, and shipped them consigned to defendants at Willacoochee, Georgia, but the defendants declined to receive the goods, and allowed them to remain in the depot, and notified the plaintiff of their refusal to accept them: that the goods ordered and described in the order hereto attached were articles of merchandise kept in common stock and sold generally by the plaintiff; that there was no consideration for the contract not to countermand the order which appears at the bottom of the order; that the cherry phosphate Ford bought from Moore was not salable: that he still has the greater part of it on hand; tried to give it away to induce trade, but it rather had the effect to run off trade, and was worthless, but Ford does not know whether this he bought from Moore was from the same house [plaintiff's] or not, and does not know how long Moore had had the said barrel in stock prior to this purchase from Moore." The presiding judge rendered a judgment in favor of the defendants for costs, whereupon the plaintiff made a motion for a new trial, which being overruled, it excepted. The grounds of this motion were that the verdict was contrary to law and to the evidence. The answer of the defendants raises two questions: First. Are the defendants liable to the plaintiff under the contract notwithstanding the fact that the order for the goods was countermanded before delivery, and notice given to the plaintiff before shipment that the defendants would not accept and receive the goods which they had ordered? Second. Should the action on open account abate because the defendants, if liable at all, were only so in an action to recover damages for a breach of the contract?

1. We find no difficulty in disposing of the first of these questions. The contract made by the parties was a good and valid one, in writing, by the terms of which plaintiff agreed to sell and deliver to the defendants certain goods named therein, and the defendants agreed to pay for the same when so delivered. It was an executory contract, and bound both parties. Without any regard to the entry which appeared below the signature of the parties,—that the order was not subject to countermand,—it may be stated in general terms that, as the contract was the act of both of the parties, it could not be legally dissolved and rendered nugatory except with the consent of each; and the countermand and notice to the plaintiff that the defendants would not be bound by its terms did not have the effect of rescinding the contract unless the plaintiff agreed to such rescission. It appears from the agreed statement of facts that the plaintiff did not so agree; hence no rescission of the contract was effected.

2. The second proposition raised by the plea—that if the plaintiff had any right of action it was for damages for a breach of the contract, and not on open account to recover the price of the goods—is one more difficult of solution. In legal effect, this part of the plea is to be treated as a plea in abatement of the action. Under it the question arises whether the notice of the countermand which defendants gave plaintiff in advance of the time of performance was effectual to cause a breach of the terms of the contract. It is undoubtedly true, as a general rule, that, after the breach of an executory contract by either party, the only remedy of the other is to recover such damages as he may have sustained in consequence of the breach. If the notice did not, under the law, cause a breach of the contract, then the seller would have the right to perform his part of the contract and force the buyer to comply with his obligation; that is, pay the contract price for the goods. But the authorities differ as to the effect of a notice that the buyer will not, at the time fixed for the performance of the contract, accept the goods purchased. By some eminent law writers, and in many adjudicated cases, the proposition is laid down that "the notice of an intended breach will operate as a breach only if accepted and acted upon as such by the other party, who may, if he pleases, disregard the notice and insist upon performance according to the contract." Leake, Contr. 872. Mr. Parsons, in his Law of Contracts (vol. 2, *676), says: "If one bound to perform a future act, before the time for doing it declares his intention not to do it, this is no breach of his contract; but, if his declaration be not withdrawn when the time comes for the act to be done, it constitutes a sufficient excuse for the de-

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fault of the other party." Mr. Benjamin, in his work on Sales, 6th Am. ed. § 1118, says: "The date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract and to refuse accepting the goods." This doctrine has also been sustained by the supreme judicial court of Massachusetts, where it was ruled that an action for the breach of a written agreement to purchase land, brought before the expiration of the time given for the purchase, cannot be maintained by proof of an absolute refusal on the defendant's part ever to purchase. *Daniels* v. *Newton*, 114 Mass. 530, 19 Am. Rep. 384. The contrary of this doctrine was stated to be the law by Cockborn, Ch. J., in the case of *Frost* v. *Knight*, L. R. 7 Exch. 111, in the following language: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the party as a wrongful putting an end to the contract, and at once bring his action as on the breach of it; and in such an action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." Mr. Mechem, in his treatise on the Law of Sales of Personal Property (§ 1089) declares that "this doctrine is well settled in England, and is adopted by the majority, though not by all, of the American courts;" and after examination we find that rulings have been made to this effect in a great number of the courts of last resort in several of the United States. *Crabtree* v. *Messersmith*, 19 Iowa, 179; *McCormick Harvesting Mach. Co.* v. *Markert*, 107 Iowa, 340, 78 N. W. 33; *Kadish* v. *Young*, 108 Ill. 170, 43 Am. Rep. 548; *John A. Roebling's Sons' Co.* v. *Lock Stitch Fence Co.* 130 Ill. 660, 22 N. E. 518; *Dugan* v. *Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Pancake* v. *George Campbell Co.* 44 W. Va. 82, 28 S. E. 719; *Howard* v. *Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Windmuller* v. *Pope*, 107 N. Y. 674, 14 N. E. 436; *Hosmer* v. *Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Platt* v. *Brand*, 26 Mich. 173; *Zuck* v. *McClure*, 98 Pa. 541; *Hocking* v. *Hamilton*, 158 Pa. 107, 27 Atl. 836. Mr. Mechem further says (§§ 1091, 1092): "Where goods have been ordered from a wholesale dealer, but before shipment or other appropriation the order is recalled, . . . the law is well settled that a party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by reason of having his performance checked at that stage in its progress." "The contract is not rescinded, but broken; and, while the other party has the right to deem it in force for the purpose of the recovery of his damages, he is under no obligation, for that purpose, to tender complete performance, nor has he the right to unnecessarily enhance the damages by proceeding after the countermand to finish his undertaking." An examination discloses that this language fairly states the rule laid down in the cases of *Davis* v. *Bronson*, 2 N. D. 300, 16 L. R. A. 655, 50 N. W. 836; *Gibbons* v. *Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756; *Clark* v. *Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670; *Danforth* v. *Walker*, 37 Vt. 239, 40 Vt. 257; *Moline Scale Co.* v. *Beed*, 52 Iowa, 307, 35 Am. Rep. 272, 3 N. W. 96; *Butler* v. *Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Unexcelled Fire Works Co.* v. *Polites*, 130 Pa. 536, 18 Atl. 1058; *Hosmer* v. *Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Ault* v. *Dustin*, 100 Tenn. 366, 45 S. W. 981. It has also been repeatedly ruled that the remedy of the seller who has received such a notice from the buyer is an action for the breach of the contract, and not for goods sold or for labor and material; that the seller is entitled to pursue his remedy at once, because the direction of the buyer not to proceed is the equivalent of an absolute physical inability, etc. In the case of *Roehm* v. *Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780, the Supreme Court of the United States declared that "after a careful review of all the cases, American and English, relating to anticipatory breaches of an executory contract by a refusal on the part of one party to perform it, the court holds that the rule laid down in *Hochster* v. *De La Tour*, 2 El. & Bl. 678, is a reasonable and proper rule to be applied" in the case then being considered, and "that rule is that after the renunciation of a continuing agreement by one party the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it, but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option." See also Mechem, Sales, § 1699, and cases cited.

It must be ruled, from a consideration of the numerous cases cited above, and the rule therein enunciated, which seems to be founded both in reason and justice, that a notice from the buyer of goods, such as appears in this case, operates as a breach of the contract; and, without attempting to harmon-

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ize the numerous cases arising in other jurisdictions as to the remedy which the law affords to the seller under such circumstances, we can reach such conclusions also on the law contained in our Civil Code (§ 3551), which prescribes that, where the purchaser refuses to take and pay for goods bought, "the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery; or, he may sell the property, acting for this purpose as the agent of the vendee, and recover the difference between the contract price and the price on resale; or, he may store or retain the property for the vendee and sue him for the entire price." While under this last provision the seller might have stored and retained the property for the buyers after notice by the buyers that they would not receive the goods, it is sufficient to say that it did not do so, but, without so doing, sought to recover the price agreed on. Had it done so, it might have brought an action against the buyers for the entire price of the goods. On the contrary, instead of storing and retaining the goods after the notice, it delivered them to the carrier, doubtless under the well-recognized general rule that in ordinary transactions of bargain and sale of goods a delivery to the carrier is a delivery to the buyer. It may be that the provisions of this section of our Code do, to some extent, at least, modify the rule found in some of the authorities above cited; but under its plain provisions the remedy of the seller in this case was not to sue for the price of the goods, but it was remitted to its action for a breach of the contract. It was ruled in the case of *Unexcelled Fire Works Co.* v. *Polites*, 130 Pa. 536, 18 Atl. 1058, that where goods were ordered under a simple contract of bargain and sale, and notice was given by the buyer to the seller not to ship them, in advance of delivery, and before they were separated from the bulk and set apart to the buyer, such notice is not only a repudiation of the contract, but also a revocation of the carrier's agency to receive them; and the refusal of the buyer to receive the goods when delivery is tendered by the carrier does not make him liable for their contract price, but only for special damages for the refusal to receive them. In the opinion in that case Clark, J., said: "It is plain that the notice given to the plaintiffs by the defendant not to ship the goods was a repudiation of the contract. It was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk and set apart to the defendant. The direction not to ship was a revocation of the carrier's agency to receive, and the plaintiffs thereby had notice of the revocation. . . . The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered." As we have seen, the plaintiff did not store or retain the goods for the vendees after the latter had given notice that they would not take and pay for the goods, so as to obtain the statutory right to sue for the value of the goods; and not having done so, and the legal effect of the notice given being to cause a breach of the contract, the only remedy which the plaintiff had was to institute an action to recover damages for the breach. Hence its petition, which treated the contract as an executed one on its part, and sought to recover the purchase price of the goods, was subject to a plea in abatement of the action, and the trial judge committed no error in dismissing the same under the facts admitted to be true, and the plea filed by the defendant.

Judgment affirmed.

All the Justices concur, except **Lewis, J.**, absent on account of sickness.

Malcolm MACLEAN *et al.*, Exrs., etc., of Elizabeth H. Mills, Deceased, *Plffs. in Err.*,
v.
Robert F. WILLIAMS by Next Friend.

(.....Ga.....)

*A will contained the following item: "I give, devise, and bequeath all the rest and residue of my estate, of every description and kind, and wherever situate, and not by this will fully disposed of, as follows: I direct that two thirds thereof be distributed in equal shares to such persons in life at the time of my decease who would then be the heirs at law of my deceased husband had he survived me, and that the other one third be distributed in equal shares to my own heirs at law then in life." *Held*, that the distribution provided for among the heirs at law of the testatrix should be *per stirpes*, and not *per capita*.

(August 8, 1902.)

ERROR to the Superior Court for Chatham County to review a judgment construing the will of Elizabeth H. Mills, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. **Denmark, Adams, & Freeman**, for plaintiffs in error:

In the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect.

Fraser v. *Dillon*, 78 Ga. 475, 3 S. E. 695; *Wright* v. *Hicks*, 12 Ga. 163, 56 Am. Dec. 451; *Sharman* v. *Jackson*, 30 Ga. 230.

The words "equal shares" are as completely satisfied by making the shares equal in the sense of the statute, that is to say,

*Headnote by COBB, J.

NOTE.—As to meaning of term "heirs at law" in will, see also Proctor v. Clark (Mass.) 12 L. R. A. 721, and *note*.

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equal *per stirpes*, as they can be by giving to each individual the same share without regard to *stirpes*.

Sharman v. *Jackson*, 30 Ga. 230; *Balcom* v. *Haynes*, 14 Allen, 205; *Almand* v. *Whitaker*, 113 Ga. 890, 39 S. E. 395; *Roome* v. *Counter*, 6 N. J. L. 111, 10 Am. Dec. 391; *Blackler* v. *Webb*, 2 P. Wms. 383; *Baskin's Appeal*, 3 Pa. St. 304, 45 Am. Dec. 641; *Mayer* v. *Hover*, 81 Ga. 308, 7 S. E. 562; *White* v. *Holland*, 92 Ga. 216, 18 S. E. 17; *Risk's Appeal*, 52 Pa. 269, 91 Am. Dec. 156; *Fraser* v. *Dillon*, 78 Ga. 475, 3 S. E. 395; *Wright* v. *Hicks*, 12 Ga. 163, 56 Am. Dec. 451; *Burch* v. *Burch*, 20 Ga. 838; *Holbrook* v. *Harrington*, 16 Gray, 102; *Houghton* v. *Kendall*, 7 Allen, 72; *Bassett* v. *Granger*, 100 Mass. 348; *Rand* v. *Sanger*, 115 Mass. 124; *Hall* v. *Hall*, 140 Mass. 267, 2 N. E. 700; *Raymond* v. *Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688; *Lyon* v. *Acker*, 33 Conn. 224; *Minter's Appeal*, 40 Pa. 111; *Templeton* v. *Walker*, 3 Rich. Eq. 543, 55 Am. Dec. 646; *Collier* v. *Collier*, 3 Rich. Eq. 555, 55 Am. Dec. 653; *Rivenett* v. *Bourquin*, 53 Mich. 10, 18 N. W. 537; *Hoch's Estate*, 154 Pa. 417, 26 Atl. 610; *Re Ashburner's Estate*, 159 Pa. 545, 28 Atl. 361; *Kelley* v. *Vigas*, 112 Ill. 242, 54 Am. Rep. 235; *West* v. *Rassman*, 135 Ind. 278, 34 N. E. 991; *Henry* v. *Thomas*, 118 Ind. 23, 20 N. E. 519; *Swinburne's Petition*, 16 R. I. 212, 14 Atl. 850; *Lowe* v. *Carter*, 55 N. C. (2 Jones Eq.) 377; *Bullock* v. *Downes*, 9 H. L. Cas. 1.

Messrs. **Groover & Johnston** and **Walter G. Charlton**, for defendant in error:

The rule of intention is conclusive and exclusive in Georgia.

Ga. Code § 3324; *Olmstead* v. *Dunn*, 72 Ga. 855; *Cook* v. *Weaver*, 12 Ga. 47; *Wright* v. *Hicks*, 12 Ga. 155, 56 Am. Dec. 451; 2 Wms. Exrs. & Admrs. p. 1205; 2 Jarman, Wills, 2d ed. 98; *Randolph* v. *Bond*, 12 Ga. 362; *Clifton* v. *Holton*, 27 Ga. 321; *Almand* v. *Whitaker*, 113 Ga. 889, 39 S. E. 395.

Testatrix's intention was that her husband's heirs and her own at the given moment should receive equal shares,—the only difference being that the one class drew equal shares from two thirds, and the other from one third. Yet the moment we abandon the will, and take up with the law of intestacy, we encounter inequality of shares in every direction.

Houston v. *Davidson*, 45 Ga. 574.

Cobb, J., delivered the opinion of the court:

The single question involved in this case is, What is the proper construction to be placed upon the eighth item of the will of Elizabeth H. Mills, which is set forth in the headnote which precedes this opinion?

At the date of the death of the testatrix, there were no brothers or sisters of her deceased husband in life, but there were then living children and descendants of children of three deceased brothers. The kindred of the testatrix at the date of her death consisted of two half sisters on the paternal side, nephews and nieces who were children of deceased sisters, and grand nephews and nieces. The will of the testatrix is a lengthy document, consisting of many items, some of them being subdivided into numerous sections. She died possessed of a large estate, which came to her through her deceased husband, and, having no children, she divided the estate between her kindred and those of her husband. In more than one item of her will she distinctly provided for a distribution *per stirpes* among those who were to take under the items. The item which we are called upon to construe disposed of the residue of the estate after the greater part of the same had been disposed of by legacies both general and specific. The question to be determined is whether, under this item, those persons who answered to the description of heirs at law of the testatrix take *per stirpes* or *per capita*. The heirs at law of a deceased person are those who are entitled to take the estate, under the statute of distributions, when the decedent dies intestate. When the expression "heirs at law" is used in a will, and is unaccompanied by any qualifying or explanatory language, there is but one place to which resort must be had to ascertain what persons are within the meaning of this descriptive term, and that is the statute of distributions. Those falling within the description are entitled to the estate of the decedent, unless there is some law declaring to the contrary, or the decedent has died testate, and the language of the will is such as to indicate that the intention of the testator was that some other persons than those who would take under the statute of distributions should take, or, if, under the will, the estate goes to those who would take under the statute, the testator intends that they shall take in a different manner than that provided in the statute. The will of a testator is the law which controls the question as to who shall take the property of the decedent; and this law, if clearly manifested by the terms of the will, will be allowed to prevail over the provisions of the statute of distributions, both as to what persons shall take the property and as to the interest which they will take therein, if there is nothing in the provisions of the will which contravenes the general policy of the state. The intention of the testator is to absolutely control. Not only may the rules of grammar be entirely disregarded in order to carry into effect the manifest intention of the testator, but even well-defined technical terms of the law will be given an unusual meaning, or will be held to be meaningless, when it is clear from the provisions of the will that the testator did not use them in their technical sense, or when, to carry out his intention, it is necessary to entirely disregard such technical terms. If, however, the will uses words which have a well-settled, definite meaning in the law, and there is nothing in the will itself to indicate that it was the intention of the testator that such words should be given any other meaning than that which the law gives them, then it is to be presumed that it was the intention of the testator that the words should be construed in that sense in

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which the law would ordinarily construe them.

The words "heirs at law," have in law the well-settled meaning above stated, and whenever these words are found in a will, unaccompanied by any qualifying or explanatory expressions, they will be given the meaning which the law ordinarily gives them, and only the persons will come within the class thus described who would take the property of the decedent under the statute of distributions if there had been no will. See Page, Wills, § 556. If the item of the will under consideration had simply provided that the property thereby bequeathed should go to the heirs at law of the testatrix at her death, it would seem to be clear that those who would take under the will would be those persons who were then in life answering to that description under the statute of distributions. But the will provides that the persons answering the description of heirs at law of the testatrix at the date of her death shall take in equal shares. All individuals who may take under the statute of distributions do not necessarily take in equal shares; and it is therefore insisted that, while we must go to the statute to find who are the persons within the descriptive terms, after having determined this the statute has no further bearing upon the question; and that the individuals coming within this class are each to take an equal share in the property which passed under the item of the will. It is the general rule that a devise to named individuals in equal shares would call for a *per capita* distribution, and that a devise to a class, such as "all my nephews," and the like, would also call for a *per capita* distribution. When the words "heirs at law" are used in a will, unless there is something to indicate a contrary intention, it is to be presumed that the testator intended, not only that the persons taking should be those who would take under the statute of distributions, but that the quantum of interest of each should be what each individual would take under the statute. Is the use of the expression "equal shares" alone sufficient to overcome this presumption? The shares under the statute of distributions are equal. As was said in *Odam* v. *Caruthers*, 6 Ga. 42, persons standing in unequal degrees are allowed to take *per stirpes* "to fulfil the equity of the statute, which contemplates an equal distribution." If all the heirs at law stand in the same relation to the decedent, they take equally *per capita*. If some stand in different degrees from others, they take *per stirpes*, but they take equally nevertheless. The estate in either event is divided into shares, and equal shares, although in the one case each share goes to an individual, and in the other case the equal shares go to a class of individuals. The statute of distributions sets forth the settled policy of the law as to where the estate of a decedent shall go. While a testator is allowed to ignore, either in part or altogether, the rules laid down in that statute, it will not be presumed that it was the intention of the testator to disregard the law as it is contained in the statute in any part, unless the terms of the will are such as to make this intention manifest. Mr. Page says: "A devise to 'children and heirs' of two persons named, to be divided among them 'equally,' was held to call for a distribution *per stirpes*, since the word 'heirs' so strongly implies representation that it overcomes the force of the word 'children' and 'equally,' both of which call for a distribution *per capita*." Page, Wills, § 556. In 15 Am. & Eng. Enc. Law, 2d ed. p. 322, we find the rule stated in these words: "A devise to heirs, whether to one's own heirs or to the heirs of a third person, designates, not only the persons who are to take, but the manner and proportion in which they are to take. Where there are no words to control the presumption, the law presumes the intention to be that they take as heirs would take by the rules of descent." See also Schouler, Wills, 3d ed. §§ 538 *et seq.*

While adjudicated cases construing other wills are generally not helpful in arriving at what is the proper construction to be placed upon a will under consideration in a given case, for the reason that no two wills are in exactly the same language, still rulings in other cases serve to show what are the general rules to be resorted to in arriving at the intention of the testator in a given case, and the trend of judicial thought in reference to the proper application of such rules to devises or bequests of a similar nature to the one under consideration. In the following cases, bequests or devises in language somewhat similar to the item of the will under consideration in the present case were held to require a distribution *per stirpes*. *West* v. *Rassman*, 135 Ind. 278, 34 N. E. 991; *Taylor* v. *Fauver* (Va.) 28 S. E. 317; *Houghton* v. *Kendall*, 7 Allen, 72; *Balcom* v. *Haynes*, 14 Allen, 204; *Swinburne's Petition*, 16 R. I. 208, 14 Atl. 850; *Baskin's Appeal*, 3 Pa. 304, 45 Am. Dec. 641; *Templeton* v. *Walker*, 3 Rich. Eq. 543, 55 Am. Dec. 646; *Roome* v. *Counter*, 6 N. J. L. 111, 10 Am. Dec. 390; *Rivenett* v. *Bourquin*, 53 Mich. 10, 18 N. W. 537; *Ferrer* v. *Pyne*, 81 N. Y. 281; *Thomas* v. *Miller*, 161 Ill. 60, 43 N. E. 848; *Kelley* v. *Vigas*, 112 Ill. 242, 54 Am. Rep. 235; *Raymond* v. *Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688; *Bassett* v. *Granger*, 100 Mass. 348; *Minter's Appeal*, 40 Pa. 111; *Dukes* v. *Faulk*, 37 S. C. 255, 16 S. E. 122; *Hoch's Estate*, 154 Pa. 417, 26 Atl. 610. In the following cases somewhat similar language was held to require a distribution *per capita*: *Bisson* v. *West Shore R. Co.* 143 N. Y. 125, 38 N. E. 104; *Scott's Estate*, 163 Pa. 165, 29 N. E. 877; *Ramsey* v. *Stephenson*, 34 Or. 408, 56 Pac. 520, 57 Pac. 195; *McKelvey* v. *McKelvey*, 43 Ohio St. 213, 1 N. E. 594; *Records* v. *Fields*, 155 Mo. 314, 55 S. W. 1021; *Stevenson* v. *Lesley*, 70 N. Y. 512; *Nichols* v. *Denny*, 37 Miss. 59; *Farmer* v. *Kimball*, 46 N. H. 435, 88 Am. Dec. 219; *Brittain* v. *Curson*, 46 Md. 186; *Richards* v. *Miller*, 62 Ill. 417; *Best* v. *Farris*, 21 Ill. App. 49; *Hill* v. *Spruill*, 39 N. C. (4 Ired. Eq.) 244; *Harris* v. *Philpot*, 40 N. C. (5 Ired. Eq.) 324; *Lord* v. *Moore*, 20 Conn. 122; *Johns-*

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ton v. *Knight*, 117 N. C. 122, 23 S. E. 92. Of course there is no case decided by this court in which a will having identically the language of the one under consideration was construed, but there are cases which apply the principle of the rule of construction which requires that, in the absence of a contrary expressed intent, it would be presumed that the testator intended the words "heirs," "heirs at law," or the like, to describe, not only the persons who were to take under the will, but the interest that each individual was to take in the property bequeathed or devised. "In the absence of anything in the will to the contrary, the law will presume that the testator intended his property to go where the law casts it; and to disturb this natural course of descent should require plain words to that effect." *Wright* v. *Hicks*, 12 Ga. 156 (10), 56 Am. Dec. 451. In *Randolph* v. *Bond*, 12 Ga. 362, the testatrix provided that several named legatees, children of two deceased sons, should receive, "share and share alike," certain property under the provisions of certain other items of the will. It was held that, construing the whole will together, the children of the two deceased sons took *per stirpes*, and not *per capita*. In *Clifton* v. *Holton*, 27 Ga. 324, Judge Lumpkin, said: "Courts should, in this country, lean to that interpretation of wills which carries out the provisions of the statute of distributions, rather than to that which defeats them." In *Sharman* v. *Jackson*, 30 Ga. 224, the court had under consideration a deed which gave certain slaves to a person for life, and provided that at his death they were "to be equally divided among the heirs of the body," of the grantee. It was held that the children of a daughter of the grantee took under the deed *per stirpes*, and not *per capita*. Judge Lyon, in referring to the words "equally divided among the heirs," says: "It is true she says equally divided, but that is to be understood and construed as that equal division made by the distribution laws,—that is, that all the heirs related to the first taker, equally, or in the same degree, should take equally, while those who were in the same line, but further removed, should take by representation; that is, all together standing in the place of the deceased parent, and taking but the share or proportion which is equal with the shares of the children. This is an equal division among the heirs of Wm. F. Jackson, and it is not the less so that one or more of the shares must again be subdivided into as many parts as there are grandchildren distributees." In *Fraser* v. *Dillon*, 78 Ga. 474, 3 S. E. 695, the testatrix devised certain real estate to one of her children and to "the children" of a deceased child. It was held that the children of the deceased child took *per stirpes*, and not *per capita*. It was further ruled that, "in the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect." In *Mayer* v. *Hover*, 81 Ga. 308, 7 S. E. 562, it was held that, under a will which provided that in a certain contingency property of a certain kind should be "divided between the children of defendant and Mary A. C. Mayer, share and share alike," the children in question and Mary A. C. Mayer, took *per stirpes*, and not *per capita*. See also *White* v. *Holland*, 92 Ga. 216, 18 S. E. 17. It will be thus seen that the trend of judicial thought in this state has been, from the time this court was organized, in favor of applying the rule that the words "heirs," "heirs at law," or even "children," under certain circumstances, would require a *per stirpes* distribution, unless the contrary intention is plainly manifest under the terms of the will.

It is contended by the learned counsel for the defendant in error, and it was so held by the able judge whose decision is under review, that there is no authoritative ruling by this court on the subject; it being insisted that what is said in the case of *Sharman* v. *Jackson*, *Fraser* v. *Dillon*, as well as in others, was simply *dicta* of the judges writing the opinions. Be this as it may, the reasoning of the judges in the cases decided in this state in favor of the rule just referred to, and the reasoning of the judges in the cases decided in other states above cited, is more satisfactory to us than that which is found in the cases holding the contrary. Even if it can be conclusively shown that the decisions above cited from this court are not authoritative rulings, we feel satisfied in following what has been said in those and other cases for the reason that the line of judicial thought in this state seems to be almost unbroken in favor of applying the rule which we adopt in this case. The case of *Almand* v. *Whitaker*, 113 Ga. 889, 39 S. E. 395, is not in conflict with this line, for the reason that the will in that case named the individuals to whom the property was to go. It was held in the case of *Randolph* v. *Bond*, 12 Ga. 362, cited above, that under the will then being dealt with the distribution was *per stirpes*, even though the persons who were to take were designated by name. We are not now concerned to ascertain whether these two cases are in conflict with each other, but we are clear that no conflict exists between the *Almand Case* and the present case. We therefore reach the conclusion in the present case that, as there is nothing in the item of the will except the expression "equal shares" to qualify the words "heirs at law," it is not plainly manifest from the terms of the item that it was the intention of the testatrix that her heirs at law should take *per capita* instead of *per stirpes*, as they would have taken under the statute of distributions if she had died intestate. It is insisted that because the testatrix in express terms provided for a distribution *per stirpes* in other items of the will, and did not in terms provide for such a distribution in the item under consideration, she intended the distribution under that item to be *per capita*. We do not think this reasoning is sound. The

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presumption is that the testatrix intended the statute of distributions to prevail wherever she failed to provide to the contrary, and there is nothing in the item now under consideration which indicates an intention on her part that the statute should not be looked to both for the purpose of ascertaining the persons who are to take, and the interest of each therein. Merely because in other items she expressly provided that those taking thereunder should not take *per capita* does not mean that under the item now under consideration those taking should take *per capita*.

Judgment reversed.

All the Justices concur, except **Lewis**, J., absent on account of sickness.

N. J. STEELE, Admr., etc., of J. R. Steele, Deceased, *Plff. in Err.*,
v.
Ima GATLIN.

(.....Ga.....)

*1. **A policy of life insurance is a chose in action** even before the death of the insured.

2. **To vest the legal title to a policy of life insurance in an assignee,** it is essential that the assignment should be in writing.

3. **A verbal assignment of a policy of life insurance** by the insured, accompanied by words indicating an intention to give, and by a delivery of the policy, does not constitute a complete gift; and in such a case a court of equity will not interfere, at the instance of the alleged donee, to complete the gift, when she has not acted to her injury, or incurred expense, on the faith of the incomplete gift.

(July 19, 1902.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to establish title to certain insurance policies. *Reversed.*

The facts are stated in the opinion.

Messrs. **Arnold & Arnold,** for plaintiff in error:

There should be a definite, written contract, assigning these choses in action, and making this new insurance contract, before the law will give effect to the transaction. This assignment may be looked at in two lights, (1) as the assignment of a chose in action; (2) as the creation of a new contract of insurance. In either aspect, the law would require the contract to be in writing.

Turk v. *Cook*, 63 Ga. 681; *Planters' Bank* v. *Prater*, 64 Ga. 613; *Union Fraternal League* v. *Walton*, 109 Ga. 3, 46 L. R. A. 424, 34 S. E. 317.

Life-insurance contracts in Georgia are governed by the same rules as fire-insurance contracts, as to the requirement of a writing.

Roberts v. *Germania F. Ins. Co.* 71 Ga. 478; *Thomas* v. *Funkhouser*, 91 Ga. 478, 18 S. E. 312; *Simonton* v. *Liverpool, L. & G. Ins. Co.* 51 Ga. 76; Code, §§ 2089, 2117; *Mitchell* v. *Universal L. Ins. Co.* 54 Ga. 289; *St. Paul F. & M. Ins. Co.* v. *Brunswick Grocery Co.* 113 Ga. 786, 39 S. E. 483; *Nally* v. *Nally*, 74 Ga. 669, 58 Am. Rep. 458.

In every case where a verbal assignment was upheld it will be found that there was a performance of some service upon the faith of the contract, or the payment of money, or that the verbal assignment was part of an entire contract, and that other parts of it had been performed, or that the assignee had, upon the faith of the assignment, so changed his status as that serious injury would be done if the assignment were not given effect, or that the case was one where the general principles of estoppel, because of part performance or change of status, applied.

1 Phillips, Ins. § 80; *Chicago Bldg. & Mfg. Co.* v. *Barry* (Tenn. Ch.) 52 S. W. 458; 1 Bacon, Ben. Soc. 297, 298; 1 Biddle, Ins. § 273; *Malone's Estate*, 9 Ins. L. J. 767.

Mr. **C. T. Ladson** for defendant in error.

Cobb, J., delivered the opinion of the court:

Mrs. Gatlin brought suit against N. J. Steele as administrator of the estate of J. R. Steele; the allegations of the petition being, in substance, as follows: The estate of J. R. Steele is solvent, there being no creditors of the same, and his heirs at law are brothers and children of deceased brothers and children of a deceased sister, the plaintiff being one of the latter. The decedent, during his lifetime, had procured two policies of insurance upon his life in a named association, payable to his "estate or his lawful heirs;" copies of these policies being attached to the petition as exhibits. The association was a mutual benefit and assessment association, and by its constitution and by-laws the insured had a right, upon compliance with certain requirements to change the name of the beneficiaries at pleasure, but no change was ever made in accordance with the rules of the association. Three years before the death of the insured he "verbally assigned" the policies

*Headnotes by COBB, J.

NOTE.—As to sufficiency of possession by donee of chose in action see also, in this series, First Nat. Bank v. Holland (Va.) 55 L. R. A. 155.

As to assignability of life policy generally, see *note* to Johnson v. Alexander (Ind.) 9 L. R. A. 660; also Rittler v. Smith (Md.) 2 L. R. A. 844; Roller v. Beam (Va.) 6 L. R. A. 136; Milner v. Bowman (Ind.) 5 L. R. A. 95; Hewlett v. Home for Incurables (Md.) 17 L. R. A. 447; Mutual Reserve Fund Life Asso. v. Hurst (Md.) 20 L. R. A. 761; Hays v. Lapeyre (La.) 35 L. R. A. 647; Steinback v. Diepenbrock (N. Y.) 44 L. R. A. 417; Tate v. Commercial Bldg. Asso. (Va.) 45 L. R. A. 243; and Chamberlain v. Butler (Neb.) 54 L. R. A. 338.

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to the plaintiff, and delivered the same to her for her exclusive benefit, saying at the time that he wanted her to have the money that would be paid thereon, that he would always keep the dues paid up as long as he lived, and that the policies would be to plaintiff "as good as gold." Plaintiff accepted the gift, and received the policies from her uncle's own hands, who told her to take good care of them, as the money paid thereunder would help support plaintiff and her children. Plaintiff kept the policies as long as her uncle lived, and until they were surrendered to the association after his death. Her uncle often spoke of having given the policies to her, after the delivery above referred to. Upon being asked if it was necessary "to put the policies in petitioner's name," he said no written assignment was necessary to make the gift legal and binding, nor was it necessary that plaintiff's name should be placed on the policies, or upon the books of the association; that he had previously caused other policies which he held in the association, and which stood in the name of another beneficiary, to be changed "to his estate and his heirs," so that he could at any time, by mere gift and manual delivery, give and verbally assign the same to whomsoever he might select, without the necessity of changing the beneficiaries upon the books of the association. For years before and since her uncle verbally assigned to her the policies, plaintiff had rendered to him many acts of kindly service, and he visited her home, and in many ways showed his affection for her. Upon the death of her uncle, plaintiff and defendant each made proofs of loss under the policies. To avoid delay in collecting the amount due from the association, plaintiff and defendant, without waiving any of their legal or equitable rights, entered into an agreement to collect the amount from the association, and abide by the decision of the courts as to who owned the money. Under this agreement, the money was collected from the association and placed in a solvent bank, subject to the joint check of plaintiff and defendant; the bank acting as a stakeholder until there could be a final judgment and decree of a court having jurisdiction to settle the controversy. Plaintiff avers that she is the rightful and equitable owner of the fund in controversy; and she prays for a judgment and decree to this effect, and for general relief. To this petition, the defendant filed a demurrer upon various grounds, among them being that the petition set forth no ground for relief, legal or equitable; that no consideration is stated for the assignment of the policies to plaintiff; that the petition shows upon its face that the assignment relied on was verbal, and under the law the assignment would not be valid unless it was in writing. The court overruled the demurrer, and the defendant excepted.

A policy of life insurance is, after the death of the insured, unquestionably a chose in action, it being then simply a promise to pay money. It has been held in numerous cases that a policy of life insurance, even before the death of the insured, is a chose in action. See *Ex parte Ibbetson*, L. R. 8 Ch. Div. 519; *Harley* v. *Heist*, 86 Ind. 196, 44 Am. Rep. 285; *Bushnell* v. *Bushnell*, 92 Ind. 503; *Hutson* v. *Merrifield*, 51 Ind. 24, 19 Am. Rep. 722; *New York L. Ins. Co.* v. *Flack*, 3 Md. 341, 56 Am. Dec. 742; *Ionia County Sav. Bank* v. *McLean*, 84 Mich. 625, 48 N. W. 159; *Palmer* v. *Merrill*, 6 Cush. 282, 52 Am. Dec. 782.

A policy of life insurance, being a chose in action arising upon a contract, may, under the provisions of our Code, be assigned so as to vest the title in the assignee. Civil Code, § 3077. But such assignment must be in writing. *Turk* v. *Cook*, 63 Ga. 681; *Planters' Bank* v. *Prater*, 64 Ga. 613; *Hartford F. Ins. Co.* v. *Amos*, 98 Ga. 533, 534, 25 S. E. 575, and cases cited. The Code provisions in reference to fire insurance are, wherever applicable, equally the law of life insurance. Civil Code, § 2117. In *St. Paul F. & M. Ins. Co.* v. *Brunswick Grocery Co.* 113 Ga. 786, 39 S. E. 483, it was held that an assignment of a policy of fire insurance must be in writing. In one opinion, Mr. Justice Fish says: "The Civil Code, § 2089, requires that a contract of fire insurance must be in writing. As an assignment of an insurance policy with the assent of the company is a new contract of insurance between it and the assignee, it must, under the provisions of this section of the Code, be in writing." In the case of *Hartford F. Ins. Co.* v. *Amos*, 98 Ga. 533, 534, 25 S. E. 575, and in the case of *National F. Ins. Co.* v. *Grace*, 106 Ga. 264, 32 S. E. 100, it was held that, in order to transfer the legal title to a policy of fire insurance, the assignment must be in writing. As the assignment of a policy of fire insurance, in order to be valid, must be in writing, so, under the provisions of our Code making the principles relating to fire insurance, wherever applicable, apply equally to the law of life insurance, an assignment of a policy of life insurance must be in writing in order to vest the title in the person claiming to be the assignee. The assignment of the policies in the present case not having been in writing, but merely verbal, the plaintiff did not acquire title to the same, and hence could not maintain a suit in her own name against the association upon the policies. It is said, though, that, even if it be true that if the association had not paid the amount of the policies to the bank, to be held subject to the rights of the plaintiff and defendant, the plaintiff could not have maintained in her own name an action on the policies, still, under the facts alleged in the petition, the plaintiff became in equity the owner of the policies: and, while the legal title to the same would be in the administrator of the estate of the insured, the plaintiff would be entitled to use the name of the administrator in order to enforce her claim against the association as the equitable owner of the policies. If the plaintiff had been a purchaser of the policies for value, she would in equity be the owner of the same, and would be entitled to

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use the name of the administrator for the purpose of asserting her rights. The verbal assignment of the policies to the plaintiff, although followed by an actual delivery thereof, was entirely without any valuable consideration. The transaction would not be complete as a gift, under the law of this state, unless the assignment was in writing; and it is too well settled now to admit of controversy, at least in this state, that equity will not interfere, at the instance of a volunteer, for the mere purpose of making perfect a gift which was incomplete because lacking in some of the essentials required by law.

There are cases holding that bonds and other negotiable obligations for the payment of money may be the subject of a valid gift, and that a delivery of the obligation to the donee without written assignment, but with a clear and manifest intention to pass the title, is sufficient to satisfy the rule requiring delivery of the thing given; and this rule has been applied to a life insurance policy. See *Travelers' Ins. Co.* v. *Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; 3 Joyce, Ins. § 2326; 1 Bacon, Ben. Soc. new ed. § 297. Even if, in those jurisdictions where the law does not require the assignment of a life insurance policy to be in writing, a verbal assignment, followed by actual delivery of the policy and words indicating an intention to give, would make a complete gift, certainly in this state, where the law requires the assignment to be in writing, a gift which was not a substantial compliance with the statute would not have the effect to vest the title, either legal or equitable, in a mere volunteer. Mr. Justice Hall, in *Nally* v. *Nally*, 74 Ga. 669, 673, 58 Am. Rep. 458, thus states the rule governing the case of a volunteer who appeals to a court of equity: "Equity never interferes in favor of volunteers except where the contract is actually executed (Code, § 3116 [Civil Code, § 3972]), and will never decree the performance of a voluntary agreement, or merely gratuitous promise, unless the volunteer has gone into possession, and upon the faith of the agreement has incurred expense in making improvements of the property donated, or has done something of a similar nature which would render it inequitable upon the part of the donor not to carry out the contract. . . . The donee must not be placed in a worse condition than she was before the gift was tendered." In the present case, the plaintiff is in exactly the condition she was in at the time of the verbal assignment; she has done nothing to change her position; and nothing in the allegations of her petition would authorize a court of equity to interfere in her behalf. She failed to secure a legal title to the policies when she relied upon a verbal transfer, and this transfer, although accompanied by a delivery of the policies and words indicating an intention to give, will not make her the equitable owner, when she has done nothing upon the faith of the transfer which would make it inequitable for the heirs or legal representatives of the insured to urge now the invalidity of the transfer on account of the failure of the parties to comply with the rule of law requiring such an assignment to be in writing. There is nothing in the case of *Nally* v. *Nally*, 74 Ga. 669, 673, 58 Am. Rep. 458, to conflict with the ruling now made. The contest there was between a sister who was the named beneficiary in a policy of life insurance as originally issued, and the wife of the insured, who had married him upon the faith of a promise that the policy should be so changed as to make her the beneficiary. This change was authorized, by the terms of the policy, without the consent of the beneficiary named therein. The company had agreed to make the change, but had neglected to do so. It was held that as the sister was a mere volunteer, and the wife was a purchaser for value, marriage being a valuable consideration, the wife was to be preferred, and was entitled to the proceeds of the policy. The court erred in overruling the demurrer.

Judgment reversed.

All the Justices concur, except **Lewis, J.**, absent on account of sickness.

ILLINOIS SUPREME COURT.

Digory W. BAKER *et al., Appts.*,
v.
Aaron H. McCLURG *et al.*

(198 Ill. 28.)

1. **The ultimate purpose of a building erected for the use of tenants** who intend to carry on the bakery business is not shown to be limited to that business, so that ovens and fixtures placed in it by the tenants cannot be removed, by the fact that openings are left in the floors through which to extend the ovens, if by closing such openings the building would be as well adapted for any of the ordinary uses of buildings of its general character as for a bakery.

2. **A building erected for a tenant intending to carry on the bakery business,** who erects an oven through openings left in the floors to receive it, will not be injured by removal of the oven, if it will be

NOTE.—As to what are fixtures, as between landlord and tenant, see also cases in *note* to Overman v. Sasser (N. C.) 10 L. R. A. 723; also Wright v. DuBignon (Ga.) 57 L. R. A. 669.

As to right of tenant to remove fixtures on leased premises, see Collamore v. Gillis (Mass.) 5 L. R. A. 150, and *note;* Friedlander v. Hewitt (Neb.) 9 L. R. A. 700, and *note;* Sanitary Dist. v. Cook (Ill.) 39 L. R. A. 369; and Bass v. Metropolitan West Side Elev. R. Co. (C. C. App. 7th C.) 39 L. R. A. 711.

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left by such removal in the same condition as it was when first erected.

3. **The removal of ovens placed by a tenant on leased premises** is not prevented by the fact that to effect it the bricks and iron would have to be removed piece by piece, thereby destroying for the time their character as ovens.

4. **Ovens, engine boilers, and shafting** placed by a tenant in a leased building for carrying on the bakery business, with the intention of removing them, are removable as trade fixtures.

5. **The surrender by a partnership of a lease before the expiration of the term,** and the acceptance of a re-execution by one of the partners for the balance of the term upon the same conditions as the original lease, for the purpose of releasing the other from further liability thereon, are not sufficient to destroy title to the trade fixtures, although they are not reserved in the new lease.

(June 19, 1902.)

APPEAL by plaintiffs from a judgment of the Branch Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendants in an action brought to restrain the removal of alleged fixtures from plaintiffs' building. *Affirmed.*

The facts are stated in the opinion of the Branch Appellate Court, which was as follows:

Appellants are owners of premises on Green street, Chicago, upon which, pursuant to an agreement in writing made in October, 1890, they erected a two-story and basement brick building, and by a written instrument dated January 15, 1891, leased the same to appellee McClurg and one George C. Aldrich, at that time composing the firm of McClurg & Aldrich. The building was erected and was rented to be used for a bakery. Upon taking possession under their lease, said McClurg & Aldrich proceeded to erect three ovens in the building, and also placed therein an engine, boiler, shafting, pulleys, wheels, etc. The principal oven, called a "reel oven," extended from foundations laid in the earth below the basement floor, through the first and second stories, nearly to the roof of the building. Square openings had been left in the several floors, including the cement floor of basement, when the building was erected, pursuant to the plans and specifications agreed upon between the parties, in order to enable said oven to be so built. This oven was built by the tenants upon foundations of its own, contiguous, but not attached, to the north wall of the building. These foundations were laid (necessarily, because of the projection of certain of the footings of the building's foundations within the space to be used for the purpose) partly upon said footings; the rest of the oven's foundations being laid upon or within the earth. Upon said foundations an arch was erected, on which the oven stands. The other two ovens erected by the tenants, known, respectively, as the "Fish oven" and the "Peterson oven," rest, likewise, upon separate brick foundations, in part resting also upon the footings of the building wall, but do not extend quite to the basement ceiling. The boiler is inclosed in a brick masonry jacket, separate from the brick wall of the boiler room in which it stands; said room being outside of, and connected with, the main building.

The lease to McClurg & Aldrich provided for a term of ten years,—from January 15, 1891, until January 14, 1901. A new lease was, however, made for the balance of the same term by mutual agreement, December 2, 1891, owing to the withdrawal of Aldrich from said firm, and his desire to be released from liability. It was executed by and between appellants and appellee McClurg alone. Except that the lessee is McClurg alone, the second lease is in substance and effect practically identical with the original. It contains, however, one additional provision, *viz.*, a consent of the lessors to its assignment to the McClurg Cracker Company. The business of McClurg and the McClurg Cracker Company, together with the leasehold interest, has since been transferred to the National Biscuit Company, but no formal assignment of the lease was made by McClurg.

Just before the expiration of the end of the term the appellees were commencing to remove the ovens and fixtures, when appellants filed a bill to restrain such removal, and obtained an interlocutory injunction. Upon hearing, that injunction was dissolved, and the bill dismissed. From this decree the present appeal is taken.

The question to be determined is whether the appellees are entitled to remove the ovens, engine, and other fixtures erected by them upon the leased premises, and claimed as trade fixtures.

It is contended in behalf of appellants: First, that the building upon the premises leased to McClurg & Aldrich January 15, 1891, was erected and designed as a bakery, and that the ovens were erected by the tenants in pursuance of the same purpose and design, and became, therefore, a part thereof; second, that the removal of the ovens would result in material injury to the premises; third, that such removal would destroy their identity as ovens, and their character as fixtures. And it is urged the law is that fixtures are not removable where they are placed in a building to carry out the design and purpose for which the building to which they are attached was erected, or to permanently increase its value for occupation, nor where their removal would injure the freehold, or destroy their identity as fixtures. In the second place, it is contended that, when the original lease to McClurg & Aldrich was canceled, appellee McClurg took a new lease of the same premises, without reserving therein any right to remove the fixtures in controversy, and that he thereby lost the right to remove them, even if such right had before existed.

The facts in the case are mainly settled by stipulation. There are, however, accord-

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ing to appellants' counsel, two controverted questions of fact, *viz.*, whether the ovens were erected to carry out the purposes for which the building itself was designed, and what, if any, injury would result to the premises from their removal. But the alleged controversy is, rather, What conclusions are to be drawn from conceded facts? than as to the facts themselves. It is stipulated the building was erected in accordance with plans prepared and submitted to the lessees, McClurg & Aldrich, and by them approved as suitable for the uses to which they were intending to put it. They intended to, and did, use it as a bakery, and with that intention and for that purpose erected the ovens in question. So far, therefore, as the building was planned for the purpose for which the tenants intended to use it, both building and ovens were constructed with the same immediate end in view. But it does not necessarily follow from that fact that the ovens and trade fixtures became thereby a permanent part of the building, or so entered into and influenced its character and construction that without them the ultimate design and purpose of the building would be frustrated. It is doubtless true that they were put in for the same purpose for which the building itself was intended during the term of the lease, but that fact is not enough to justify the conclusion that the building was designed and intended for a bakery, and nothing else, after the expiration of the term, and that it is unsuited to other uses. The evidence does not so indicate. The only material difference of construction distinguishing it from other buildings designed for any business requiring the use of machinery appears to be that openings were left in the floors for the erection by the tenants of the "reel oven." With these closed, we find in the evidence no reason to suppose that the building was not designed and is not adapted for any of the ordinary uses of buildings of its general character as well as for a bakery. If so, the bakery fixtures are not irremovable because of the purpose for which the building was erected. Neither did they enter into its ultimate design and purpose to any greater extent than ordinary trade fixtures put in by a tenant, and suited to his special business. Nor is it apparent that the building itself will be injured by their removal. It is true, the removal of the reel oven would leave the original openings in the two floors, as well as in the cement floor of the basement. But these were left when the building was erected, and if they should be filled in by the tenants to correspond with the rest of the building, as may be the latter's duty in equitable compliance with their covenants, it is difficult to see wherein the freehold would be injured. It is also true, doubtless, that the brick structure of the ovens, when removed, would have to be taken down brick by brick; but this need not be injurious to the building or premises if the work should be properly done. We conclude, therefore, that the facts do not justify the conclusion that the ovens became necessarily a part of the building by reason of the purposes for which both building and ovens were constructed, nor that the removal of the fixtures would necessarily injure the freehold.

But it is said that fixtures are not removable if by removing them their identity and character as fixtures are destroyed. That taking down the ovens brick by brick, and removing the iron of the structure piece by piece, would change the form of the original structures for the time being, is made clear by the evidence, and is obvious. It could never again be precisely the same structure of brick and mortar as before, but the iron work would doubtless retain its identity, even though taken down in pieces and subsequently re-erected; and there is evidence tending to show that the ovens can be profitably removed and re-erected by the tenant.

The ovens in question were, when erected by the lessees, as the evidence tends to show, intended for trade fixtures. This intention is clearly indicated by the conduct of the tenants. The ovens were not attached to, nor made a part of the structure of, the building. They were built within it, but not of it. They were not joined to its walls nor to its foundations. These facts of construction certainly tend to sustain the contention of appellees that it was the intention at the time they were put up to have them removable. There is other evidence of such intention and understanding afforded by the bills of sale transferring the machinery, fixtures, ovens, etc., from Aldrich to McClurg, from McClurg to the cracker company, and from the latter to the biscuit company. That this was also the view of the landlords is, we think, apparent from the conduct of the latter. One of the appellants testifies to having visited the premises shortly before the expiration of the term of the leases, looking the fixtures all over, including the engine, boiler, shaftings, and steam-heating plant, and asking appellee McClurg "to put a price on it, and also to include the ovens." He states that McClurg told him he would not include the ovens, and that afterward he (appellant) "again asked him to throw in the ovens. We would buy the whole thing." Whatever may be the effect of this testimony in other respects, it does tend to show an understanding on the part of both parties at that time that the fixtures were the property of appellees, and removable. There is no evidence of any other intention or understanding during the whole of the ten-year term.

There is some conflict of authorities as to whether fixtures are removable when by removal they are liable to suffer substantial injury. In *Collamore* v. *Gillis*, 149 Mass. 578, 5 L. R. A. 150, 22 N. E. 46, it is said that, "in determining whether an addition by a tenant to a leased building is removable or not by him during his term, the chief element to be considered is the mode of its annexation, and whether it can be re-

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moved without substantial injury to the building or to itself. The intention with which it was put there, though often an element to be considered, is of secondary importance. . . . We are not inclined to extend the right of removal so far as to include a thing which cannot be severed from the realty without being destroyed or reduced to a mere mass of crude materials." But in *Hopewell Mills* v. *Taunton Sav. Bank*, 150 Mass. 519, 6 L. R. A. 249, 23 N. E. 327, it is said: "The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place." The rule in Illinois is liberal in favor of the tenant. As between him and the landlord, removable trade fixtures may include all erections made for the purposes of trade during tenancy "which he may have attached to the freehold while in possession, such as soap vats, fire engines to work a colliery, pans used in manufacturing salt, brew-houses, furnaces . . . greenhouses, hothouses, erected by nurserymen and gardeners." *Moore* v. *Smith*, 24 Ill. 513. Ordinarily, such things cannot be removed without injury to the material composing them. No reason is perceived why, in the nature of things, an exception should be made in the case of ovens, engine, boiler, and other fixtures, such as those here in controversy. It has been held that a two-story house, with brick chimney and foundations, was so removable. *Van Ness* v. *Pacard*, 2 Pet. 137, 7 L. ed. 374. In *Wiggins Ferry Co.* v. *Ohio & M. R. Co.* 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188, it is said: "Indeed, it is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term." In the case of *Moore* v. *Wood*, 12 Abb. Pr. 393, it was held that a brick chimney extending through the roof, and with its foundations 3 feet in the earth, erected for trade or manufacturing purposes by the tenant, might be removed. The court says: "It was not movable without taking it down, and was in every respect a ponderous structure. Nevertheless, under the circumstances of the present case, it was not a fixture. The rigor of the ancient law of fixtures has yielded, and must continue to yield, to the contingencies of modern times. The law must take notice of trade and manufactures and their wants, and afford to them adequate and appropriate protection."

It is contended by appellees that the intention with which the fixtures were put in place, as shown by the evidence in the case before us, is the chief test as to whether they are removable by the tenant before the expiration of his lease. This is conceded by appellants to be the rule if such fixtures may be removed without injury to the freehold or themselves; but, as we have said, the evidence fails to sustain appellants' claim that their removal would in this case necessarily injure the freehold, and authorities above referred to are to the effect that the fact that its removal requires the taking to pieces of a fixture, such as a brick chimney or a brick oven, is not conclusive against the tenant's right. Upon principle, it would seem that the mere fact that its removal may cause some injury to the fixture itself, though not injuring the freehold, ought not to destroy the right. The landlord is not affected by an injury done by the tenant to the latter's own property. It may still be valuable to the tenant, even though he be put to extra expense to repair or rebuild; and if, when the trade fixture was erected, the tenant, by his conduct, manifested the intention to retain ownership and remove it at the end of the lease, it appears that such intention should control, even if such removal necessitates a reconstruction of the fixture. Ewell, Fixtures, p. 96.

Identity is not necessarily lost by demolition. It is said in *Hopewell Mills* v. *Taunton Sav. Bank*, 150 Mass. 522, 6 L. R. A. 249, 23 N. E. 330, before referred to: "The intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act." In this state the intention so manifested is regarded as the principal test to determine the right of removal. In *Sword* v. *Low*, 122 Ill. 487, 13 N. E. 826, it is said: "To determine the irremovable character of a fixture, three tests are by the modern authorities applied, *viz.*: 'First, actual annexation to the realty or something appurtenant thereto; second, application to the use or purpose to which that part of the realty with which it is connected is appropriated; and, third, the intention of the parties making the annexation to make a permanent accession to the freehold.'" Here no such intention appears, but the contrary. It is further said in that case: "It is apparent from the authorities that, however permanently attached, if removable without material injury, the intention, to be inferred from the circumstances, and the relation of the parties to each other and to the realty, or as shown by evidence, will be of controlling and decisive importance." To the same effect are *Fifield* v. *Farmers' Nat. Bank*, 148 Ill. 163, 35 N. E. 802; *Hewitt* v. *General Electric Co.* 164 Ill. 420, 45 N. E. 725; *Kelly* v. *Austin*, 46 Ill. 156, 92 Am. Dec. 243.

In the present case the fixtures in controversy, being so removable, and having been erected with that intention, were subject to be taken away by the tenant, unless, as is contended by appellants, the right to removal was lost by acceptance, after the erection of the fixtures, of a new lease which contains no express reservation of the right to remove. In *Sanitary Dist.* v. *Cook*, 169 Ill. 184, 39 L. R. A. 369, 48 N. E. 461, it is said: "But the great weight of authority seems to be that where at the expiration of a lease, during which trade fixtures have been erected on the premises by the tenant, a new lease is taken of the same premises, containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises, and without recog-

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nizing the right to remove them, such fixtures, erected under the former lease, cannot be removed by the tenant during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous." And it is further said: "The reason given is because the fixtures set up on the premises at the time of the lease are part of the thing demised, and the tenant, by accepting a lease of the kind without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterward estopped from denying."

Applying the foregoing rule to the case at bar, the only question we deem it necessary to consider is whether, in fact or law, the alleged cancellation and surrender of the original lease to McClurg & Aldrich, and the execution of a new instrument to McClurg alone, constituted a new lease of the premises, including the fixtures in dispute. It will be noted that this transaction occurred, not at the expiration of the original lease, but during its term, which continued to run on as before. All that was in reality done was just what was intended to be done, *viz.*, to release Aldrich from liability as a lessee thereunder, in accordance with his wish to be relieved because of his retirement from the firm. It appears that upon one copy of the original instrument the appellants wrote the words: "Canceled December 2, 1891. D. W. & H. Baker,"—and handed said copy to Aldrich, the retiring partner and lessee, but retained in their possession the other copy or duplicate, which was uncanceled and unsurrendered. It is true that a new lease was made out and executed by McClurg alone, but it was for the balance, only, of the same term, at the same rental, payable in monthly instalments of the same amount, at the same place, to the same parties. It was but a reiteration of the former lease. It contained in addition thereto a permission for assignment by McClurg to a corporation,—the McClurg Cracker Company,—which he seems to have been intending to organize, or had organized, to take in the business; but this certainly did not make it a new lease. It is evident that there was in this transaction no intention to create any new or different liability on the part of McClurg, the lessee. The purpose, as shown by what was done, was to release Aldrich; and what was done was, in legal effect, no more than if an indorsement had been made on the original instrument to the same effect. We are compelled to the conclusion that the parties did not intend to, and did not in fact, make any new or additional demise or create any new obligation for the tenant, and that the lessee, McClurg, did not intend to, and did not in fact, accept any new obligation,—in other words, that the transaction did not amount to a new leasing of the demised premises, and had no effect whatever upon the ownership of the trade fixtures in controversy, and the right to their removal.

The judgment of the circuit court must be affirmed.

Mr. **Edward W. Cullen** for appellants.
Messrs. **Green, Honore, & Peters** and **Peck, Miller, & Starr** for appellees.

Per Curiam:
We concur in the views expressed in the foregoing opinion of the Branch Appellate Court, which opinion will be adopted by this court, and the *judgment will be affirmed.*

Rehearing denied October 8, 1902.

LOUISIANA SUPREME COURT.

SUCCESSION OF Edward B. BENTON, Deceased.

(106 La. 494.)

***1. Where the conduct of the husband justifies the wife in leaving him,** and furnishes grounds for divorce, she is necessarily authorized to acquire a separate domicil, and the law of the domicil so acquired will determine her marital status. Hence, a judgment of divorce, rendered by a court of a state in which such domicil is acquired, and valid where rendered, is valid in other jurisdictions, without regard to the place of marriage, the offense, or the domicil of the husband, and the latter may be brought into court, by publication or otherwise, as provided by the *lex fori.*

2. It is settled jurisprudence in this state that a marriage will not be dissolved on grounds antedating the estab-

*Headnotes by MONROE, J.

NOTE.—*Conflict of laws on subject of divorce.*

I. *Introduction,* 136.
II. *What law determines right to divorce,* 141.
III. *Jurisdiction of subject-matter.*
a. *Domicil.*
1. *General rule,* 142.
2 *When neither party domiciled or permanently residing at forum,* 143.
3. *Domicil of wife for purpose of bringing suit,* 146.
4. *Domicil or residence of defendant as condition of relief on cross bill,* 149.
III.—continued.
b. *Place of marriage and of original matrimonial domicil,* 151.
c. *Place of marital offense,* 154.
d. *Time of marital offense relatively to acquisition of domicil at forum,* 155.
IV. *Jurisdiction of the person or of the res: foreign decrees upon constructive service.*
a. *In general,* 162.
b. *Decrees rendered upon constructive service.*
1. *When defendant a resident of state where rendered.*
(a) *In general,* 162.

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lishment here of the marital domicil; but it does not follow that this court will not recognize the validity of a divorce granted upon such grounds in another state.

3. **In such a case, the decree of divorce is open to attack** upon questions of jurisdiction, among which is good faith as to the acquisition of domicil. But where, in such decree, all necessary facts are found, it presents upon its face no intrinsic nullity, and will serve as a basis for a presumption of good faith with respect to a subsequent marriage.

4. **A dative executrix should deposit the funds coming into her hands in a bank** established in the parish where such succession is opened, which pays interest on deposits, if there is such a bank, and, if there is no such bank, she should deposit such funds in a solvent bank in such parish which pays no interest; and if she fails so to do, and fails to file annual accounts, and pays out such funds without authority of the court, for matters in which the succession is not concerned, she should be destituted of her office.

5. **The fees and expenses of attorneys, and the expense of litigation between different heirs or claimants,** as to their respective rights, do not constitute general charges against the succession.

6. **It being shown that an opponent had originally been employed by decedent as housekeeper,** but that, in the course of time, there had ceased to be any question of wages between them, and that she and her children and grandchildren were, equally with the decedent, the beneficiaries of the home which he provided and which she made comfortable, and that the decedent further provided for them all in his will, a claim for years of back wages and for nursing during last illness was properly rejected.

7. **It appearing in this case that there**

IV. b, 1—continued.
(b) *Domicil of wife as defendant*, 163.
2. *When defendant a nonresident.*
(a) *Validity, and effect on status, of decree in state where rendered*, 165.
(b) *Validity, and effect on status, of decree in other states.*
(1) *Doctrine that decree is entitled to recognition and determines status in all states*, 167.
(2) *Jurisdictions in which foregoing doctrine is denied, or not clearly adopted*, 168.
V. *Custody of children when international elements involved*, 177.
VI. *Effect upon property rights of divorce involving international elements.*
a. *Alimony.*
1. *Award of, upon constructive service.*
(a) *Against resident*, 178.
(b) *Against nonresident*, 178.
2. *Enforcing award of, in another state*, 178.
3. *Effect of divorce in one state or country upon right of action for alimony in another*, 180.
b. *Dower.*
1. *When divorce obtained by husband*, 181.
2. *When divorce obtained by wife*, 182.
c. *Other property rights*, 183.
VII. *Impeaching decree granted in other state.*
a. *On jurisdictional facts*, 183.
b. *On the merits; fraud*, 186.
VIII. *Suits for same cause in different jurisdictions*, 187.

As to conflict of laws respecting right of guilty party to remarry, see *note* to Hernandez's Succession (La.) 24 L. R. A. 831; and *note* to Hills v. State (Neb.) 57 L. R. A. 155; also State use of Newman v. Kimbrough (Tenn.) 52 L. R. A. 668.

I. *Introduction.*

It must be remembered that, subject to constitutional limitations, all principles of international or interstate law on the subject of divorce, like those on any other subject, may be, and in fact often have been, utterly ignored or repudiated in framing the legislation of a particular state or country. There can be no question but that in case of a conflict between a statute and a principle of international law, however fundamental the latter may be, the former will prevail within the jurisdiction in which it was enacted, unless the latter has been expressly or impliedly incorporated in the organic law. So, undoubtedly, a rule of law contrary to the generally accepted principles of international law may be established for a particular jurisdiction by judicial decision without the aid of statute. In an actual case, therefore, the first question is whether the legislature or the courts of the forum have adopted any distinctive rule on the subject. If so, provided the rule is clearly defined, and is subject to no constitutional objection, there is no necessity for the courts of that jurisdiction to resort to the principles of international law.

This note is not concerned with the question as to the construction of the statutes of a particular jurisdiction, or as to the application of special judicial rules adopted in that jurisdiction, assuming that they are constitutional, except so far as such construction or application may be determined, or influenced, by the principles of international law. When, however, guided by such distinctive rule, the courts of that jurisdiction have decreed a divorce, the courts of another jurisdiction in which such divorce comes in question may subject it to the test of the principles of international law, and give it effect or not, according as it conforms to that test or not. At least, this is so as between two foreign countries, or a state and a foreign country. When, however, the question arises as between two states of the United States, it is not so clear on principle that the courts of one state may refuse to recognize and give effect to a decree of divorce rendered in another, which is valid according to the law of the latter, and does not offend any provision of the state or Federal Constitution, because it is deemed contrary to the principles of international law. The provision of the Federal Constitution (art. 4, § 1) requiring each state to give full faith and credit to the public acts, records, and judicial proceedings of every other, at least, puts it beyond the power of the courts of one state to apply the principles of international law to such a decree rendered in another, unless those principles go to the question of the jurisdiction of the court which rendered the decree.

It is well established, however, that that con-

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are conflicting claims with respect to the ownership of land, which derives its principal value from the timber on it; that the probability is that it will be denuded of such timber if allowed to remain, or to go into the possession of either of the claimants; and that the judge *a quo* has ordered the judicial sequestration of such land, and has refused an application to bond the same, —this court finds no reason for interfering with such ruling.

8. Nor, where a will has been probated, whereby the testator disposes of his entire estate, does this court discover any reason for reversing the ruling of the judge *a quo* in refusing to probate an alleged will of older date, which gives nothing which is not given in the will already probated.

On Rehearing.

†9. A marriage only putative produces civil effects, as relates to the party in good faith and his or her children.

10. Without determining that the marriage is valid, it is entitled to weight in determining the good faith of the wife or of the husband.

11. After the second marriage had been contracted apparently in good faith, those who have for years recognized its validity are scarcely in a position to be heard to have it decreed void, and the children of the marriage illegitimate and without the least rights.

12. The marriage, as relates to the daughter, is entitled to complete legal effect. As relates to the other parties concerned, the original opinion remains, as well as the decree.

(Blanchard, J., dissents.)

†Rehearing headnotes by BREAUX, J.

(May 6, 1901.)

stitutional provision does not apply to judgments rendered without jurisdiction; and it is clear, both upon principle and authority, that a court of one state may rightfully refuse to recognize a decree of divorce rendered by a court of another, if the latter did not have jurisdiction tested by its own Constitution and statutes, and by the Federal Constitution, so far as the latter is applicable. But the courts seem to have extended the exception to this constitutional provision still further, so as to include divorces which are deemed contrary to the principles of international law affecting jurisdiction in divorce, even assuming that the jurisdiction meets every test applicable to it when the validity of the divorce in the state where rendered is concerned. In other words, the courts seem to assume that there is one test of jurisdiction, drawn from the Constitution and laws of the state in which the decree is rendered, to be applied when the validity of the decree in that state is concerned, and another and additional test, drawn from the principles of international law, to be applied when its validity in another state is concerned. This appears to be the theory of the recent decision of the United States Supreme Court in Andrews v. Andrews, 187 U. S. —, 47 L. ed.—

Since a state court will voluntarily recognize a decree of divorce which conforms to its ideas of what the international test of jurisdiction requires, even if it was rendered in a foreign country and is, therefore, not within the "full faith and credit" provision, it might at first seem, upon the assumption of a double standard of jurisdiction as above explained, that the only effect of such provision (beyond making the decree conclusive, instead of merely prima facie, evidence on the merits) is to render compulsory what would otherwise be voluntary. But it will be observed that, even under the view that this constitutional provision contemplates an international or inter-state standard of jurisdiction as distinguished from a strictly infra-state standard, it operates to make a practically important distinction between decrees of divorce rendered in foreign countries and those rendered in other states, since in the latter case the question as to what the international or interstate test of jurisdiction requires becomes one of Federal cognizance, the determination of which by the United States Supreme Court is binding upon the state courts, so far as the recognition of divorces granted in other states is concerned; while in case of divorces granted in other countries each state may be guided by its own views on the subject. The last, indeed, is true, even of decrees rendered in other states, to the extent, and so long as, any particular question affecting jurisdiction from an international or interstate point of view remains undetermined by the United States Supreme Court. The full faith and credit provision, however, does not make the question of jurisdiction in a domestic suit one of Federal cognizance even when the suit involves international or interstate elements, and if the Federal Constitution can be brought to bear upon that question, it must be by virtue of some other provision.

It is obvious that the adoption of this double standard of jurisdiction, unless both standards are practically the same (a question that will be alluded to presently), necessarily involves the result that a court which admits that, within the state where the divorce was granted, the parties are lawfully divorced and are no longer husband and wife (not merely that the courts of that state will uphold the divorce, but that it is really valid when subjected to every test applicable to it when its validity in that state is concerned) will nevertheless hold them to be still man and wife as soon as they depart from that state; and that, too, without making any different finding as to jurisdictional facts. Indeed, under the theory of a double standard of jurisdiction the very court that refuses to recognize divorces granted in other states, under certain circumstances, because in violation of its views as to the requirements of jurisdiction from an international or interstate point of view, may itself assume jurisdiction under its own statutes to grant divorces under exactly the same circumstances,—and rightfully, too, unless both standards are necessarily the same. These consequences of a double jurisdictional test are not merely theoretical possibilities, but have become practical realities, in the conflict of views between the courts of different states, and, in some instances, between the legislature and the courts of the same state, as to the circumstances under which a court may properly assume jurisdiction in a divorce suit involving international or interstate elements. In view of the close relation sustained between the states and the constant migration of the inhabitants from one to another, the existence of these conditions implies numberless and bewildering complications of marital relations, involving, not only the parties to the divorce suit, but their children, and the children of marriages subsequently contracted by either. If these conditions cannot be otherwise avoided, there is an urgent necessity for an amendment of the Federal

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APPEAL by the heirs and legatees of Edward B. Benton, deceased, from a judgment of the Judicial District Court for the Parish of St. Tammany refusing to remove the executrix, to release certain sequestered property on bond, to probate a certain will, and approving an account of the executrix. *Reversed.*

The facts are stated in the opinions.

Messrs. **Stephen D. Ellis, Benjamin M. Miller,** and **Benjamin Rice Forman** for appellants.

Messrs. **Wickliffe & Falls, Stifft & Madison,** and **T. M. Burns** for appellee.

Monroe, J., delivered the opinion of the court:

Edward B. Benton, a resident of the parish of St. Tammany, died in New Orleans, June 4, 1897, leaving real and personal property in said parish and in the parish of Orleans. Upon June 7th following, his sister, Ella S. Benton, a resident of New York, presented to the district court of St. Tammany an instrument purporting to be her said brother's olographic last will, dated May 29, 1897, whereby, after certain particular legacies, the testator gives "the remaining disposable portion" of his estate to his two sisters, Ella S. and Charlotte E. Benton, and names the former as his executrix, without bond. This instrument was duly proved and ordered to be recorded and executed, and the proponent took the required oath and received letters testamentary. Upon June 28th a petition was presented to the court in the name of Mrs. Rachael Benton, in which it is alleged that the petitioner resides in New Orleans; that she was married to the decedent at Cairo,

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Constitution, not for the purpose of enabling Congress to enact a uniform law prescribing the causes of divorce, but to enable it to prescribe uniform jurisdictional tests applicable, whether it be a question of assuming jurisdiction in a domestic suit, or of recognizing divorces granted in other states.

But, is an amendment of the Constitution necessary to avoid the diversity of marital relations as affected by divorce? Is it not possible to accomplish such result by a proper application of existing constitutional provisions? It is obvious from what has already been said, that, assuming that a court which refuses to recognize a decree of divorce rendered in another state under certain circumstances is correct in its view as to the principle of international law affecting jurisdiction, the diversity of marital status results from its concession of the validity of the decree in the state where it was rendered, and the impossibility, if it be such, of applying the same principle of international law either directly or indirectly, to the question of the validity of the decree in the latter state.

But is such concession necessary, assuming that the court is right in its view that the decree is contrary to the fundamental principles of international law? If, for instance, the international principle that jurisdiction of the subject-matter in a divorce suit depends upon domicil,—which was the principle applied in the case referred to,—is so fundamental that a court is justified in disregarding a decree of divorce rendered in another state in violation of it, does not its violation render the decree invalid even in the state where rendered? It is true it may be authorized by the statutes of that state, and that the statutes if constitutional prevail over the principle of international law as such, but those statutes are not the final test of jurisdiction, even when it is merely a question of the validity of the decree in that state. The statutes must, in turn, be subjected to the state and Federal Constitutions, and while such principle of international law may not be expressly incorporated in either of those Constitutions, is it not comprehended by the general provision as to "due process of law," or, as it is sometimes termed, "the law of the land," which is embodied in the 14th Amendment to the Federal Constitution, and in most, if not all, of the state Constitutions? It is obviously impossible to give an exact and comprehensive definition of these phrases, but, as applied to matters within the domain of international law, they would seem to comprehend the established principles of international law,—at least those that are so fundamental that the courts of another state are justified in adhering to them notwithstanding the "full faith and credit" provision. The first part of the history of the well-established principle that a purely personal judgment rendered upon constructive service against a nonresident, who did not appear, is invalid in the state where rendered, as well as elsewhere, though the statutes of that state purport to authorize it, followed very nearly the same course as the subject under discussion. That principle was originally regarded as applicable only when the validity of the judgment in another state was concerned, and the courts that applied it often—in fact, almost uniformly—conceded the validity of the judgment in the state where rendered, while still holding that it did not come within the "full faith and credit" provision because it was rendered without jurisdiction (evidently meaning without jurisdiction tested by the principles of international law), until the question as to the validity of such a judgment in the state where rendered was presented to the United States Supreme Court in the case of Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, when Judge Field pointed out that such concession was not only unnecessary, but improper; because if (to use the language of the previous decisions) the court which rendered such a judgment had no jurisdiction over the person of the defendant, and if the whole proceeding without personal service or appearance is *coram non judice* and void; if to hold a defendant bound by such judgment is contrary to the first principles of justice,—the judgment is contrary to due process of law, and is therefore invalid, even in the state where rendered. (For a full discussion of the history of this principle, see *note* to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 577.)

As applied to the vexed question of the validity of a decree of divorce upon constructive service against a nonresident (which is discussed in subdivision IV. b, 2, *infra*) the decision in Pennoyer v. Neff would be decisive if such a decree could be regarded as a purely personal one, assuming that the provision as to due process of law applies to the subject of divorce at all,—a question that will be presently discussed.

While a decree of divorce is not, in its nature, strictly *in personam*, still, from the point of view of a court that regards it as governed by the principles applicable to decrees of that class rather than by those applicable to decrees *in rem*, and therefore regards constructive service against a nonresident as insufficient to

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Illinois, August 11, 1869, and lived with him thereafter in New Orleans for many years, until he withdrew from the matrimonial domicil, and that said marriage was never dissolved; that she loaned him money before, and placed in his hands property belonging to her after, said marriage, and is a creditor of his succession with respect to the same in an amount exceeding $5,000; that the decedent left property in this state, acquired during said marriage, and which fell into the community superinduced thereby, and that she is entitled to be recognized as owner of one half thereof; that he also left a daughter, issue of said marriage, now the wife of Jules F. Peytral, of New Orleans, and that the instrument purporting to be the will of said decedent, which has been admitted to probate, ignores the rights of petitioner and of said daughter, and is to that extent null and void. She further alleges the illegality of the confirmation of Ella S. Benton as executrix, and avers that said executrix has failed to give bond and to cause an inventory to be made; that the property of the succession is worth over $40,000; and that, as a creditor, she has a right to demand a bond. She prays for citation of the parties interested, and for judgment ordering the executrix to furnish bond and recognizing her as widow in community and as a creditor. There was also filed upon the same day (June 26, 1897) a petition on behalf of Mrs. Peytral, in which it is alleged that the petitioner is the only child and forced heir of the decedent; that the instrument probated as his will is void for the reason that it was not "dated, written, and signed by the hand of said decedent, nor without assistance," and because

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sustain the jurisdiction for international or interstate purposes, it is not apparent why the reasoning in Pennoyer v. Neff does not justify, and indeed require, the conclusion that the decree is not valid, even in the state where rendered, assuming the applicability of the "due process" provision to the marriage relation. According to the theory here suggested, the test of jurisdiction is practically the same whether the validity of the decree in the state where rendered or in another state is in question. In either case, after compliance with the statutes of the state where the decree was rendered is shown, the inquiry will be whether compliance with due process is shown, and this will involve the inquiry whether a decree of divorce is governed by the principles applicable to decrees *in personam*, in which case, under the decision in Pennoyer v. Neff, constructive service against a nonresident is insufficient to meet the requirements of due process; or, by the principle applicable to decrees *in rem*, in which case that mode of service is sufficient. It is an obvious corollary from the foregoing that (assuming the applicability of the "due process" provision), a court which takes the position that a decree of divorce is governed by the principles applicable to a decree *in personam*, and therefore refuses to recognize a divorce granted in another state upon constructive service against a nonresident, ought not itself to assume jurisdiction, in a domestic suit, to grant a divorce under such circumstances, even if the local statutes purport to authorize it; for, under this theory, those statutes are invalid because contrary to due process of law. It will be observed that this theory, unlike that which concedes the validity of the decree in the state where rendered, but refuses it recognition because it is contrary to the fundamental principles of international law (ignoring the effect of the "due process" provision), preserves, at least from the point of view of the court that adopts it, and upon the same state of jurisdictional facts, the uniformity of marital status throughout the states, as affected by divorce; for, from that point of view, and upon any given state of facts, a divorce, if effectual to determine the status of the parties in the state where rendered, is effectual to determine their status in other states, and, conversely, if ineffectual to determine their status in other states, is ineffectual to determine their status in the state where rendered. It is true that, even if this theory of a single standard of jurisdiction, to be applied without reference to the state in which the question arises, were to be adopted by all the states, there might still be an apparent, and even a practical, diversity of marital status as affected by divorce; but this condition would not be inherent in the theory itself, as it is in the double-standard theory above discussed, but would exist, either because the court which is asked to recognize a divorce granted in another state does not agree with the court which granted the divorce as to the facts affecting the jurisdiction (the former not being concluded by the latter's finding as to such facts), or because, assuming an agreement as to the jurisdictional facts, the courts of the two states hold different views respecting the question whether a decree of divorce is governed by the principles applicable to decrees *in personam* or by those aplicable to decrees *in rem*, and, therefore, upon the question as to the sufficiency of constructive service when defendant is a nonresident. From the very nature of the case absolute uniformity of marital status is impossible so long as the court of one state has the power to go behind the finding as to jurisdictional facts of the other. The other question, however, is one of law and of Federal cognizance, and will undoubtedly be ultimately determined by the United States Supreme Court; and under the theory that there is but one ultimate test of jurisdiction, namely, the due process provision, whether the validity of the decree in the state where rendered or in other states is in question, a decision of that court either in favor of, or against the jurisdiction, whether the question arises upon appeal from a decree of divorce or from a decree of one state refusing to recognize a divorce granted in another, will, assuming that the finding of jurisdictional facts is not impeached, restore practical, as well as theoretical, uniformity of marital status as affected by divorce; while under the "double standard of jurisdiction" theory previously discussed, a decision by that court affirming a decree rendered in one state refusing recognition of a divorce granted in another upon constructive service against a nonresident would leave the courts of both states at liberty, if the local statutes so provided, to grant divorces in domestic suits under such circumstances, and at the same time permit the courts of either to refuse recognition of divorces granted in the other under those circumstances.

There is one class of cases which reconciles the concession of the validity of the decree in the state where rendered with the refusal to recognize it in another under the "full faith and credit" provision, without resorting to the

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he was *non compos mentis* at the date at which said instrument purports to have been executed, and was under the control of his sister, Ella Benton, and of one of the particular legatees. It is further alleged that, in any event, the bequest to said particular legatee is void, for the reason that she was the concubine of the decedent, with whom he lived, while his wife, the mother of the petitioner, was and is living. She prays that the probate of the said alleged will and the confirmation of the executrix be annulled, and that said instrument be decreed to be of no effect, or, if that be denied, and said instrument be maintained as the will of said decedent, that the particular legacies therein be declared null; that said Ella Benton be removed as executrix, and that petitioner be appointed in her stead; and that petitioner be also recognized as the sole heir of the decedent and sent into possession of his entire estate, or, in the alternative, that she be recognized as his forced heir to the extent of two thirds of said estate; and she further prays that an inventory be ordered. Upon this petition, the judge *a quo* made an order directing the executrix to give bond in the sum of $25,000 within thirty days, and to show cause within a shorter time why she should not be removed for failure to cause an inventory to be made or begun, as required by law. Thereafter a petition was filed in the name of Mrs. Rachael Benton, which recites the order of court above mentioned, and alleges that the executrix has failed to comply therewith, and that her office is therefore *ipso facto* vacated, and the petitioner prays that an inventory be taken, and that, after publication of her application, she be ap-

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double standard of jurisdiction. This class of cases does not deny that a decree of divorce is a decree *in rem*, but takes the position that if there is a *res* it is status of one, or perhaps of both, spouses, but their status only within the state where the decree was rendered and, therefore, when the court is obliged to proceed as *in rem*, the decree only affects the status of the parties within that state, and the requirements of the "full faith and credit" provision are satisfied by conceding such effect to the decree without giving it any extraterritorial effect. This theory avoids the erection of a double standard of jurisdiction, but rests upon an arbitrary restriction of the natural effect of the decree, assuming its validity. This theory is also subject to the same objection as the double standard theory, in that, by its very structure, it necessarily involves a diversity of marital status. It is obvious that both of these theories have been devised for the purpose of evading, or at least of avoiding, the effect of the "full faith and credit" provision; and that the necessity of resorting to either for such purpose arises from the concession of the validity of the decree in the state where rendered. If the jurisdiction may be subjected to the test of "due process," it is apparent that it comes naturally within the operation of the rule that the "full faith and credit" provision does not apply to decrees rendered without jurisdiction, and there is no necessity of erecting a double standard of jurisdiction, or of arbitrarily restricting the natural effect of a decree of divorce.

As already pointed out, however, this theory rests upon the assumption that the "due process" provision applies to and protects the marriage relation so that it cannot be dissolved by a divorce granted without compliance with the requirements of that provision; and it must be admitted that difficulties are encountered in maintaining that assumption. In the first place, the provision as embodied in the 14th Amendment is, in terms, that no state shall deprive any person of "life, liberty, or property" without due process of law. The marital relation itself, apart from the property rights involved, is, literally, neither life, liberty, nor property, and it has been expressly stated by a text writer that the provision does not apply to it; and this position has considerable indirect support from a decision of the United States Supreme Court in Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723, upholding a decree of divorce granted by the territorial legislature of Oregon to the husband, who was a resident of the territory, without cause, and without the knowledge of the wife, who was a nonresident. It is true that the divorce was granted before the adoption of the 14th Amendment, but there was a provision as to due process of law in the 5th Amendment that was applicable to the Federal government. So far as appears, however, that provision was not urged, at least there is no mention of it in the opinion, which put the decision upon the ground that divorce was a rightful subject of legislation within the organic act creating the territory, and that a marriage is not a contract within the meaning of the constitutional provision against impairing the obligation of contracts. Justice Field, who wrote the opinion in the last case, took pains, in his opinion in Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, after holding that a personal judgment upon constructive service against a nonresident was contrary to due process of law, to say (although the remark was entirely *obiter*) that he did not mean to imply that a state did not have power to authorize a divorce, at the instance of a resident, against a nonresident, spouse without personal notice to the latter, and intimates that it might have such power by virtue of the jurisdiction which every state possesses to determine the civil status and capacity of its inhabitants. It is clear that the distinction here suggested by Justice Field, rests, not upon the idea that a purely personal judgment is within the protection of due process of law while a decree of divorce is not, but upon the idea that while personal service is necessary to constitute due process in the case of a purely personal decree, it may not be so in the case of a decree of divorce, because such a decree operates on a status within the jurisdiction. The case is not referred to in this connection because of its support of the *res* theory, but because of the implication, from the suggestion of that theory as a means of upholding the jurisdiction in divorce upon constructive service, that a decree of divorce, as well as a purely personal decree, must comply with the requirements of "due process," but that in the case of a decree of divorce constructive service sufficiently meets those requirements because of its analogy to a decree *in rem*, while in case of a purely personal decree that mode of service is insufficient to meet those requirements. He was here assuming that the question was as to validity of such a decree of divorce in the state where rendered. If he had been of the opinion that such a decree is not governed by the due process provision, it would have been entirely unnecessary to suggest the distinction based on

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pointed dative testamentary executrix. The inventory was accordingly taken, and in due time, there being no opposition, the applicant took the oath, gave bond, and, upon September 24, 1897, received letters as dative testamentary executrix. In May, 1898, she filed a provisional account, which was opposed by two persons, claiming to be creditors, and by the particular and universal legatees. The legatees also appeared, and, for answer to the petitions filed on behalf of Mrs. Benton and Mrs. Peytral, deny the averments and charges therein made, and insist upon the validity of the will. In May, 1898, Mrs. Mary E. Monroe, claiming as creditor and particular legatee, presented a petition asking that the dative testamentary executrix be ordered to file a true statement of her accounts, together with her bank book, and, in default thereof, that she be dismissed from office, condemned, with her sureties, for all moneys collected by her and not deposited and accounted for; and the executrix was accordingly ordered to file an account and to show cause why she should not be devested of her office. In February, 1899, another petition was filed, on behalf of said particular legatee and the two universal legatees, praying that said dative executrix be deprived of her office, condemned for certain moneys alleged to have been received, and decreed to have no interest in the succession; and the two petitions thus mentioned were in regular course put at issue. In July, 1900, the dative executrix provoked the seizure by judicial sequestration of certain property said to belong to the estate and to have been put in the possession of the particular legatee mentioned, who moved, without avail, to set

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the status involved in such a decree; in that case it could have been much more easily and certainly distinguished by the statement that the "due process" provision did not apply. There are other cases cited in IV. b, 2, a, *infra*, which seem to assume that a decree of divorce must comply with the requirements of "due process," though there do not seem to be any in which a statute authorizing the granting of divorces in violation of fundamental principles of international law has been held unconstitutional because in violation of that provision. It would perhaps be difficult to show that the application of "due process" to divorce is necessary to prevent deprivation of property without due process of law since most of the rights dependent upon the marriage relation are not vested rights, though it seems to be otherwise with respect to curtesy initiate after the birth of the child, which right, though defeated by a valid divorce (2 Bishop, Marr. Div. & Sep. § 1644) because it can never become consummated, is nevertheless vested in the sense that it cannot be defeated by an act of the legislature. (See *note* to McNeer v. McNeer (Ill.) 19 L. R. A. 256.) But however that may be, a guaranty by the Federal Constitution being regarded as necessary to prevent interference with property rights without due process of law by state legislatures or courts, it would seem to be at least equally necessary to provide such guaranty against interference with the marital relation,—especially since the denial of extraterritorial effect to a divorce valid in the state where rendered necessarily involves the unfortunate result that persons who are man and wife in one state are not such in another.

It is not the purpose here to argue for or against the jurisdiction of a court to render a decree of divorce under a given set of circumstances. The positions of the courts upon the various phases of this question will be shown in the subsequent subdivisions. The intention here is merely to suggest that from the point of view of a court that regards the exercise of jurisdiction by the court of another state under a given set of circumstances—as, for instance, when the defendant is a nonresident, is served constructively only and does not appear—as so opposed to fundamental principles of international law as to justify it in refusing to recognize the decree, it is unnecessary to concede the validity of the decree in the state where rendered, involving, as that concession necessarily does, a diversity of marital status throughout the different states; that the same principles of international law that are involved to negative jurisdiction from an interstate point of view, also, through the medium of the due process of law provision, negative jurisdiction from an infrastate point of view; and that, conversely, if the decree meets the jurisdictional test of due process, and is otherwise valid, it cannot be refused recognition under the full faith and credit provision upon the ground that it was rendered without jurisdiction. This theory is merely offered by way of suggestion, and as embodying what seems to the annotator to be the logical result of the two provisions of the Federal Constitution, "due process" and "full faith and credit." It has but little, except indirect, support in the decisions, most of which, as already stated, seem to proceed upon the assumption that even if the decree is so contrary to the fundamental principles of justice that its recognition in another state will be refused upon the ground that it was rendered without jurisdiction, yet its validity in the state where rendered must be conceded if it complies with the statutes of that state, entirely ignoring the question as to the applicability of the "due process" provision.

II. *What law determines right to divorce.*

The cases do not, as a rule, distinguish between the question, what state or country furnishes the law by which the existence of a cause of divorce is to be determined, and the question what state or country has jurisdiction, through its legislature or courts, to declare or pronounce the divorce. That these two questions are not necessarily identical is illustrated by the practice of the courts of enforcing causes of action for death or personal injuries which are created by the statutes of other jurisdictions, and which do not depend at all upon the statute of the forum. This power, however, to take jurisdiction of causes of action depending wholly for their existence upon the law of another country seems never to have been exercised in case of divorce. It appears to have been assumed that the courts of one state or country will never take jurisdiction of a cause of divorce created by the law of another. Practically, therefore, when it is held that a court of one state or country has jurisdiction to grant a divorce for a particular cause, notwithstanding there are some elements of an interstate or international character in the case, as, for instance, the celebration of the marriage, or the commission of the marital offense, in another state or country,—it is meant that, not-

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aside and to bond said seizure. Thereafter said particular legatee offered for probate an instrument purporting to be a will made by the decedent in April, 1893, and the probate thereof was refused, on the grounds that the will of later date, already probated, disposed of the entire estate, and that it was useless to probate the other. From the issues as made up by these varied pleadings it resulted that a number of judgments were rendered, four of which were to the following effect, to wit: (1) A judgment rejecting the demand for the destitution of the executrix, and praying that she be decreed to be without interest in the succession. (2) On the oppositions to the account. (3) Refusing to set aside, or release on bond, the judicial sequestration. (4) Refusing to probate the will of April, 1893. These judgments have been brought up for review by means of an appeal taken on behalf of the particular and universal legatees, and they will be considered in the order in which they have been mentioned.

1. The appellants pray that the dative executrix be destituted of her office, and decreed to be without interest in this succession, upon the grounds, *inter alia*, that she obtained her appointment by falsely and fraudulently representing herself to be the widow of the decedent, when in fact she was never legally married to him. The evidence shows that in 1863 she was married, in Mississippi, to Burrell J. Manscoe, and that she lived with him in said state, except during certain intervals of separation, until probably the year 1866, when they came to New Orleans. Whether they came with the intention of establishing a permanent domicil here is not altogether free from doubt;

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withstanding those elements, the case falls within the law of the forum defining the causes of divorce, and it is for that reason that the court has jurisdiction of the subject-matter. It follows, therefore, that a divorce can only be granted for a cause created by the law of the forum, and that the decisions cited in division III., *infra*, upon the question as to jurisdiction over the subject-matter, are equally authorities upon the question as to what law determines the existence, or nonexistence of a cause of divorce. As already suggested, the rule just stated rests in the main upon what is implied, rather than what is expressly stated in the cases; but Gibson, Ch. J., expressly said in Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767, that, not only does jurisdiction belong to the courts at the place of domicil, but retribution must be meted out by their measure.

III. *Jurisdiction of subject-matter.*

a. *Domicil.*

1. *General rule.*

One of the best established and most fundamental principles of international law on the subject of divorce, though it may, of course, subject to constitutional limitations, be abrogated by statute within any particular state or country, is that to confer jurisdiction of the subject-matter of divorce the domicil, or the residence in the sense of domicil, of at least one of the parties must be at the forum at the time of the commencement of the suit. This principle is established by the cases cited in subdivision III. a, 2, *infra*, where the jurisdiction, from an international point of view, has been denied because neither of the parties was domiciled in the state or country where the divorce was granted; and those cited in subdivisions III. b and c, *infra*, where the fact that the marriage was celebrated, or the cause relied on occurred, in a particular state or country, is held insufficient to confer jurisdiction, at least from an international point of view. So far, however, as jurisdiction of the subject-matter, as distinguished from the person, is concerned, the location of the domicil, or residence *animo manendi*, of one of the parties at the forum is sufficient, assuming that there is no other objection.

As a matter of purely international law, it would not, perhaps, be very material whether it be the plaintiff or the defendant whose domicil is at the forum; and it was held in Smith v. Smith, 4 Mackey, 255, that under the statute of the District of Columbia the residence of the defendant and the commission of the offense within the District were sufficient to give a court of the District jurisdiction, though the plaintiff resided elsewhere. Practically, however, the laws of most states and countries make the domicil, or residence in the sense of domicil of the plaintiff, or, at least, of the spouse seeking the divorce, a prerequisite of jurisdiction. The converse of the foregoing principle, *viz.*, that if one of the parties is domiciled at the forum at the time of the commencement of the suit the court has, from an international point of view, jurisdiction of the subject-matter of the suit (though it has been sometimes questioned in its application to a marriage celebrated in another state or country [see *infra*, III. b], or to a cause of divorce originating before the acquisition of the domicil of the forum) has been generally assumed.

The following quotation, though from the dissenting opinion of Brett, L. J., in Niboyet v. Niboyet, L. R. 4 Prob. Div. 1, 48 L. J. Prob. N. S. 1, 39 L. T. N. S. 486, 27 Week. Rep. 203, seems to embody a correct statement of generally recognized principles: "By the universal comity of nations, foreigners do not, by their mere sojourn in a country, make themselves subject to its personal laws, other than its police or correctional law, or laws expressly enacted to bind all who are in fact within its territorial limits. By the universal independence of nations, each binds, by its personal laws, its natural born subjects and all who may become its subjects. By the universal consent of nations, everyone who elects to become domiciled in a country is bound by the laws of that country, so long as he remains domiciled in it, as if he were a natural born subject of it. It follows, then, from the nature of the subject-matter, that laws which, for certain enacted or predicated causes, as distinguished from causes agreed upon between the parties, alter the personal relations of individuals to each other, or their relation to the community, can only bind the natural born subjects of the enacting country, or foreigners who have become domiciled in it; but they may, consistently with the principles and the universal consent of nations, bind both of these."

It is not the purpose to discuss here the general question as to what is necessary to constitute a domicil at the forum which will support the jurisdiction; but it may be said generally that there must be at least a bona fide residence, *animo manendi*, and that a mere residence for the very purpose of acquiring a divorce is not sufficient. That is implied in nearly all of the cases cited in III. a, 2, *infra*, where

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but as a matter of fact, after a separation the duration of which is not shown, they resumed their relations as husband and wife in New Orleans about the beginning of the year 1867, and remained together until the middle of that year, when they separated finally, and the next definite information we obtain as to the defendant's whereabouts is from a petition for divorce, filed in her name in June, 1869, in the circuit court of Knox county, Indiana. In said petition, and in an amended petition filed at a later date, she alleges that she is a bona fide resident of said county and has lived there for more than a year, and she charges her husband with want of support, drunkenness, brutality, and adultery, and prays for a judgment of divorce. The defendant was summoned by publication in a Knox county newspaper, and thereafter, upon the testimony of our or five reputable witnesses, taken under commission in New Orleans and fully sustaining the charges contained in said petition, there was a decree of divorce, which was entered upon what is called the "Judgment Book," as of date August 12, 1869. It is now claimed that said judgment was really rendered upon August 10, 1869, and that, by a proceeding had for the purposes of this litigation in 1898, the date of said judgment has been changed *nunc pro tunc* to that which it should originally have borne. Be that as it may, upon August 11, 1869, the defendant, as Rachael L. Davidson, which name the decree of divorce authorizes her to resume, was married at Cairo, Illinois, to E. B. Benton, whose estate is the subject of this controversy. The couple shortly afterwards came to New Orleans, where, with the exception of an in-

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the jurisdiction is denied upon the ground that neither party was bona fide domiciled in the state or country where the divorce was granted; and the courts of England have repeatedly refused to recognize Scotch divorces upon the ground that there was no actual bona fide domicil in Scotland, although there was such a domicil as was contemplated by the law of Scotland for the purpose of divorce (III. b, *infra*). But a distinction is to be observed between a case where a person goes to a particular state or country for the purpose of procuring a divorce and with no intention of making his permanent residence there, and a case where, though the divorce law of the state or country was one of his reasons for going there, he nevertheless actually intended to make it his permanent residence. In the latter case, undoubtedly, a bona fide domicil at the forum may be acquired. Among other cases that might be cited to this effect are Colburn v. Colburn, 70 Mich. 647, 38 N. W. 607; Hunter v. Hunter, (N. J. Eq.) 53 Atl. 221; *Re* Hall, 61 App. Div. 266, 70 N. Y. Supp. 406; Fosdick v. Fosdick, 15 R. I. 130, 23 Atl. 140.

2. *When neither party domiciled or permanently residing at forum.*

As to the effect of appearance to waive jurisdictional defects, see *infra*, VII. a.

In accordance with the principle stated in the last subdivision, it is established by the great weight of authority as a principle of international law that a court in which neither of the parties is domiciled, or residing *animo manendi*, at the time of the suit, has no jurisdiction of the subject-matter, though one or both parties may be temporarily within the state at that time. Generally, the jurisdiction of the courts of any particular state or country, as affected by domicil or residence, is fixed by statute, so that the principle of international law above stated has ordinarily no function to perform when the question of jurisdiction arises in the state in which the suit is brought; and it is, as a rule, invoked only when the validity of a divorce rendered in one state or country is questioned in another. But even in the former case the principle may serve as a rule of statutory construction if the terms of the statute are ambiguous. Thus, in Maguire v. Maguire, 7 Dana, 181, it was held, under the influence of such principle, that the statute of Kentucky relied upon by plaintiff had not attempted to confer jurisdiction upon the courts of Kentucky over suits of divorce where neither party was domiciled within the state, even if it were within the power of the legislature to confer jurisdiction under such circumstances. In Yates v. Yates, 13 N. J. Eq. 280; Payson v. Payson, 34 N. H. 518; and Blumenthal v. Tannenholz, 31 N. J. Eq. 194, also, the refusal of the court to take jurisdiction where neither party was domiciled within the state seems to have been prompted, or at least influenced by, the general principle. In Calef v. Calef, 54 Me. 365, 92 Am. Dec. 549, the principle, as applicable in Maine, was stated with the qualification that the parties were not married in that state; but such qualification was due to the fact that the Maine statute, contrary to the general principle of international law (*infra*, III. b), makes the celebration of the marriage in that state a ground of jurisdiction. That is also true in New York (Code Civ. Proc. § 1756, subdiv. 2). In Shreck v. Shreck, 32 Tex. 578, 5 Am. Rep. 251, it was held that a court of Texas had jurisdiction of a suit by the wife for divorce upon the ground of ill treatment by the husband occurring in Mexico where they were domiciled, it appearing that the marriage was celebrated in Texas, and that she left her husband in Mexico and returned to Texas. The opinion seems to proceed upon the assumption that the wife must be regarded as legally domiciled in Mexico, but that the circumstance of the marriage in Texas and the return of the wife to that state took the case out of the principle that jurisdiction is determined by domicil. Upon such assumption, the decision is contrary to the great weight of authority, though it would be reconcilable with the principles of international law if it had been put upon the ground that the wife had acquired a separate domicil in Texas (see *infra*, III. a, 3).

In the following cases it is held, upon principles of international law, that a decree of divorce rendered in a state in which neither of the parties was domiciled or permanently residing is not entitled to recognition in another: Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551, Affirming 157 N. Y. 719, 53 N. E. 1123; Streitwolf v. Streitwolf, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553, Affirming 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683; Andrews v. Andrews, 187 U. S. —, 47 L. ed. —, 23 Sup. Ct. Rep. 237, Affirming 176 Mass. 92, 57 N. E. 333, Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Strait v. Strait, 3 MacArth. 415; Hood v. State, 56 Ind. 263; Watkins v. Watkins, 125 Ind. 163, 25 N. E. 175; Gregory v. Gregory, 78 Me. 187, 57 Am. Rep. 792, 3 Atl. 280; Hanover v. Turner, 14 Mass. 227, 7 Am.

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terval spent at Bay St. Louis, Mississippi, they lived together for about nineteen years. During that time there were three children born to them, *viz.*, a boy and a girl who died, and another girl, now Mrs. Rachael Peytral, one of the present litigants. There was never at any time the slightest question raised or suggested as to the validity of the divorce so obtained, or the marriage so entered into, or as to the legitimacy of the children born of said marriage. Benton introduced the defendant as his wife, and she was so recognized by everyone in New Orleans who came in contact with them, and also, through correspondence, by his own family, including the universal legatees now before the court. In 1888, however, the decedent went to Honey island, in St. Tammany parish, where he engaged in sawmilling and other business; and if, from that time until the day of his death, he ever saw or communicated with his wife, the record fails to show it, as it also fails to show why he so acted. Nevertheless, for a number of years he continued to write frequently, and in terms of interest and affection, to his daughter. But she married upon April 3, 1895, and never saw him afterwards; nor does it appear that she ever heard from him after he was informed of her marriage. His sister, Ella S. Benton, and the particular legatee, Mrs. Mary E. Monroe, were with him during his last illness, and they sent word to the daughter, who called to see her father, that he could not be seen; and when he died they failed to notify her, so that her first intimation of the event came through a notice in a newspaper, several days after he was buried. There is no evidence in the record, save the

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Dec. 203; Reed v. Reed, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720; Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108; Leith v. Leith, 39 N. H. 20; Jackson v. Jackson, 1 Johns. 424; Forrest v. Forrest, 2 Edm. Sel. Cas. 180; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30. 7 Am. Rep. 299; St. Sure v. Lindsfelt, 82 Wis. 346, 19 L. R. A. 515, 52 N. W. 308 (divorce rendered in foreign country); Magurn v. Magurn, 3 Ont. Rep. 570.

In *Re* Ellis, 55 Minn. 401, 23 L. R. A. 287, 56 N. W. 1056, also, the principle was recognized, although in this case it was held that the defendant, having appeared in the action in which the divorce was granted, could not impeach the jurisdiction. (As to the effect of appearance on the right to impeach the decree, see *infra*, VII. a.)

In Massachusetts it has been expressly provided by statute that when any inhabitant of the commonwealth shall go into another state in order to obtain a divorce for any cause which occurred in Massachusetts and whilst the parties resided in Massachusetts, or for any cause which would not authorize a divorce by the laws of Massachusetts, a divorce so obtained shall be of no force or effect in Massachusetts. In the following cases divorces rendered in other states in violation of this statute have been refused recognition in Massachusetts, though in some of them it is expressly, and in others impliedly, assumed that the same result would have followed upon principles of international law: Lyon v. Lyon, 2 Gray, 367; Shannon v. Shannon, 4 Allen, 134; Smith v. Smith, 13 Gray, 209; Chase v. Chase, 6 Gray, 157; Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299; Hardy v. Smith, 136 Mass. 328; Dickinson v. Dickinson, 167 Mass. 474, 45 N. E. 1091; Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333, Affirmed in 187 U. S. —, 47 L. ed. —, 23 Sup. Ct. Rep. 237.

It will be observed that, so far as the principle embodied in the above statute is confined to cases where the party who obtained the divorce was previously an inhabitant of Massachusetts, and where the divorce was for a cause occurring while the parties were domiciled in Massachusetts, or for a cause which would not authorize a divorce by the law of Massachusetts, it is narrower than the principle of international law. In one respect, however, the statute is, or is at least susceptible of a construction making it, broader than the international principle, for it is possible to so construct it as to make it applicable under the circumstances mentioned, even if the party who obtained the divorce in the other state had previously acquired a bona fide domicil there. In Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299, and Dickinson v. Dickinson, 167 Mass. 474, 45 N. E. 1091, however, the view seems to be taken that the statute presupposes that the party did not acquire a bona fide domicil in the state where the decree was rendered. At least that view was taken of a similar statute in Gregory v. Gregory, 76 Me. 535, it being there held that the statute was merely an affirmance of the general principles of international law, and did not apply where the party who procured the divorce obtained a bona fide domicil in the state where it was granted. Holmes, Ch. J., in discussing the Massachusetts statute in Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333, said that whether or not it went further than the law would go without it, he was of the opinion that, as applied to a case where a party did not obtain a domicil in the state where the divorce was rendered, it did not go beyond the constitutional powers of the state. This language seems to leave it an open question whether the statute would be constitutional as applied to a case where, notwithstanding that the party's intention in going to the other state may have been to secure a divorce, he nevertheless procured a bona fide domicil there. The doubt in the judge's mind evidently arose from the consideration of the full faith and credit provision of the Federal Constitution.

The opinion of the United States Supreme Court affirming the decision in the last case also proceeds upon the assumption that the party who procured the divorce had not obtained a bona fide domicil in the state where it was granted. 187 U. S. —, 47 L. ed. —, 23 Sup. Ct. Rep. 237.

In the cases thus far cited in which a decree of divorce rendered in one state has been refused recognition in another because neither party was domiciled in the former state, the statutes of the state in which the divorce was rendered seem to have made domicil, or residence *animo manendi*, a prerequisite of jurisdiction, though in most of the cases the decision was put upon general principles of international law.

In People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260, where a decree of divorce rendered in Indiana was held invalid in Michigan because neither of the parties to the suit ever resided in Indiana, the court takes the position that, even upon the assumption that residence in the state had not been essential under the Indiana statute, the decree would not have been entitled

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finding in the decree of divorce to the effect that all the facts necessary to the obtention of that decree had been established, as to the plaintiff's bona fide residence in the state of Indiana. Upon the other hand, there is no evidence sufficient to overcome the prima facie effect to which that finding is entitled; the most that can be said concerning such evidence being that it raises a suspicion that the *animus manendi* may have been wanting. In view, therefore, of a ruling heretofore made upon this point, while we should hesitate to maintain the validity of the divorce so obtained without further proof of the good faith of the plaintiff (defendant here) in the matter of the acquisition of domicil in Indiana, we are nevertheless of the opinion that the decree in question discloses upon its face no intrinsic nullity, and is "subject to attack only upon proof of extrinsic facts undermining the jurisdiction." *Smith* v. *Smith*, 43 La. Ann. 1140, 10 So. 248.

Under the circumstances, however, we prefer to pretermit, as did the learned judge *a quo*, any decision as to the validity of such decree, and to proceed to the inquiry whether the said plaintiff (defendant here) can be held to have believed, in good faith, that she was at liberty to marry again. It has already been shown that for nineteen years, from 1869, when the marriage was celebrated at Cairo, until 1888, when the decedent left the defendant and went to Honey island, E. B. Benton and the defendant lived together as husband and wife, and that during that time the validity of the divorce which the defendant had obtained, and of the marriage which she had thus contracted, was never impugned. To this

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to recognition in Michigan. The decision, upon this hypothesis, proceeds upon the idea that the provision of the Federal Constitution as to full faith and credit must be construed conformably to the established principles of international law, and not as requiring the recognition of a decree which violates the principle that jurisdiction of divorce depends upon domicil.

At one time the statutes of Utah attempted to confer jurisdiction to grant divorces at the suit of persons who were not, but desired to become, residents of the territory. It was held in Hood v. State, 56 Ind. 263, 26 Am. Rep. 21, that, notwithstanding such statute, a divorce granted in Utah would not be recognized as valid in Indiana, where it appeared on the face of the record that neither party was domiciled in Utah. The court said that the question was to be decided by the *jus gentium*, the law of nations, the first principles of which are that all nations, with respect to rights, are equal, and that each is sovereign within its own territory of jurisdiction over the persons and property therein.

Upon similar grounds, Utah divorces have been refused recognition in other jurisdictions in the following cases: Litowich v. Litowich, 19 Kan. 451, 27 Am. Rep. 145; State v. Armington, 25 Minn. 29; Smith v. Smith, 19 Neb. 706, 28 N. W. 296; People *ex rel.* Public Charities & Correction Comrs. v. Smith, 13 Hun, 414; Gettys v. Gettys, 3 Lea, 260, 31 Am. Rep. 637; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154.

A similar decision was also made in Hardy v. Smith, 136 Mass. 328, but this case came within the terms of the Massachusetts statute already referred to.

So, also, in Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507, a divorce rendered in Colorado, where neither of the parties was domiciled, was refused recognition in Ohio although the Colorado statute, contrary to the general principle of international law (*infra*, III. b), purported to make the commission of the marital offense in Colorado a ground of jurisdiction.

The opinion of the United States Supreme Court in Andrews v. Andrews clearly proceeds upon that principle, though it incidentally alludes to the fact that the state of South Dakota, where the divorce was granted, made domicil, and not residence merely, the basis of jurisdiction.

In Scotland at one time the courts assumed to base jurisdiction in divorce upon what was termed a matrimonial domicil, resting upon an indefinite permanency of residence, as distinguished from the true domicil of the parties. In other words, it seems to have been regarded as sufficient to support the jurisdiction that the matrimonial residence was in Scotland although the true domicil was elsewhere. Shields v. Shields, 15 Sc. Sess. Cas. 2d Series, 142; Jack v. Jack, 24 Sc. Sess. Cas. 2d Series, 467; Hume v. Hume, 24 Sc. Sess. Cas. 2d Series, 1442; Pitt v. Pitt, 1 Sc. Sess. Cas. 3d Series, 106. The decision in the last case was reversed on appeal by the House of Lords,—4 Macq. H. L. Cas. 627, 10 Jur. N. S. 735, 10 L. T. N. S. 626, 12 Week. Rep. 1089. It appears that at the bar of the House the position that a divorce *a vinculo* might be validly granted to strangers not domiciled, though temporarily resident, within the jurisdiction, was abandoned, so that the question was not argued before the House; but it is stated in the opinion that the concession was in accordance with the law of the case.

In the following cases Scotch divorces based on residence in that country of a less degree of permanency than was required to create a true domicil there were refused recognition when they came collaterally in question in England: Conway v. Beazley, 3 Hagg. Eccl. Rep. 639; Dolphin v. Robins, 7 H. L. Cas. 390, 29 L. J. Prob. N. S. 11, 5 Jur. N. S. 1271, 7 Week. Rep. 674; Shaw v. Gould, L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833; Wilson v. Wilson, L. R. 2 Prob. & Div. 435, 41 L. J. M. C. N. S. 74, 27 L. T. N. S. 351, 20 Week. Rep. 891; Bonaparte v. Bonaparte [1892] P. 402.

So, in Shaw v. Atty. Gen. L. R. 2 Prob. & Div. 161, 30 L. J. Prob. N. S. 81, 23 L. T. N. S. 322, 18 Week. Rep. 1145, a decree of divorce rendered in favor of a wife in Iowa, where she had previously lived for two and one-half years, was held invalid in England upon the ground that she did not have a domicil in Iowa, though it was assumed that she had such a residence there as was required by the law of that state. In this case, however, the only service was by publication, and the husband never had actual notice of the proceedings until after the decree, and had never resided in Iowa; and these facts are emphasized, and are, perhaps, to be taken as qualifying the decision.

In Niboyet v. Niboyet, L. R. 4 Prob. Div. 1, 48 L. J. Prob. N. S. 1, 39 L. T. N. S. 486, 27 Week. Rep. 203, the jurisdiction of a court of England to grant a divorce was upheld by the court of appeal upon the ground that the matrimonial domicil was in England at the time the cause of divorce occurred and at the time of the suit, although the dom-

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it may be added that, even after Benton left the matrimonial domicil, and up to the date of his death, in June, 1897, he never repudiated said marriage, and that during the greater part of that time he continually recognized his daughter, issue of that marriage, and wrote to her of her mother, and that in his last will, written only a few days before his death, he plainly recognized his daughter's rights, and impliedly those of the mother, by the words "the remaining disposable portion" used in bequeathing the residuum of his estate to the universal legatees. And it may be further remarked, in this connection, that the plaintiffs herein insist that for thirteen years of the time during which the defendant herein and the decedent lived together, in and about New Orleans, the divorced husband, Manscoe, was also in and about here, and that it has not been suggested that he, any more than anyone else, questioned the status of the defendant as the lawful wife of E. B. Benton. It is proper to bear in mind, also, for the purpose of the present inquiry, that the finding of the decree by which the divorce from said Manscoe is claimed to have been effected—that the plaintiff in the suit had resided for a year in Indiana—is entirely uncontradicted. In fact, it is not suggested, even in argument, that she did not, as a matter of fact, reside there during that time prior to the obtention of the decree, and it would be hard to believe that, having done so, and having obtained said decree, she still believed herself to be the wife of Manscoe, and, so believing, united herself to Benton. Viewed in the light of her conduct throughout, we therefore conclude that the defend-

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icil was in France, the husband, who was the defendant in the suit, being a French consul residing in England. A distinction was made between a mere temporary sojourn and a matrimonial residence, and while it was held that the former would not be sufficient to uphold the jurisdiction, it was held that the latter would be, though the legal domicil were elsewhere. It is true that the decision was governed by a statute, but the statute was not explicit upon the point in question, and its construction was clearly determined by what the majority of the court deemed the true principle of international law on the subject. Brett, L. J., dissented, insisting that jurisdiction could only rest upon true domicil. This was also the position of Phillimore, from whose order the appeal was taken. (See, however, Le Mesurier v. Le Mesurier [1895] A. C. 517, 64 L. J. P. C. N. S. 97, *infra*.)

In Manning v. Manning, L. R. 2 Prob. & D. 223, 40 L. J. M. C. N. S. 40, 24 L. T. N. S. 196, 19 Week. Rep. 479, the court, without expressing any opinion upon the question whether mere residence in England was sufficient to sustain the jurisdiction in a divorce suit, held that the residence must be at least bona fide and not casual, or that of a mere traveler.

In Callwell v. Callwell, 3 Swabey & T. 259, a divorce was granted in England at the suit of a husband who was domiciled in Ireland and had only a temporary residence in England at the date of filing the petition; but in this case the wife appeared, and there was no discussion of the question of the jurisdiction.

In Argent v. Argent, 11 Jur. N. S. 864, 4 Swabey & T. 52, 34 L. J. Prob. N. S. 133, 12 L. T. N. S. 768, the court of probate, while not going to the extent of holding that a court of a country where the parties are substantially resident, though not domiciled, ought to be held in other countries to have the power to entertain a suit for divorce, held that a woman, whom a soldier in Her Majesty's service married while stationed at the Cape of Good Hope, after he had there obtained a decree of divorce from a former wife whom he also married there, the second marriage being a valid one according to the law of the Cape of Good Hope,—was entitled to administration of the goods of his estate as his lawful widow.

The principle of international law that jurisdiction in divorce must depend upon domicil, and cannot rest upon residence, matrimonial or otherwise, has been clearly settled in England by a decision of the privy council in Le Mesurier v. Le Mesurier [1895] A. C. 517, 64 L. J. P. C. N. S. 97, it being there expressly held that the domicil which will give a court jurisdiction to decree a divorce entitled to extraterritorial effect under the law of nations must be a permanent domicil, and that a so-called "matrimonial domicil," said to be created by bona fide residence of the spouses within the territory of a less degree of permanence than is required to fix the true domicil, cannot be recognized as creating such jurisdiction. There is an extended discussion in this case of the question as to whether the "matrimonial domicil," as distinguished from true domicil, is sufficient, as a basis of jurisdiction from an international standpoint; and the position of the majority of the court of appeal in Niboyet v. Niboyet, L. R. 4 Prob. Div. 1, 48 L. J. Prob. N. S. 1, 39 L. T. N. S. 486, 27 Week. Rep. 203, on the question is distinctly repudiated. The question in this case arose upon an appeal from a decision of a court of India; but it was decided upon principles of international law, as there was no local law contrary to those principles.

3. *Domicil of wife for purpose of bringing suit.*

As to domicil of wife when defendant, see IV. b, 1, (b), *infra*.

It having been shown in subdivisions III. a, 1 and 2, *supra*, that the principles of international law require that one at least of the spouses shall be domiciled at the forum, and that the municipal law of most states and countries requires that the party seeking the divorce shall be domiciled there, it becomes important to inquire as to the right of a wife to acquire a separate domicil at the forum so as to entitle her to bring a suit for divorce when the husband is domiciled elsewhere, in view of the maxim or fiction of law that the domicil of the wife follows that of the husband. If this fiction or maxim were to be universally applied in divorce suits, it is obvious that a wife could only sue for divorce at her husband's domicil, since her legal domicil would be there, wherever her actual residence might be. There are a few cases which apparently deny the right of a wife, under any circumstances, to acquire a domicil separate from that of the husband for the purposes of a suit for divorce.

In Yelverton v. Yelverton, 1 Swabey & T. 574, 29 L. J. M. C. N. S. 34, 6 Jur. N. S. 24, it was held by the court for divorce and matrimonial causes that the domicil of the husband is the domicil of the wife, and that even where he has been guilty of such misconduct as would furnish her with a defense to a suit by him for

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ant was sincere in the belief that she was a lawfully divorced, and lawfully married, woman. And viewing the matter in its legal aspect, and inquiring why she should have entertained such belief, we find that, if she had been reasonably well informed as to the law and jurisprudence of the country upon a somewhat difficult subject, she would have known that it is the universally recognized exception to the general rule, which determines the domicil of the wife by that of the husband, that, where the conduct of the husband furnishes grounds for divorce, and justifies the wife in leaving him, she is necessarily authorized to acquire a different domicil; that the law of the domicil controls the marital status; that a judgment rendered by a court in one of the states of the Union having jurisdiction of the parties and of the subject-matter, and valid where rendered, is valid in the other states, and in the courts of the United States; that in most of the states it is held that a proceeding for divorce may be instituted by the wife at her domicil, and that in such cases the place of the marriage, of the offense, and of the domicil of the husband are of no consequence; and that the husband may be brought into court, by publication or otherwise, as the law of such domicil may direct. *Cheever* v. *Wilson*, 9 Wall. 108, 19 L. ed. 604; 11 Bishop, Marr. & Div. 6th ed. §§ 128, 155 *et seq.* It may properly be said that she would also have known that it is established jurisprudence in this state that a marriage contracted elsewhere will not be dissolved on grounds antedating the establishment of the marital domicil here. But she could not have been expected to have assumed that, because the

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restitution of conjugal rights, she cannot on that ground acquire a separate domicil for herself. It was accordingly held that a wife could not, though deserted by her husband, acquire a domicil in England which would entitle her to maintain a suit for the restitution of conjugal rights, where the husband had not acquired a domicil in England, notwithstanding that he had deserted her.

The same rule was applied in Burton v. Burton, 21 Week. Rep. 648, to a suit by the wife on the ground of cruelty.

So, the dissenting opinion in Niboyet v. Niboyet, L. R. 4 Prob. Div. 1, 48 L. J. Prob. N. S. 1, 39 L. T. N. S. 486, 27 Week. Rep. 203, *supra*, III. a, 2, expressly takes the position that jurisdiction of a suit for divorce by the wife must depend upon the domicil of the husband, and the prevailing opinion makes the jurisdiction depend upon the existence of a matrimonial residence at the forum, assuming, apparently, that the wife could not acquire a separate domicil for the purposes of such a suit.

In Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227, the wife's domicil was, by virtue of the rule that her domicil follows the husband's, held to be in Alabama, and not in South Carolina, notwithstanding that the parties were married in South Carolina and were originally domiciled there, but subsequently removed to Alabama, where the wife was obliged to leave the husband and return to her friends in South Carolina because of his ill treatment of her. In this case, however, it was held that though the wife, at the time she filed a bill in South Carolina for a separate maintenance, was legally domiciled in Alabama, she was an actual resident of South Carolina. The jurisdiction of the South Carolina court was upheld upon the ground that the decree merely enforced the duties and obligations of the marriage relation, and did not annul or materially impair it.

In Dunlop v. Dunlop, 3 Ky. L. Rep. 20, the court said (*obiter*) that a court of Kentucky would not recognize as binding a decree of a sister state divorcing a wife from the husband, where the husband was an actual bona fide resident of Kentucky, the separation taking place in Kentucky and the wife seeking another jurisdiction for the purpose of dissolving the marriage relation. It was said that the chancellor would determine in such a case that her residence was in Kentucky, and that she could not abandon her husband at his home to make such complaint in another jurisdiction.

In Maguire v. Maguire, 7 Dana, 181, the court said that, although the wife may have had good cause for leaving her husband, and was actually resident in Kentucky, yet her legal domicil was still in Alabama, where the husband resided. It added, however: "We do not intend to decide that Kentucky might not protect her in the enjoyment of her selected home: nor do we mean to decide that the sovereign power of Kentucky, disregarding the laws of comity and all foreign consequences, might not even dissolve the legal, as well as the actual, union between her and her husband within the limits of this state, and so far as its own citizens and courts may be concerned."

In Neal v. Neal, 1 La. Ann. 315, it was held that a court of Louisiana had no jurisdiction of a suit by a wife against her husband domiciled in another state for a cause of divorce occurring in the latter state, because a married woman has no other domicil than that of her husband.

The great weight of authority, however, establishes that, whenever it is proper or necessary, a wife may acquire a separate domicil for the purposes of a suit by her for divorce. In the following cases, where the principle is recognized or assumed, the wife's separate domicil was established in a state or country different from that of the previous matrimonial domicil: Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604; Hekking v. Pfaff, 82 Fed. 403; Chapman v. Chapman, 129 Ill. 386, 21 N. E. 806; Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841 (in this case, however, it was held that the wife had not acquired a bona fide domicil in the state where the divorce was granted); Hill v. Hill, 166 Ill. 54, 46 N. E. 751; Smith v. Smith, 43 La. Ann. 1140, 10 So. 248; Benton's Succession, 106 La. Ann. 494, 31 So. 123; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372; Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Ditson v. Ditson, 4 R. I. 87.

After a decree *a mensa et thoro*, a wife may have a domicil separate from that of her husband, and they may become citizens of different states within the meaning of the Federal Constitution conferring jurisdiction upon the Federal courts in suits between citizens of different states. Barber v. Barber, 21 How. 582, 16 L. ed. 226. This was an action by the wife in a Federal court sitting in one state to enforce an award of alimony made by a state court of another state.

The right of the wife to acquire a separate domicil for the purposes of bringing a divorce suit was, as is pointed out in Craven v. Craven, 27 Wis. 418, impliedly recognized in Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702, where the

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courts of Louisiana do not recognize certain grounds as sufficient to justify decrees of divorce in cases presented to them, they will therefore decline to recognize the validity of divorces granted upon such grounds in other states, where jurisdiction *ratione materiæ et personæ* have been acquired. As to the discrepancy between the date of the divorce, as shown by the original transcript of the record, and the date of the marriage, the testimony of the counsel for the defendant, who examined the judge's docket of original entries, and the "judgment book" in which the decree was afterwards entered, is clear to the effect that the judgment of divorce was actually rendered upon August 10, 1867, and we consider the matter of the correction of the record as immaterial for the purposes of the present question, since, if the plaintiff (defendant here) was present when the judgment was rendered, she might very well have believed that she was a divorced woman from that time. As to the suggestion that the marriage was null, because entered into within ten months after the divorce, by reason of the provisions of the Code, art. 137, if it be assumed that the article in question is applicable to the defendant, and to the marriage contracted by her in Illinois, we are nevertheless of the opinion that said article is not framed in such terms of prohibition, especially when considered in connection with articles 115 and 960 of the Code, as to justify the conclusion that a marriage entered into in contravention of its provisions is stricken with nullity. Our conclusion upon this branch of the case, then, is that the defendant believed, and had reasonable grounds for believing, that she was a lawfully divorced,

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wife left the husband in New York and came to Wisconsin, and the rule was expressly declared in the first-mentioned case, though the question in that case was merely as to the right of the wife to bring a suit in a county other than that in which the husband was domiciled, both parties apparently having been domiciled in the state.

In the following cases where the principle that a wife may have a separate domicil for the purpose of a divorce suit by her was applied, the wife retained the original matrimonial domicil, the husband having acquired a domicil in another state: Moffatt v. Moffatt, 5 Cal. 280; Turner v. Turner, 44 Ala. 437; Lazovert v. Lazovert, 14 Ill. App. 653; Derby v. Derby, 14 Ill. App. 645; Bowman v. Bowman, 24 Ill. App. 165; Rhyms v. Rhyms, 7 Bush, 316; Watkins v. Watkins, 135 Mass. 83; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507.

In Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740, *supra*, the court said that in some cases there were statements which implied that from the time of a *delictum* which would justify the wife in leaving her husband, she should be treated as a person who has the right to fix her own domicil, and the husband should not be permitted to assert this fiction of law against her. The court, however, refrained from deciding whether the exception to the general rule that a wife's domicil follows her husband shall be carried so far in favor of the wife as to permit her to acquire a new domicil before she brings a suit for a divorce. It was merely held that she had a right to retain her old domicil acquired while she and her husband were actually abiding in the same place for the purposes of a divorce suit by her.

In Hanberry v. Hanberry, 29 Ala. 719, *supra*, it was held that while the general rule is that a wife's domicil follows her husband's, yet she may, for the purpose of procuring a divorce, acquire a separate domicil in the state in which she is actually living at the time she is deserted by her husband, even when the desertion consists in his refusal to allow her to return after having without adequate excuse, left his abode in another state. In this case the husband was domiciled in South Carolina, the wife left him there without adequate cause and came to Alabama (the forum), but while residing there offered to return to her husband, who refused to receive her. She then brought an action against him for desertion based on such refusal, and it was held that the court had jurisdiction.

The doctrine that a wife may acquire a separate domicil is usually qualified by the condition that she was justified in leaving her husband, or that he left her without adequate cause; and it was expressly held in Suter v. Suter, 72 Miss. 345, 16 So. 673, that a wife who remained in Mississippi after her husband had invited her to return to their home in Louisiana could not acquire a separate domicil in Mississippi so as to give a court of that state jurisdiction of a suit for divorce by her, because she was not justified in living apart from the husband.

Some of the courts, however, apparently take the position that the acquisition of a separate domicil by the wife is not dependent upon the existence of an adequate cause for leaving her husband.

Thus, in Johnson v. Johnson, 57 Kan. 343, 46 Pac. 700, it was held that, whatever the rule may be in jurisdictions where there is no such statute, under the Kansas statute providing that a wife who resides in the state at the time of applying for a divorce shall be deemed a resident of the state, though her husband resides elsewhere, the wife's separate domicil is not dependent upon the existence of adequate cause for leaving her husband. It was accordingly held in this case, that, notwithstanding the failure of the wife to make out her charge of cruelty upon which her prayer for divorce was founded, the court had jurisdiction to grant such relief as is contemplated by the Kansas statute when both parties are at fault, notwithstanding that the husband was a nonresident.

In most of the cases depending upon the acquisition of a separate domicil by the wife, the divorce has been based on grounds that occurred prior to the separation of the parties, so that a finding on the merits in favor of the wife established the existence of an adequate cause for leaving her husband, and therefore the question whether the existence of such a cause is essential to the acquisition of a separate domicil by the wife was not material, for in any event, the court would have the right to take jurisdiction until the fact in that respect was determined. The question, however, may become a practical one when the divorce is based on grounds occurring after the separation of the parties. That was the case in Chapman v. Chapman, 129 Ill. 386, 21 N. E. 806, where it became necessary for the wife to establish a separate domicil in Illinois at the time of the husband's commission of the adultery on which her complaint for divorce was founded. It appeared that prior to the alleged adultery there was a separation between the

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and a lawfully married, woman, and that she and her daughter born of such marriage are entitled to the benefits of the civil effects resulting therefrom. Civil Code, arts. 117, 118; 1 Marcade, 522; 1 Baudry Lacantinerie, 329; *Patton* v. *Philadelphia & New Orleans*, 1 La. Ann. 98; *Navarro's Succession*, 24 La. Ann. 298; *Blasini* v. *Blasini*, 30 La. Ann. 1388; *McCaffrey* v. *Benson*, 40 La. Ann. 10, 3 So. 393; *Smith* v. *Smith*, 43 La. Ann. 1140, 10 So. 248; *Jerman* v. *Tenneas*, 44 La. Ann. 620, 11 So. 80; *Bothick* v. *Bothick*, 45 La. Ann. 1382, 14 So. 293; *Hernandez's Succession*, 46 La. Ann. 962, 24 L. R. A. 831, 15 So. 461.

The plaintiffs allege that the defendant failed to furnish a sufficient bond, with solvent sureties; that she failed to deposit the funds of the succession in a bank in the parish, paying interest on deposits; that she has failed to file annual accounts; and that she has paid out the money of the succession without authority. These charges are all substantiated, except the first, with regard to which, it appears that the amount of the bond furnished by the defendant was fixed by the court and is ample, and that new sureties were furnished, when ordered, to replace those who died or were doubtful. As to the failure of the defendant to file an annual account, it is not, of itself, sufficient cause to justify destitution, unless such failure continues after demand and order for an account. But the failure of the defendant in this regard acquires a cumulative effect, when considered in connection with the more serious charges, which are fully established. Our learned brother of the district court held, upon the authority of *Peytavin's Succession*, 7 Rob. (La.) 478,

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parties, he swearing that she then deserted and abandoned him; and she, in effect, that he deserted her. The court held, apparently without determining who was to blame for the separation, that from the time of the separation her residence no longer was the same as his, and that she might thereafter lawfully acquire a residence in another state if she did so in good faith.

But, assuming that an actual separation itself, in the absence of an adequate excuse therefor on the part of the wife, is insufficient to enable her to obtain a new domicil, the jurisdiction of the court, even if the cause of divorce occurred after the separation, may, perhaps, be upheld upon the theory that from the time of the occurrence of such cause the separation was justified, unless, as in the preceding case, the jurisdiction depended upon the existence of a cause occurring while the domicil of the wife was at the forum.

The question as to the right of a court of one state to review the express or implied finding of the court of another, as to the existence of a separate domicil of the wife in the latter, is discussed in VII. a, *infra*.

Upon the same principle that denies the right to invoke against the wife the legal maxim that her domicil follows her husband's, for the purpose of defeating the jurisdiction of a suit brought by her in the state where she is actually resident, it has been held that such maxim cannot be invoked in her favor for the purpose of conferring jurisdiction of such a suit upon a court of a state in which the husband is domiciled when she is actually a resident of another state. Wood v. Wood, 54 Ark. 172, 15 S. W. 459; Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335; Pate v. Pate, 6 Mo. App. 49; Schonwald v. Schonwald, 55 N. C. (2 Jones Eq.) 367; White v. White, 18 R. I. 292, 27 Atl. 506; Dutcher v. Dutcher, 39 Wis. 651.

The contrary doctrine, however, is adopted in the following cases:

In Kashaw v. Kashaw, 3 Cal. 312, the wife was, by the fiction that her domicil follows her husband's, permitted to bring a suit for divorce in California, although she had actually been in the state less than the required period of residence, it appearing that her husband had been actually domiciled there for such period.

In Dunlop v. Dunlop, 3 Ky. L. Rep. 20, the fiction was applied so as to uphold the jurisdiction of a Kentucky court over an action commenced by the wife against the husband who was domiciled in Kentucky, notwithstanding that she had left him and was actually residing in another state at the time the action was commenced.

In Masten v. Masten, 15 N. H. 159 and Payson v. Payson, 34 N. H. 518, it was held that a wife had a domicil in New Hampshire by virtue of her husband's residence in that state, notwithstanding that by reason of his desertion she was obliged to leave the state in order to maintain herself and children.

In Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299, it was held that the husband still retaining his legal domicil in Massachusetts, its courts had jurisdiction of a libel for divorce by the wife, although they had separated and she was actually residing in another state.

In Smith v. Smith, 19 Neb. 706, 28 N. W. 296, the domicil of the husband in Nebraska was attributed to the wife for the purpose of enabling her to bring a suit in that state, notwithstanding that they were living apart, the husband having procured a decree of divorce in another state, which, however, was invalid. The court said that permanent separation usually implied separate domicils, but that, in the absence of any proof showing a separate domicil of the wife, proof of the domicil of the husband will be sufficient to establish that of the wife.

In Gells v. Gells, 1 Macq. H. L. Cas. 255, it was held that even if a wife's Scotch domicil was severed by a divorce *a mensa et thoro* recovered by her in England, a Scotch court would have jurisdiction of a suit for divorce *a vinculo* by her, the husband being a Scotchman and domiciled in Scotland. The court said what the effect of the English divorce would be on the right to a Scotch divorce was another question, though, as a matter of fact, it was held that the English divorce was not a bar to the granting of the Scotch divorce.

4. *Domicil or residence of defendant as condition of relief on cross bill.*

So far as the principles of international law are concerned, there is no objection to granting a divorce to a nonresident defendant upon a cross bill if the complainant in the original bill is a resident; and, unless the statute of the forum makes the residence of the defendant in the state a prerequisite to relief on his cross bill, the rule seems to be that the residence of the complainant in the original bill is sufficient to sustain the jurisdiction to grant relief on the cross bill at the instance of a defendant who is a nonresident. The practical question is whether the statute of the forum does make the residence of the defendant a prerequisite,

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that the defendant was excused for the failure to deposit the funds of the succession in a bank in the parish, paying interest on deposits, by reason of the fact that there was no such bank in the parish of St. Tammany. The evidence shows that there is a bank, recently established, in the parish, and while it has not, as yet, paid interest upon any deposit, it is not conclusively shown that it would not do so. In any event, it was the duty of the defendant to have deposited in such bank, the money received by her as executrix, as the decision in the case relied on must be considered as having been overruled by the decision in *Christy's Succession*, 6 La. Ann. 427, in which it was said: "But the great object [of the law] was to insure the safety of the funds by their deposit in a bank. That is the essential requirement of the law. The deposit in an interest-paying bank is but an incidental requisition of the law." It may be said that the executrix should be excused in this respect because she deposited in a bank in New Orleans, and this argument would be entitled to serious consideration if she had complied with the other requirements of the law by which her duties are defined, though it does not appear that the bank in which her deposits were actually made pays any interest thereon, and we hold it to have been her duty to have deposited the money coming into her hands in a bank within the territorial jurisdiction of the court by which she was appointed, if there was such a bank to be found; and so, although the law requires an executrix to file her accounts annually, her failure to do so may not require her dismissal from office, where she files her account when demanded, or when the de-

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since the statutory provision on the subject of residence is generally drafted in terms which apply to the "petitioner" or the person filing the petition, without being made expressly applicable to a person filing a cross bill or cross petition.

In Barrett v. Barrett, 11 Ky. L. Rep. 287, where it was held that a court having jurisdiction of a husband's action for divorce has jurisdiction to grant a wife a divorce upon a cross petition, even conceding that it would not have had jurisdiction of an original action by her for a divorce by reason of the fact that she was a nonresident, the terms of the statute do not appear.

In Sterl v. Sterl, 2 Ill. App. 223, the Illinois statute providing that "no person shall be entitled to a divorce . . . who has not resided in the state one whole year next before filing his or her bill or petition," was construed not to prevent a divorce upon a cross bill in favor of a nonresident, if the complainant in the original bill had resided within the state for a year. The offense for which the divorce was granted to the wife upon her cross bill in this case occurred in Illinois, and that fact alone would, under the Illinois statutes, have entitled her to a divorce upon an original petition notwithstanding that she was a nonresident. The court, however, does not base its decision upon that ground, but takes the position that the complainant, having summoned the wife into the court presumably against her will, was precluded from questioning its jurisdiction to grant her affirmative relief.

In Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335, the jurisdiction of a court of Indiana to grant a divorce upon a cross petition filed by a nonresident, the petitioner being a resident, was upheld. The statute in this case provided that "divorces may be decreed. . . . on petition filed by any person who at the time . . . shall have been a bona fide resident of the state one year previous to the filing of the same." A subsequent section provided that, "in addition to an answer, the defendant may file a cross petition for divorce, and when filed the court shall decree the divorce to the party legally entitled to the same. If the original petition be dismissed after the filing of a cross petition, the defendant may proceed to the trial of the cross petition without further notice to the adverse party." The court said: "Thus, while our statute is intended to prevent nonresidents from making use of our courts to perpetrate frauds upon their unsuspecting wives or husbands, by coming here to petition for divorces, it, at the same time, arms them with every weapon of defense which is afforded to our own people when brought into court at the suit of those whose bona fide residence gives us jurisdiction."

In Clutton v. Clutton, 108 Mich. 267, 31 L. R. A. 160, 66 N. W. 52, where it was also held that a decree of divorce may be granted upon a cross bill to a nonresident of the state who is brought in by the complainant, if the latter has been a resident of the state for the statutory period required to give the court jurisdiction, the statute provided that no divorce shall be granted unless the party exhibiting the petition or bill of complaint shall have resided in the state one year immediately preceding the time of exhibiting such petition or bill; or unless the marriage was solemnized in the state and the complainant shall have resided therein from the time of such marriage until the time of exhibiting the petition or bill.

In Ferry v. Ferry, 9 Wash. 239, 37 Pac. 431, it was held, under a statute of Washington which, in terms, provided for cross complaints without mentioning residence as a prerequisite, that the defendant in a divorce suit might herself obtain a divorce upon a cross complaint, notwithstanding that she was a nonresident, assuming that the plaintiff in the original bill was a resident, or that the party questioning the jurisdiction of the court is estopped to assert that he was not.

In Valk v. Valk, 18 R. I. 639, 29 Atl. 499, however, it was held that a nonresident defendant in a divorce suit could not have affirmative relief, either upon cross petition, or upon motion; but the decision is upon the ground that under the Rhode Island statute a nonresident cannot file a cross bill for a divorce, and that relief can only be granted upon motion under circumstances which would have entitled the party to relief on a cross bill. The statute in this case provided that the court shall not have cognizance of, or jurisdiction over, any petition for divorce unless the petitioner shall, at the time of preferring the petition, be a domiciled inhabitant of the state and have resided therein for a period of one year next before the preferring of such petition. It does not seem possible to distinguish this case from the preceding cases by virtue of the difference in the statutes, for the Rhode Island statute seems no more explicit on this point than the statutes of the other states. The court in this case distinguished the case of Sterl v. Sterl, 2 Ill. App. 223, upon the point already referred to, that the occurrence of the cause of divorce in Illinois was, under the Illinois statute, itself a ground of divorce with-

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mand for such dismissal is not made until such delayed account is filed. *Head's Succession*, 28 La. Ann. 800; *Mount Carmel Church Congregation* v. *Farrelly*, 34 La. Ann. 533. But to these omissions we have, in the instant case, the additional established charge, that the executrix has paid out the funds of the succession under her administration without authority and in connection with matters with which that succession has no concern. She appears to have been authorized by means of a motion, which was approved by the then presiding judge, December 28, 1897, but which was not filed until July 13, 1900, to pay $450 to her counsel and $365 to herself as money "by her expended in opening said succession and obtaining evidence therein." This authorization is distinctly open to criticism in that it fails to specify the purposes for which the payments so authorized were to be made, and we are at a loss to understand why it should have been withheld from the files of the court for nearly three years. But, even by the most liberal construction, it does not acquit the defendant of the charge that she has paid out money of the succession without authority, since the vouchers filed by her show that she has paid $1,061.05, or $246.05 more than the motion calls for. It is true that there are a few cases in which demands for the destitution of executors for making payments without authority have been denied, where they have satisfactorily shown that such payments were made in discharge of debts justly due by the successions administered by them. *Dickson* v. *Dickson*, 23 La. Ann. 583; *Mount Carmel Church Congregation* v. *Farrelly*, 34 La. Ann. 533; *Sparrow's*

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out reference to the residence of the parties, though, as already pointed out, that was not the ground of the decision in the latter case.

b. *Place of marriage and of original matrimonial domicil.*

It is now established as a principle of international law by the great weight of authority, both in England and the United States, though it has been changed by statute in some states, that the fact that a marriage was celebrated in a certain state or country, and that the parties were then domiciled there, neither confers jurisdiction of divorce upon its courts, nor deprives a court of another state or country in which one or both of the parties are domiciled at the time of the suit of such jurisdiction.

The first part of the above proposition to the effect that jurisdiction cannot be founded on the fact that the marriage was celebrated, and the parties were then domiciled, at the forum is expressly held by the following cases: Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Kruse v. Kruse, 25 Mo. 68; Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372; Clark v. Clark, 8 N. H. 21; Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767.

In Pawling v. Willson, 13 Johns. 192, the court, while conceding that a divorce rendered in a state where neither of the parties was domiciled would not be good if the marriage was not celebrated in that state, expressed a doubt, but did not decide the question, whether it might not be good if the marriage were celebrated in that state. From the statement of facts it appears that the divorce in this case was by a special statute, although in alluding to it in the opinion the court speaks as if it were by a decree of court.

In Greenlaw v. Greenlaw, 12 N. H. 202, the libel in a divorce action was held defective because it did not aver the parties were married in New Hampshire (the forum); but this was upon the ground that, in the absence of such an averment, it could not be inferred that the parties were domiciled there at the time the cause of divorce arose. The court said that if it had been averred that the marriage was celebrated in the state, it would be inferred from that averment, in connection with the averment of the residence in that state at the time of the commencement of the divorce, that it was also their residence at the time the cause of divorce arose. White v. White, 5 N. H. 476, and Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395, where the place of marriage is referred to as a material fact, are explainable upon the same ground.

It must be remembered, however, that this principle above stated may be changed by statute. In New York, for instance, the Code of Civil Procedure, § 1756, expressly makes the celebration of the marriage within the state a ground of jurisdiction without reference to domicil.

The second part of the foregoing proposition, to the effect that the fact that the marriage was not celebrated at the forum and the parties were not domiciled there at the time of the marriage, does not deprive the court of jurisdiction if one or both are domiciled there at the time of the suit, is supported by the following cases: Barber v. Root, 10 Mass. 260; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702; Ditson v. Ditson, 4 R. I. 87; Jones v. Jones, 67 Miss. 195, 6 So. 712; Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604; Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372; Gillis v. Gillis, Ir. Rep. 8 Eq. 597; Brodie v. Brodie, 2 Swabey & T. 259, 30 L. J. M. C. N. S. 185, 4 L. T. N. S. 307, 9 Week. Rep. 815.

In D'Auvilliers v. Her Husband, 32 La. Ann. 605, it was held that the court of Louisiana had jurisdiction notwithstanding that the marriage was celebrated in France, but the decision is upon the assumption that the parties were at the time of the marriage domiciled in Louisiana. The implication that it would be otherwise if the parties had not been domiciled in Louisiana at the time of the marriage seems to be upon the assumption that the cause of divorce occurred outside of Louisiana.

In Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81, it was held that a decree of a court of the Kingdom of Würtemberg, having jurisdiction of the parties and subject-matter, annulling a marriage contracted by a subject of the Kingdom in Illinois while domiciled in that state, upon the ground that it was contracted in violation of a statute of the Kingdom declaring marriages of subjects in a foreign state, without license of the sovereign, null and void, would be recognized and enforced by the courts of Illinois in determining the right of the wife to real property in that state owned by the husband at the time of his death.

Besides the foregoing cases in which the point has been expressly decided, there are many cases that have proceeded upon the assumption that the jurisdiction of the subject-matter is not defeated by the fact that the marriage was not celebrated at the forum.

For the reasons explained in subdivision II., *supra*, a decision that a court has jurisdiction

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Succession, 39 La. Ann. 704, 2 So. 501. Upon the other hand, in *Reed* v. *Crocker*, 12 La. Ann. 445, an executor was held liable for the penalty imposed by the act of 1837 (now Civil Code, art. 1150) for withdrawing funds from bank without authority, irrespective, apparently, of the disposition made of such funds; and in *Boutte's Succession*, 32 La. Ann. 556, the sureties of the executors were released, upon their demand to that effect, because said executors had failed "to deposit all moneys of the estate in bank," and because they had paid out money without an order of court, although such payment had been made in discharge of privileged claims, such as funeral expenses, law charges, etc. This court said in that case, through Mr. Justice Fenner, after referring to Civil Code, art. 1150: "Executors and curators, where their violations of these provisions have been merely technical, such as the payment of debts found to be really privileged and reasonable in amount, though without order, may plead equity against the enforcement of the penalties of 20 per cent damages and dismissal from office; but the right of the surety to require a termination of his liability and the substitution of a new bond is rather a privilege to the surety than a penalty on the executor," etc. We have been referred to no case, however, in which an executor has been excused where it has been shown that he has paid out the money intrusted to him, without an order of court, in satisfaction of claims for which the succession administered by him was not liable. We therefore conclude, in view of the several irregularities which have characterized the administration of the defendant, that some

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to decree a divorce notwithstanding that the marriage was celebrated, and the parties at the time of the marriage were domiciled, in another state or country, if, at the time of the suit, they were domiciled at the forum, involves the point that the existence, or nonexistence, of a cause of divorce is to be determined by the law of the forum, and that it is immaterial whether the law of the place where the marriage was celebrated recognizes any cause for divorce at all, or the particular cause upon which the action is founded. In the following cases the rule is stated so as to uphold the jurisdiction, even if by the law of that place where the marriage was celebrated no cause for divorce, or at least not the cause relied upon, is recognized: Harrison v. Harrison, 19 Ala. 499; Thompson v. State, 28 Ala. 12; Standridge v. Standridge, 31 Ga. 223; Tolen v. Tolen, 2 Blackf. 407, 20 Am. Dec. 742; Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767; Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328.

The contract of marriage, being *sui generis*, may be regarded as an exception to the universality of the rule that the law of the place where a contract is made governs in determining its construction, obligation, and enforcement, its validity or invalidity. Shreck v. Shreck, 32 Tex. 578, 5 Am. Rep. 251.

In Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549, which involved the validity of a decree of divorce rendered in Rhode Island, the marriage having been celebrated in Massachusetts, the divorce was rendered for adultery, which was a cause of divorce both under the law of Massachusetts and that of Maine, so that there was no conflict; but the court said that if it had been otherwise it would not have followed that the decree of divorce would not have been valid under the Constitution and laws of the United States with reference to giving full faith and credit to the judicial proceedings of other states.

It was held in an early case in South Carolina (Hull v. Hull, 2 Strobh. Eq. 174) that a marriage celebrated in South Carolina was indissoluble in any other state. That decision was followed in Duke v. Fulmer, 5 Rich. Eq. 121. In the former case the court said the *lex loci contractus* furnishes a just rule for the interpretation of the rights and obligations under the marriage contract, as it does in the case of other contracts. If the doctrine is placed upon that ground, it would seem not to apply to a divorce granted upon a ground which would be a cause of divorce by the law of the place where the marriage was celebrated, though such qualification could not affect the application of the doctrine to a marriage celebrated in South Carolina, since that state recognizes no cause for divorce.

See also McCreery v. Davis, 44 S. C. 195, 28 L. R. A. 655, 22 S. E. 178, *infra*, IV. a, 2, (b), (2).

In Irby v. Wilson, 21 N. C. (1 Dev. & B. Eq.) 568, the court of North Carolina was urged to refuse recognition of a divorce rendered in Tennessee upon the ground that the parties were married, and the matrimonial domicil was originally established, in South Carolina where divorces are not allowed on any ground. The court did refuse to recognize the Tennessee divorce, but not upon that ground. The express ground of the decision was that the defendant in the divorce suit was not a subject of Tennessee, but a citizen of North Carolina, and was not served with process, and was therefore not subject to the jurisdiction of Tennessee or amenable to her tribunals. This case has sometimes been supposed to support the doctrine of Hull v. Hull, 2 Strobh. Eq. 174, but that it does not is apparent from the concession made by the court that the decision might have been different if the wife had been domiciled in Tennessee, although absent therefrom at the time of the divorce. This concession clearly shows that the ground of the decision was that the Tennessee court did not have jurisdiction of the person of the defendant, not that it did not have jurisdiction of the subject-matter.

It was at one time held in England, upon the supposed authority of Lolley's Case, Russ. & R. C. C. 237, 2 Clark & F. 567, that an English marriage (meaning, evidently, a marriage celebrated in England between persons domiciled there) could not be dissolved in another state or country. The decision, as stated by the reporter, was that such a marriage cannot be dissolved in another state or country for grounds on which it was not liable to be so dissolved in England. The particular ground of divorce, however, does not seem to have been treated as a qualification of the doctrine during the time it was recognized in England; and at the time of the decision referred to there was no way of procuring a divorce in England except by an act of Parliament. The doctrine of this case was followed in McCarthy v. De Caix, 2 Russ. & M. 620, 2 Clark & F. 568; *Re* Wilson's Trusts, L. R. 1 Eq. 247; Simonin v. Mallac, 2 Swabey & T. 67, 29 L. J. M. C. N. S. 97, 6 Jur. N. S. 561, 2 L. T. N. S. 327. In the latter case the doctrine was applied although both parties at

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other person should be placed in charge of this succession.

2. Considering the opposition to the accounts, we find that the executrix had received, prior to the date at which said account was prepared, $1,375, and that she had charged herself with $1,125. She should be required to debit her account with $250 additional. The propositions that, as widow in community of the decedent, she has a right to appropriate to herself one half of the revenues or property of the succession while it is still under administration, and that the opponents are estopped from insisting upon her accounting for what she has actually received in her capacity of dative executrix, because they have, here or elsewhere, alleged that the property of which such receipts are the revenues does not belong to the succession, are equally untenable. The widow in community can take nothing save her interest in the residuum after the community has been administered and its debts paid; and as to the other proposition, it is enough, for the present, that the executrix actually collected certain moneys for account of the succession, and that the opponents are testamentary heirs. If there is any estoppel in the matter, it is double, and she should be first estopped to set up the plea as against a demand for an accounting for moneys so received. The suggestion in the brief that this court should decree that the executrix, who had charged herself with $1,125 as collected for account of the succession, and who is before the court only as an appellee, and who has not even filed an answer to the appeal, should be credited back with one half of the amount so charged, upon the ground that to

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the time of the marriage, which was celebrated in England, were domiciled in France and immediately thereafter returned to the latter country. In Briggs v. Briggs, 28 Week. Rep. 702, L. R. 5 Prob. Div. 163, 49 L. J. Prob. N. S. 38, the court professed to apply the rule in Lolley's Case: but in this case there was an express finding that the party who procured the foreign divorce was not domiciled in the country where it was granted.

In Tovey v. Lindsay, 1 Dow. P. C. 724, also, Lord Eldon expressed a doubt whether an English marriage could be dissolved by a Scotch divorce.

In Birt v. Boutinez, L. R. 1 Prob. & Div. 487, 37 L. J. M. C. N. S. 50, 18 L. T. N. S. 586, 16 Week. Rep. 816, it was held that a decree of divorce granted by a Belgian court by the mutual consent of the parties, dissolving a ceremonial marriage celebrated in that country, did not affect a previous Scotch marriage celebrated between the same parties. The court said that if the divorce had purported to affect the Scotch marriage it would have been necessary to consider how far the law of England would adopt and act upon the dissolution of a valid Scotch marriage by a foreign court, upon a ground unknown to the law of England, namely, the mutual consent of the parties.

In Warrender v. Warrender, 9 Bligh N. R. 129, the House of Lords, upon appeal from a decision of the Scotch court of sessions, in a suit for divorce, held that a marriage contracted by a domiciled Scotchman in England, the parties to that marriage being bona fide, and not collusively for the purposes of the suit, domiciled in Scotland, might be dissolved by a Scotch divorce. The Lord Chancellor said that it was not necessary to a decision of the case to impeach the authority of Lolley's Case, or of any other that may have been determined in England upon the authority of that case; that the decision in that case was merely to the effect that the courts of England would not recognize the validity of a Scotch divorce, and that that case did not involve the right of the Scotch court to grant a divorce, or its effect in Scotland. He, however, discussed the decision in the Lolley Case at considerable length, and intimated his disapproval of it.

In Harvey v. Farnie, L. R. 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 47 J. P. 308 (Affirming L. R. 6 Prob. Div. 45, 50 L. J. Prob. N. S. 17, 43 L. T. N. S. 737, 29 Week. Rep. 409, which affirmed L. R. 5 Prob. Div. 153), a Scotch divorce dissolving a marriage celebrated in England was upheld in England, the case being distinguished from Lolley's Case upon the ground that the phrase "English marriage," as used in that case, had reference, not only to a marriage celebrated in England, but to a marriage between persons domiciled in England, whereas in the case at bar, while the woman was domiciled in England, the man was domiciled in Scotland, and the matrimonial domicil was established in the latter country. A similar distinction was made in Maghee v. M'Allister, 3 Ir. Ch. Rep. 604; and Turner v. Thompson, 36 Week. Rep. 702.

In Pitt v. Pitt, 4 Macq. H. L. Cas. 627, 10 Jur. N. S. 735, 10 L. T. N. S. 626, 12 Week. Rep. 1089; Shaw v. Gould, L. R. 3 H. L. 551, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833; Dolphin v. Robins, 7 H. L. Cas. 390, 29 L. J. Prob. N. S. 11, 5 Jur. N. S. 1271, and Conway v. Beazley, 3 Hagg. Eccl. Rep. 639, Scotch divorces dissolving English marriages were refused recognition in England upon the ground that the parties were not bona fide domiciled in Scotland at the time of the divorce, without expressly holding that they would have been recognized if there had been a bona fide domicil in Scotland. In Dolphin v. Robins, 7 H. L. Cas. 390, 29 L. J. Prob. N. S. 11, 5 Jur. N. S. 1271, the court expressly refrained from expressing an opinion on this question. In Shaw v. Gould, L. R. 3 H. L. 551, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833, however, Lords Chelmsford, Westbury, and Colonsay took occasion to repudiate the doctrine that an English marriage is indissoluble by the courts of another country where the parties have acquired a domicil, and expressed the opinion that Lolley's Case was no authority for such doctrine, but that the decisions in that case should be limited to the facts therein involved, and did not extend beyond the case where there was no bona fide domicil in the country where the divorce was rendered.

The doctrine of Lolley's Case has now been clearly limited to cases where the parties to the divorce did not have a bona fide domicil in the country where the divorce was granted, although they may have had such a domicil as the statute of that country contemplated for the purposes of divorce.

In LeSueur v. Le Sueur, L. R. 1 Prob. Div. 139, 45 L. J. Prob. N. S. 73, 34 L. T. N. S. 511, 24 Week. Rep. 616, it was said that Lolley's Case cannot be pressed as an authority beyond the extent that the Scotch court has no power to dissolve an English marriage where the parties are not domiciled in Scotland, but have only gone there for such a time as would render them amenable to the jurisdiction of

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that extent the charge is erroneous, she being entitled to retain it as widow in community, can hardly be seriously intended.

Considering the items on the credit side of the account: Items 1 and 2, amounting to $150, it is admitted, were properly disallowed. Item 3, $225. The credit in connection with this item is $223.60, which, it is said, was paid to redeem the Honey island property. The evidence upon the subject is not in the record before us, and the question of the correctness of the credit must rest in abeyance until the issues presented in the record No. 13,739 are determined. Item 4, $175, for taxes, interest, etc., on the Honey island property. We find no evidence in the record concerning this item, but will reserve the rights of the defendant with respect thereto. Items 5, $6; 6, $47; 15, $6; 16, 17, 18, 19, 20, and 21, amounting to $72; 25, $19.35; 26, $19.35; 27, $2; 28, $10; and 29, $25,—being costs and charges disbursed by the defendant from the funds of the succession in connection with her efforts to establish the validity of her divorce from Manscoe and her subsequent marriage to E. B. Benton, have no proper place upon her account as general charges against the succession. Item 9, $450, "to John C. Wickliffe, attorney for Mrs. Rachael Peytral, legal heir of the succession." This item also falls within the ruling applied to the items last above mentioned. *Gourjon's Succession*, 10 Rob. (La.) 541; *Hasley's Succession*, 27 La. Ann. 586; *Hughes's Succession*, 14 La. Ann. 876; *Florance's Succession*, 36 La. Ann. 304. Items 7 and 14, $100 and $20, respectively, costs of court on account. These items are sustained by the evidence and are admitted. Item 8, $450, "on account, at-

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the Scotch court; that it did not decide, and that no other case has decided, that the law of England does not recognize the right or authority of any court, whether domestic or foreign, to dissolve an English marriage for any cause or for any pretext whatever.

In Le Mesurier v. Le Mesurier [1895] A. C. 517, 64 L. J. P. C. N. S. 97, the court said that the doubt created by the opinions of the common-law judges in Lolley's Case, whether the principle of international law, according to which a decree of divorce dissolving the marriage of parties domiciled within the jurisdiction of the court ought to be respected by the tribunals of every civilized country, was consistent with the law of England, which at that time did not allow a marriage to be judicially dissolved, has since been dispelled, and that the rule is now settled that an English marriage between persons at that time domiciled in England may be dissolved by a decree of a court of a country in which the parties subsequently become bona fide domiciled.

A divorce for adultery rendered by a court of Cape Colony in Africa, dissolving a marriage contracted in Ireland, between persons then domiciled there, will be upheld as valid in England if the parties were domiciled in Cape Colony at the time the divorce was rendered. Scott v. Atty. Gen. L. R. 11 Prob. Div. 128.

So, the fact that the parties to a divorce suit were domiciled in England at the time of the marriage, and at the time of the commencement of an action for divorce, is sufficient to give the court jurisdiction notwithstanding that the marriage, and the facts on which the action is based, took place in India. Ratcliff v. Ratcliff, 1 Swabey & T. 467, 29 L. J. M. C. N. S. 171.

c. *Place of marital offense.*

It follows, from the principle of international law, that jurisdiction of the subject-matter of divorce depends upon the domicil (*supra*, III. a, 1 and 2), that, so far as principles of international law are concerned, jurisdiction cannot be based on the fact that the marital offense occurred at the forum; and it is so stated in Pate v. Pate, 6 Mo. App. 49, and Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507, and implicitly assumed in many other cases. This principle, however, is, of course, subject to change by statute, and in some jurisdictions the occurrence of the marital offense at the forum is made a ground of jurisdiction without reference to the domicil of the parties. Thus, in Smith v. Smith, 4 Mackey, 59 L. R. A. 255, it was held that the fact that the cause of divorce occurred in the District of Columbia gave the court of that district jurisdiction, although the petitioner was a nonresident. The decision is based upon the implication from the statutory provision that no divorce shall be granted for any cause "which shall have occurred out of the District," unless the party applying for the same shall have been a resident in the District for two years next preceding application.

In Stokes v. Stokes, 1 Mo. 320, it was held that adultery was a good cause for divorce *a mensa et thoro* if committed within the state, or while the injured party was domiciled in the state. It is not clear whether the court meant that the occurrence of the offense within the state would be sufficient if the petitioner was domiciled in the state at the time of the suit, or would be sufficient without reference to the domicil at that time.

It is also well established, as a principle of international law, that the mere fact that the offense did not occur at the forum does not defeat the jurisdiction. Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604; Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; Thompson v. State, 28 Ala. 12; Hanberry v. Hanberry, 29 Ala. 719; Tolen v. Tolen, 2 Blackf. 407, 20 Am. Dec. 742; Wilcox v. Wilcox, 10 Ind. 436; Smith v. Smith, 4 G. Greene, 266; D'Auvilliers v. Her Husband, 32 La. Ann. 605; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Shaw v. Shaw, 98 Mass. 158; Jones v. Jones, 67 Miss. 195, 6 So. 712; Payson v. Payson, 34 N. H. 518; Ditson v. Ditson, 4 R. I. 87; State v. Goodrich, 14 W. Va. 834; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702; Gillis v. Gillis, Ir. Rep. 8 Eq. 597.

There are many other cases that have assumed and acted upon the principle.

For reasons stated in subdivision II., *supra*, the decisions in the cases last cited involve the proposition that the fact that the alleged offense occurred outside of the forum does not, so far as principles of international law are concerned, prevent it from constituting a cause of divorce under the law of the forum, though it is obvious that the statutes of the forum defining the causes for which divorce may be granted may make the fact whether the alleged cause occurred within or without the forum important upon this point; but if the statutes of the forum do restrict the causes of divorce to those occurring at the forum, it follows, from the fact that the courts of one jurisdiction do not undertake to enforce a cause of action for divorce created by the laws of another (*supra*, II.),

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torney's fees to Stifft & Madison, for succession." There is some confusion as to what is meant by the items of attorney's fees which appear on the account: it being claimed by the counsel representing the defendants Mrs. Benton and Mrs. Peytral, in the brief filed by them, that the item No. 9, "to John C. Wickliffe, attorney for Mrs. Rachael F. Peytral, legal heir of the succession," does not represent a claim for attorney's fees due by Mrs. Peytral, but by the succession, and therefrom arises the confusion. If the item in question is not intended to represent the claim of Mrs. Peytral's attorney, why does the language used express that idea, and no other? The learned judge *a quo* relegated both of these questions to a future account, saying: "Items 8 and 9, attorney's fees, must be placed in a new account, and the services specified, so that the court can decide what service was rendered on behalf of the estate." We have concluded, however, that item 9 has by its terms nothing to do with the estate, and we have rejected it for that reason. Upon the other hand, item 8 is by its terms a charge for services rendered to the estate, and we are of opinion that there is sufficient evidence to justify us in allowing it. We agree with the judge *a quo*, however, that the necessity for the expenditures for telegrams and trips to Amite and Covington is not made sufficiently apparent.

The particular legatee, Mrs. Mary E. Monroe, asks to be recognized as a creditor, partly privileged and partly ordinary—First, for $1,605, for services as housekeeper, from July 23, 1888, to June 4, 1897, at $15 per month; and, secondly, for $1,395 for services as nurse during the last illness

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that the courts of the forum have no jurisdiction to grant a divorce for acts occurring in another state, though such acts constitute a ground of divorce by the law of the state where they occurred, and would have constituted a ground of divorce by the law of the forum if they had occurred at the forum. This conclusion would, of course, be avoided if the statute of the forum should expressly give the courts jurisdiction to grant divorces for acts which are a ground of divorce both by the law of the place where they occurred and by the law of the forum. In such case, however, the cause of divorce would still be determined by the law of the forum, and not by the law of the place where the cause occurred, although upon this hypothesis the concurrence of the two laws would be essential to bring the cause of divorce within the statute of the forum.

In Martin v. Martin, 47 N. H. 52, it was held that conviction and imprisonment in another jurisdiction are not a cause for divorce in New Hampshire, but this decision was the result of a construction of the language of the New Hampshire statute.

In Hitchins v. Hitchins, 41 Ill. App. 82, the court, while impliedly conceding that the fact that the alleged cause of divorce occurred in another state would not defeat a divorce action in Illinois, held that the failure of the plaintiff to resort to the courts of the country where the offense occurred and where the parties were at the time domiciled might be taken into consideration in passing upon the merits.

d. Time of marital offense relatively to acquisition of domicil at forum.

It has been shown in the last subdivision that, as a principle of international law, though it is subject to change by statute, the place where the offense was committed is immaterial upon the question of jurisdiction over the subject-matter; but a different question is presented when it appears that not only the offense was committed outside of the forum, but that neither of the parties at the time thereof was domiciled at the forum, though one or both have since become domiciled there. In some states, New York for instance, the fact that both parties were residents of the state when the offense was committed is expressly made a ground of jurisdiction, without reference to their residence, at the time of the commencement of the suit: but even in New York the fact that the parties were not domiciled at the forum at the time of the offense does not necessarily defeat the jurisdiction, which may rest on other grounds, *e. g.*, that the marriage was celebrated in the state; or that the offense was committed within the state, and the injured party is a resident of the state at the commencement of the suit (Code Civ. Proc. § 1756). In the absence of a statute on the subject, the courts generally proceed upon the assumption that if one or both parties are domiciled at the forum at the time of the suit, the fact that both were domiciled elsewhere at the time the alleged cause of divorce occurred, does not defeat the court's jurisdiction of the subject-matter, though, as will subsequently appear, there are some cases which expressly hold the contrary. The authority for this proposition, however, rests more in the tacit assumption of the courts than in cases expressly discussing the point. In many of the New York cases cited in IV. b, 2, (b), (2), *infra*, for instance, where decrees rendered in other states were refused recognition because the defendant was not personally subject to the jurisdiction of the court, the cause of divorce arose while the parties were domiciled in New York, and yet in none of these cases is it suggested that that fact would have deprived the court of the other state of jurisdiction of the subject-matter if the defendant has been personally subject to the jurisdiction. In the following cases the point is squarely decided in favor of the jurisdiction, so far as it rests upon principles of international law, or statutes which may be construed conformably to those principles, notwithstanding that the alleged cause of divorce occurred while the parties were domiciled in another state: Thompson v. State, 28 Ala. 12; Thompson v. Thompson, 91 Ala. 591, 11 L. R. A. 443, 8 So. 419; Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; Tolen v. Tolen, 2 Blackf. 407, 20 Am. Dec. 742; Wilcox v. Wilcox, 10 Ind. 436; Smith v. Smith, 4 G. Greene, 266; Colburn v. Colburn, 70 Mich. 647, 38 N. W. 607; Ditson v. Ditson, 4 R. I. 87.

In Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604, the statement of the opinion is merely that the "place of the offense is of no consequence;" but apparently the offense was committed before the acquisition of the domicil at the forum.

In Tolen v. Tolen, 2 Blackf. 407, 20 Am. Dec. 742, the court, after referring to the New York statute above referred to, said: "We have no such statutory provisions as these, and therefore the judicial decisions of that state [referring, evidently, to the New York decisions upon the question as to the jurisdiction of the New York courts], founded, as they are, on these statutes, can shed but little light on the point now under consideration."

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of the deceased. There is not the least evidence in the record to sustain the charge made by Mrs. Peytral and her husband with regard to the relations which subsisted between this opponent and the decedent. Upon the contrary, it is shown without contradiction that the opponent is a woman of good character, who, while in charge, as housekeeper, of the decedent's establishment, has lived there, surrounded by her grown children and, more recently, grandchildren; and it is a significant fact that during that time the house was visited by the decedent's sister, who lived with him for a while, and who, with other reputable witnesses, gives to the opponent her unqualified approval. But the relations between the opponent and the decedent, unobjectionable though they were, ceased at an early date to be those of master and servant in the ordinary acceptation of the term. She and her children lived at Benton's house and made it a home for him, and he provided for them and appears to have given employment in his mill to those of them who were able to work there. When he met with accidents, as he did on one or two occasions, or fell sick, he was nursed back to health and strength, and showed his gratitude by some extra liberality; but the evidence does not justify the belief that there was any question of wages between him and the opponent for a long time before his death. And it was because of that fact that he made the opponent his particular legatee, and left her $5,000 and the house in which she lives. Under these circumstances, the claim which she sets up for wages should not be allowed.

3. In support of his judgment upon the application to bond the sequestration, the

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Since, as shown in subdivision II., *supra*, the courts of one jurisdiction do not undertake to enforce the divorce laws of another, and there can, therefore, be no divorce except for a cause declared by the law of the forum, it is not apparent, upon principle, how the question whether the acts relied on constituted a ground of divorce by the law of the place where the parties were domiciled at the time of their occurrence can be material. And in Wilcox v. Wilcox, 10 Ind. 436, *supra*, where the jurisdiction was upheld, the cause of divorce was desertion, which, by the law of New York, where the parties were domiciled when it commenced, was not a ground of absolute divorce.

In Hick v. Hick, 5 Bush, 670, however, it was held that, even if the wife, who was the plaintiff in that case, could be regarded as a resident of Kentucky for the purposes of a divorce, the domicil of the husband being in another state, she could not procure a divorce under the Kentucky statute on the ground of abandonment, where the separation occurred before her removal to Kentucky, unless abandonment was a cause of divorce by the law of the place where both parties were then domiciled.

In Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372, *infra*, also, the fact that by the law of New York, where the alleged desertion occurred, it would not constitute a ground of divorce, was mentioned and relied upon to some extent, though there were other facts which were also relied on.

Of course, domicil at the forum at the time of the *delictum* may be expressly made by statute a requisite of jurisdiction. Thus, in Becket v. Becket, 17 B. Mon. 370, a statute of Kentucky was construed to require that certain causes of divorce (living apart without cohabitation for five years; and abandonment for one year) shall have originated and existed in the state and did not apply to causes originating before either party became domiciled at the forum.

In Mix v. Mix, 1 Johns. Ch. 204, where the jurisdiction of a New York court was denied because the marriage was celebrated abroad and but one of the parties was domiciled in New York at the time of the offense, the decision was governed by a statute which enumerates the cases in which jurisdiction may be exercised, and omitted the residence of either or both in New York at the time of the suit as an independent ground of jurisdiction.

In Moe v. Moe, 2 Thomp. & C. 647, a divorce granted in Vermont for abandonment occurring while the parties were domiciled in Massachusetts was refused recognition in New York notwithstanding that the defendant accepted the service of process made upon him in Massachusetts; but this decision seems to have been upon the ground that such acceptance was insufficient to subject the defendant personally to the jurisdiction of the Vermont court.

In Stokes v. Stokes, 1 Mo. 320, the jurisdiction was not denied because the adultery occurred while the parties were domiciled in another country; but that fact, in connection with the failure to resort to the court of that country for relief, and the long lapse of time, was held sufficient to justify a court of Missouri in denying relief on account of such adultery.

Louisiana.

In Louisiana the rule has been adopted, apparently upon considerations of international jurisprudence, that a court of that state has no jurisdiction if both the marriage and the offense occurred outside of Louisiana and before the parties became domiciled there. Edwards v. Green, 9 La. Ann. 317; Muller v. Hilton, 13 La. Ann. 1, 71 Am. Dec. 504; Champon v. Champon, 40 La. Ann. 29, 3 So. 397; Heath v. Heath, 42 La. Ann. 437, 7 So. 540; Nicholas v. Maddox, 52 La. Ann. 1493, 27 So. 966; Benton's Succession, 106 La. 494, 31 So. 123.

But it was held in D'Auvilliers v. Her Husband, 32 La. Ann. 605, that the rule did not apply if, at the time of the marriage and offense, they were both domiciled in Louisiana, although both marriage and offense occurred elsewhere.

In Benton's Succession, 106 La. 494, 31 So. 123, the court recognized that in most of the states it is held that the place of the marriage, of the offense, and of the domicil of the parties at the time of the offense are of no consequence; and said, although the point was not expressly decided, that it did not necessarily follow from the fact that the contrary rule obtained in Louisiana that the courts of that state would refuse to recognize a decree of divorce rendered in another state on grounds antedating the establishment of the plaintiff's domicil in that state.

New Hampshire.

The New Hampshire supreme court, also, upon its view as to what the principles of international law require, though it concedes that the weight of authority is the other way, has consistently held that the courts of that state have no jurisdiction to grant divorces for causes occurring while both parties were domiciled in another state. Clark v. Clark, 8 N. H. 21; Kimball v. Kimball, 13 N. H. 222; Greenlaw v. Greenlaw, 12 N. H. 202; Batchelder v.

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judge *a quo* says: "Up to the time of Dr. Benton's death, he retained possession and control of this property, though his sister, who lived with him, claimed under a tax title. Mrs. Monroe was on the property as his housekeeper. After Benton's death, the sister, who had the tax title, sought to administer the property under the will of the deceased constituting her a legatee and testamentary executrix. She claims that she redeemed the property sold at tax sale. . . . After the alleged redemption, Miss Benton gave Mrs. Monroe a quitclaim deed to the property, without warranty. The widow of Benton claims to own one half of the property, as belonging to the community: but the legality of her marriage is disputed by Mrs. Monroe and the Bentons. The daughter of Benton disputes the validity of the will and claims the estate as a forced heir. Her legitimacy is contested by the Bentons. It also appears that the property is under seizure by a mortgage creditor. Thus we have the following parties claiming the property: Benton's sisters, claiming under the will and as legal heirs; Mrs. Mary E. Monroe, claiming under tax title. Mrs. Benton, claiming as widow in community; the daughter, claiming as forced heir; a mortgage creditor, claiming under executory process. The property has on it two sawmills and a railroad. The parties running the mill are extending a private road, in order to enable them to haul the timber more rapidly. It requires no testimony to convince me that, if this tract of land is turned over to the party applying for permission to bond, there will be very little to litigate about by the time of the final decision of this suit. It would be

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Batchelder, 14 N. H. 380; Payson v. Payson, 34 N. H. 518 (*obiter*); Hopkins v. Hopkins, 35 N. H. 474; Leith v. Leith, 39 N. H. 20 (*obiter*); Foss v. Foss, 58 N. H. 283; Norris v. Norris, 64 N. H. 523, 15 Atl. 19.

The ground upon which this rule is based makes it applicable whether both parties, or only one, are domiciled at the forum at the time of the suit; and in Clark v. Clark, 8 N. H. 21; Greenlaw v. Greenlaw, 12 N. H. 202; Batchelder v. Batchelder, 14 N. H. 380, and Hopkins v. Hopkins, 35 N. H. 474, it appeared that the defendant was a resident of the state at the time of the suit, or appeared and was, thus, personally subject to the jurisdiction of the court.

In Kimball v. Kimball, 13 N. H. 225, however, the court said it was decided in Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395, that a woman who belonged in New Hampshire, and who, after marriage, removed to another state and was there deserted by her husband, might return to New Hampshire; and if the desertion continued for three years after such return a cause of divorce accrued in that state of which its courts would have jurisdiction, the same as if the original desertion had taken place while the parties were residing there.

This is also implied in Batchelder v. Batchelder, 14 N. H. 380, where it was said that to give a court of New Hampshire jurisdiction there must have been a legal domicil within the state during the whole period fixed by the statute as establishing a cause of divorce.

In Frost v. Frost, 17 N. H. 251, however, the court denied jurisdiction where the original desertion took place while the parties were domiciled in Maine, though it continued for more than three years after the removal of the wife to New Hampshire.

But the question, so far as suits based on desertion are concerned, seems to have been finally settled in favor of the jurisdiction by Payson v. Payson, 34 N. H. 518, where it was held that the New Hampshire court had jurisdiction, notwithstanding that the desertion occurred while the parties were domiciled in Massachusetts, it appearing that it continued for three years after the removal of the wife to New Hampshire. The decision is upon the ground that when the cause of divorce consists of a course of conduct continued during a prescribed period of time, as in the case of desertion or abandonment, it is immaterial to the jurisdiction when or where it commenced to exist. Once commenced, it continues until the parties are reconciled. The husband who has deserted and abandoned his wife still deserts and abandons her within the meaning of the New Hampshire statute at every moment until he returns.

While, as already stated, the New Hampshire doctrine, that jurisdiction of divorce depends upon the domicil at the time of the occurrence of the cause of divorce, was based upon general principles, it was conceded in Leith v. Leith, 39 N. H. 20, that it was opposed to the doctrine of most of the American courts, which maintain that the actual bona fide domicil of the parties at the time the proceedings are instituted is the proper ground for assuming jurisdiction, irrespective of the time and place of the *delictum* and of the domicil when it occurred: and the court expressed the opinion that the New Hampshire rule would not prevent a court of that state from recognizing a decree of divorce rendered in another state where the contrary doctrine prevailed for a cause originating in New Hampshire while the parties were domiciled there, notwithstanding that at the time of the divorce in the other state the defendant still retained his domicil in New Hampshire.

In Harrington v. Harrington, 68 N. H. 360, 44 Atl. 522, the court, while conceding that the general rule is that the courts of New Hampshire have no jurisdiction of a cause of divorce arising when the libellant was not domiciled in that state, held that a decree of divorce might be rendered in New Hampshire for a conviction of crime and imprisonment which took place in New Hampshire while the libelee was domiciled there, but at a time when the libellant was a nonresident. This decision, however, was influenced by the doctrine that conviction of crime and imprisonment are only causes of divorce in that jurisdiction, and not in any other.

Massachusetts.

It has sometimes been supposed that Massachusetts adopted as a principle of international law the doctrine that the domicil of one or both parties at the forum at the time of the suit is insufficient to confer jurisdiction of the subject-matter if the cause of divorce occurred while both were domiciled in another state or country: but when the distinction between jurisdiction of the subject-matter and of the person of the defendant is observed, it is not clear that such doctrine was ever adopted in that state. In Hopkins v. Hopkins, 3 Mass. 158, and Carter v. Carter, 6 Mass. 263, the jurisdiction of a court of Massachusetts to grant a divorce was denied upon the ground that at the time the alleged cause of divorce arose the parties were not domiciled in Massachusetts, although in both these cases the alleged ground of divorce was adultery, which

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unjust to allow Mrs. Monroe to bond the property, even if the bond could be made to cover all possible damages, because, if the property is not hers, it is unjust to compel the true owners to practically sell her the timber, which is yearly increasing in value. As well might a trespasser claim the right to bond an injunction against his depredations. The timber constitutes the principal value of the estate. It would be an almost impossible task to ascertain the value of the timber cut from a tract of over 13,999 acres. For these reasons, the application to bond is refused." These reasons, we think, are amply sufficient to sustain the conclusion reached, aside from which the question of the ownership of this property is now pending in another suit, which is soon to be decided in this court, and no good purpose could be subserved by changing the *status quo* in the meanwhile. Code Prac. arts. 273, 274; *Schwan* v. *Schwan*, 52 La. Ann. 1183, 27 So. 678.

4. In the matter of the refusal of the judge *a quo* to admit to probate the alleged will of April, 1893, we find no sufficient reason for making any change in the judgment. The instrument offered for probate gives nothing to anyone which is not given by the later will, which has been probated and which disposes of the entire estate of the testator. It is therefore ordered, adjudged, and decreed that the judgment of the district court of date September 4, 1900, rejecting the demand of Misses Ella S. and Charlotte E. Benton, universal legatees, and of Mrs. Mary E. Monroe, particular legatee, for the destitution and removal from office of Mrs. Rachael L. Benton, dative testamentary executrix of Edward B. Benton, de-

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was a cause of divorce by the law of the place where the parties were domiciled at the time of its commission. These decisions turn upon the construction of a Massachusetts statute, but were doubtless influenced by consideration of international law. A similar decision was made in Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372, *supra*, although, as above shown, the ground relied on would not have constituted a cause of divorce by the law of the domicil of the parties at the time of its occurrence.

In all three of these Massachusetts cases, however, the additional fact appears that while the libellant had, in the interval between the occurrence of the cause of divorce and the commencement of the suit, become domiciled in Massachusetts, the libelee or respondent was still a nonresident; and the fact of the latter's continued nonresidence, as well as the fact that both parties were domiciled elsewhere at the time the alleged cause of divorce occurred, is emphasized and relied on. Upon the assumption of the nonresidence of the libelee or respondent at the time of the commencement of the suit, there was still the question of jurisdiction over his or her person (since the implication is that there was no personal service or appearance within the state), even if the court had jurisdiction of the subject-matter. These decisions, therefore, in view of the emphasis laid on the continued nonresidence of the libelee or respondent, can scarcely be regarded as resting upon the ground that the court had no jurisdiction of the subject-matter because the offense occurred while both parties were domiciled in another state, but rather upon the ground that there was no jurisdiction over the person of defendant. If the fact that the domicil of both parties was outside of the forum at the time of the *delictum* defeated the jurisdiction over the subject-matter, it was entirely unnecessary to allude to the fact of the continued nonresidence of the libelee or respondent (implying, as that fact does, that he or she was not personally subject to the jurisdiction of the court), since, if the court had no jurisdiction over the subject-matter, it was immaterial whether the libelee or respondent was a nonresident at the time of the suit or not, because his residence at the forum at that time could not have cured the defect of jurisdiction of the subject-matter, if there had been any such defect.

But the question arises in this connection: If those decisions were really upon the ground that the court, under the circumstances, had no jurisdiction of the person of the defendant, why the insistence upon the fact that the occurrence of the offense relied upon antedated the domicil of the libellant in Massachusetts? While the court in these cases did not clearly distinguish between jurisdiction of the subject-matter and jurisdiction of the person of the libelee or respondent, there seems to be involved in them the idea, which comes out more clearly in the Pennsylvania cases subsequently cited, that in case of a cause of divorce occurring while both parties were domiciled at the forum (or, perhaps, if subsequently to the occurrence of such cause, both parties had acquired a domicil there, though the guilty party has since acquired a domicil elsewhere), the court may proceed without jurisdiction of the person of the defendant; in other words, when such is the case, the guilty party cannot deprive the court of jurisdiction by leaving the state after the commission of the offense and acquiring a domicil elsewhere, thus putting it beyond the power of the court to obtain jurisdiction of his person; but the court in such case may proceed as *in rem*. When, however, the cause occurred while neither party was domiciled at the forum, the injured party cannot, by subsequently acquiring a domicil there, enable the court to proceed without acquiring jurisdiction of the person of the defendant if the latter has never been domiciled there. This theory appears reasonable, and is apparently the only one that will explain the insistence in these cases upon the two elements, namely, the nonresidence of both parties at the time of the offense, and the continued nonresidence of the defendant at the time of the suit. (It must be remembered that if the defendant had been a resident at the time of the suit, the court could have acquired jurisdiction over his person by constructive or substituted service. See IV. b, 1, (a), *infra*.) There is an intimation in the opinion of the United States Supreme Court in Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, IV. b, 2, (b), *infra*, that the fact that the matrimonial domicil up to the time of the separation of the parties was at the forum may affect the right of the court to proceed as *in rem*, even against a nonresident, although, as subsequently shown, the decision seems to rest upon the assumption that the defendant in that case was legally domiciled at the forum. The intimation, however, suggests a distinction somewhat similar to that already pointed out in connection with the Massachusetts cases previously cited, and lends some support to the suggestion here made that the Mas-

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ceased, be annulled, avoided, and reversed, and that there now be judgment in favor of said parties first named, and against said Rachael L. Benton, destituting her of and dismissing her from said office of dative testamentary executrix. It is further ordered, adjudged, and decreed, that the judgment of said court, of date August 27, 1900, upon the oppositions of Misses Ella S. and Charlotte E. Benton, and of the said Mrs. Mary E. Monroe, to the account filed by said Mrs. Rachael L. Benton, dative testamentary executrix, be reversed, and affirmed, in the following particulars, respectively, to wit: In so far as said judgment approves and allows the items 3 and 4 of said account, and rejects, as in case of nonsuit, the two items of $450, each, for attorney's fees, that said judgment be annulled, avoided, and reversed, and that there now be judgment rejecting said items 3 and 4, as in case of nonsuit; approving and allowing item No. 8, being an item of $450, attorney's fees to Stifft & Madison; and rejecting the item of $450, attorney's fees, to "J. C. Wickliffe, attorney for Mrs. Rachael F. Peytral, legal heir of the succession." It is further ordered, adjudged, and decreed that in all other respects said judgment be affirmed. It is further ordered, adjudged, and decreed that the judgment herein rendered, of date August 8, 1900, denying the application of Mrs. Mary E. Monroe to release on bond, the judicial sequestration of the Honey island property be, and the same is hereby, affirmed. It is further ordered, adjudged, and decreed that the judgment of said district court, of date July 12, 1900, refusing the application of Mrs. Mary E. Monroe for the probate of the alleged will of April,

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sachusetts decisions above referred to rested, not upon the ground that the court had no jurisdiction of the subject-matter because neither party was domiciled at the forum when the offense occurred, but upon the ground that the court had no jurisdiction over the person of defendant because of his continued nonresidence, the inability to serve him within the state and his refusal to appear, and that under the circumstances (the matrimonial domicil not having been at the forum at the time of the offense, or since) the court had no jurisdiction to proceed as *in rem* without acquiring jurisdiction over the person.

Pennsylvania.

The opinion in Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767, which was delivered by Gibson, Ch. J., has been generally regarded as establishing the doctrine in Pennsylvania, as a rule of international law (though it was subsequently changed by statute with respect to causes of divorce arising while the parties were domiciled in another state), that jurisdiction of the subject-matter in divorce depends upon the domicil of the parties at the time and place of the *delictum*, and cannot rest upon the domicil at the time of the suit. There are certainly expressions in the opinion which seem to justify that view of it. For instance, at the close of the opinion it is said: "On general principles of law applicable to our condition, in conformity to the spirit of our statute, the sum of the matter seems to be that the law of the domicil at the time and place of the injury is the rule for everything but the original obligation of the marriage." But a careful examination of the opinion as a whole renders it at least doubtful whether it was intended to deny the jurisdiction of a court of a state in which both parties were domiciled at the time of the suit, because at the time of the offense they were domiciled elsewhere, and whether the language above quoted is not to be taken with the qualification that the defendant is not personally subject to the jurisdiction of the court, and that the court is obliged to proceed, if at all, as *in rem*. It appeared in this case that though the cause of divorce arose while the parties were domiciled in Ohio, the marriage was celebrated, and the matrimonial domicil was originally established, in Pennsylvania; and the force of the opinion seems mainly directed against the contention that jurisdiction of the subject-matter could be based on the fact that the marriage was celebrated in Pennsylvania. The opinion starts with the statement that if the court had jurisdiction on any known principle, it was that of the *lex loci contractus*. The husband (the libelee) was not a resident of Pennsylvania at the time of the commencement of the suit; and the opinion, referring to the fact that the wife was domiciled in Pennsylvania before her marriage, says: "If her domicil of origin could be an effective ingredient in her case, she would be prevented from resuming it by the coverture which suspends her separate existence and makes his domicil hers." Upon this assumption, therefore, the case before the court was one where neither party was domiciled in Pennsylvania, either at the time of the *delictum*, or at the time of the commencement of the suit, though the wife was actually residing there at the latter period; and therefore the only possible ground of the jurisdiction of the Pennsylvania court would seem to have been the presence of the libellant there at the time of the suit, or the fact that the marriage was celebrated there, and that the parties were then domiciled there. It is true that in one part of the opinion the judge says: "Moreover, it is not perceived how the presence [in Pennsylvania] of even both could confer jurisdiction of a cause of divorce which was not, in its inception, subject to the law of the forum." This statement, however, was not made upon the hypothesis that the parties were domiciled at the forum at the time of the suit, but was made in the course of an argument to combat the Scotch doctrine that the mere temporary residence of the parties at the forum, without a bona fide domicil, is sufficient to confer jurisdiction.

In 1850 (subsequent to the decision in this case) an act of the legislature was passed making it lawful for the courts of Pennsylvania to entertain jurisdiction of all cases of divorce for the cause of desertion or adultery, notwithstanding that the parties were, at the time of the occurrence of such causes, domiciled in another state. The passage of this act would seem to indicate that in the view of the legislature the case last cited had established the doctrine in Pennsylvania that jurisdiction of the subject-matter of divorce could not rest upon the fact that the domicil of the parties was in Pennsylvania at the time of the suit, if neither was domiciled there at the time of the offense. But it was held in Allison v. Allison, 18 W. N. C. 508, that the act does not confer jurisdiction to grant a divorce for desertion occurring while both parties were domiciled in another state notwithstanding that the plaintiff has since become domiciled in Pennsylvania, if the defendant is still a nonresident, is not served personally within the state, and does not appear. Here is

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1893, be, and the same is hereby, affirmed. It is further ordered, adjudged, and decreed that the costs in both courts be borne by the succession.

Provosty, J., takes no part.

An application for rehearing was granted on June 29, 1901, in the following opinion by **Nicholls**, Ch. J.:

An application for rehearing has been made on behalf of Misses Charlotte Benton and Ella Benton and Mary Monroe, to which has been annexed certain documentary evidence bearing upon the question of the bona fides of the dative executrix, Mrs. Rachael L. Benton, in the matter of the obtaining of her divorce from Burrell J. Manscoe, together with affidavits going to show that this evidence has been newly discovered. Without expressing any opinion as to what may be the further action of the court in the premises, we are of opinion that the application as thus made justifies the reopening of the case *quoad* the particular question hereinabove referred to and matters incidentally connected therewith and to be affected thereby. It is therefore ordered that the rehearing as prayed for by the parties above named be granted, and it is further ordered that the rehearing as applied for by the dative executrix be denied.

After the rehearing the following additional opinion was handed down on January 6, 1902, by **Breaux**, J.:

The dative testamentary executrix has been destituted. The judgment is final both as to the destitution and the writ of sequestration, which was issued in the case

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a clear distinction between jurisdiction of the subject-matter and jurisdiction of the person of the defendant; and while the court clearly had jurisdiction of the subject-matter because it was expressly conferred by statute, yet it was held that the action cou'd not be maintained obviously because the court had no jurisdiction over the person of the defendant. So far as appears, the defendant in Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767, was not personally served in Pennsylvania, and did not appear (and the implication from the statement, without more, that he was a nonresident at the time of the suit, is that there was no personal service in the state or appearance), so that, under the doctrine of the Allison Case, the action in the Dorsey Case would have failed for want of jurisdiction of the person of the defendant, even if the case had arisen after the act of 1850, which expressly removes any objection, so far as jurisdiction of the subject-matter is concerned, based on the fact that the domicil of both parties was in another state at the time of the *delictum*.

The doctrine of the Allison Case has been adopted and applied in the following cases: Nigh v. Nigh, 2 Pa. Co. Ct. 574; Davis v. Davis, 12 Pa. Co. Ct. 541; Burdick v. Burdick, 2 Pa. Dist. R. 622; Taylor v. Taylor, 1 Chester Co. Rep. 485; Ramsey v. Ramsey, 5 Legal Gaz. 53, 1 Legal Chronicle, 55; Fitch v. Fitch, 1 C. P. Rep. 46; Conrad v. Conrad, 1 Lack. Jur. 34; Tucker v. Tucker, 1 Lack. Jur. 263; Benton v. Benton, 1 Lack. Jur. 453; Grimes v. Grimes, 12 Lanc. L. Rev. 23.

In all of the foregoing cases it appeared that the defendant was still a nonresident of Pennsylvania when the suit was commenced, and that he was not personally served within the state and did not appear; and the intimation is that if he had been a resident, or had been personally served in the state, or had appeared, the court would have had jurisdiction. That is expressly conceded in Nigh v. Nigh, 2 Pa. Co. Ct. 574, and in Austin v. Austin, 4 Pa. Co. Ct. 368, the jurisdiction of a court of Pennsylvania was upheld notwithstanding that the cause of divorce arose while the parties were domiciled in New York, it appearing that the respondent subsequently came to Pennsylvania and resided there up to the time that service by publication was complete. It is true that it is held in Hull v. Hull, 8 Pa. Dist. R. 420, that a court of Pennsylvania may take jurisdiction upon constructive service of an action against a nonresident, as well when the offense was committed while the parties were domiciled out of the state, as when they were domiciled in the state, at that time. But this decision is contrary to the decisions just cited, and, even if correct, does not militate against the argument, drawn from those decisions, that the Pennsylvania doctrine was based, not on lack of jurisdiction of the subject-matter when the cause of divorce occurred while the parties were domiciled in another state, but upon the ground of lack of jurisdiction of the person of the defendant in such case, if he or she still continued a nonresident of Pennsylvania.

There is another class of cases which seems to support the suggestion here made, that the doctrine in Pennsylvania rested rather upon lack of jurisdiction of the person of the defendant than upon lack of jurisdiction of the subject-matter. The act of 1850 was held, in Bishop v. Bishop, 30 Pa. 412, to apply only to causes arising while the parties were domiciled in another state, and not to causes of divorce arising in another country. So far as cases of the latter class were concerned, therefore, there was no interference by statute with any doctrine previously established in the state, and yet in Lewis v. Lewis, 6 Kulp, 429; Lokes v. Lokes, 14 W. N. C. 306, and Kellow v. Kellow, 1 Lehigh Valley L. R. 202 (decided after the Bishop Case), where the jurisdiction of a court of Pennsylvania to grant a divorce for desertion or adultery occurring while the parties were domiciled in another country was denied, the facts that the defendant was a nonresident of Pennsylvania at the time of the suit, was not personally served in that state, and did not appear, as well as the fact that both parties were domiciled in a foreign country at the time of the *delictum*, are expressly stated and apparently relied on. In McCartney v. McCartney, 30 W. N. C. 132, however, the jurisdiction in such case was denied, notwithstanding that the libelee, who was still a nonresident of Pennsylvania, appeared and submitted to the jurisdiction. The decision in this case, which is expressly on the ground that the court had no jurisdiction over the subject-matter, either under the act of 1850 or the subsequent act of 1858, seems to be the only one which clearly rests upon the lack of jurisdiction of the subject-matter; at least, it is the only case in which the right of a court of Pennsylvania to entertain the suit is denied where it has appeared that the defendant was personally subject to the jurisdiction of the court.

There is still another class of cases that seem to support the suggestion that the doctrine of international law, as recognized in Pennsylvania, that a court has no jurisdiction to grant

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and which is to remain for the time being undisturbed. It is also final in matter of the opposition to the account filed and approved.

This court granted a rehearing in matter of the good faith of Mrs. Rachael Benton and upon questions incidental to that issue. The case having been argued on the rehearing, further consideration was given to the issues. It was not deemed advisable, in order that the issues may be tried before the district court, to recall and set aside the judgment, decreeing that Mrs. Benton was in good faith, of this court and of the district court, and let the case be remanded to try this issue, and to determine again the effect to be given to the proceedings for divorce and to the judgment rendered between Mrs. Benton and Burrell J. Manscoe in Indiana. Mrs. Peytral, daughter of E. B. Benton and Mrs. Rachael Benton, is also a party to this litigation. She sued to destitute the executrix, to annul the will, and to claim the succession. She asked to be recognized as Dr. Benton's sole and only heir. On the trial of the case her evidence was heard. It was made manifest that the late Dr. Benton always treated her as his daughter. After having left the matrimonial home to reside in another parish of this state, it was to her always that he wrote. His letters to his daughter are advisory and kind. He admonished her to keep good company or none; says to her that he is pleased with her letters, that her mind is improving, and that good books are excellent companions; says to her that she is near and dear to him. At all times he seeks to protect and shield her. All his letters contain a number of expressions to that end. The

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a divorce for a cause occurring while both parties were domiciled out of the state, the defendant being still, at the time of the suit, a nonresident, rests upon lack of jurisdiction of the person of the defendant and inability to proceed in such a case without jurisdiction of his person, rather than upon lack of jurisdiction of the subject-matter. The cases referred to are those in which the courts of Pennsylvania have refused recognition of decrees rendered in other states upon constructive service of process. In Colvin v. Reed, 55 Pa. 375 (where the divorce was refused recognition in Pennsylvania), the wife deserted the husband while the parties were domiciled in Pennsylvania. He subsequently removed to Iowa, acquired a domicil there, and procured a divorce for desertion upon constructive service, the wife remaining in Pennsylvania.

It was conceded in this case that the decree would have been entitled to recognition in Pennsylvania if the maxim that a wife's domicil follows her husband's were to prevail, but it was held under the circumstances that it did not (see IV. b, 1, (b), *infra*). That concession is inconsistent with the idea that the decision is upon the ground that the court which rendered the decree had no jurisdiction of the subject-matter, because the matrimonial domicil at the time of the offense was not at the forum; but is perfectly consistent with the idea that the decision was upon the ground that the court had no jurisdiction of the person of the defendant, and under the circumstances (the matrimonial domicil never having been at the forum) could not proceed without jurisdiction of her person, since, if the maxim had applied, the defendant would have been legally domiciled at the forum, and therefore liable to be personally subjected to the jurisdiction of the court by constructive service (IV. b, 1, (a), infra).

In Reel v. Elder, 62 Pa. 308, 1 Am. Rep. 414 (where the divorce was refused recognition), the divorce was granted in Tennessee upon publication of notice and personal service thereof on the wife in Pennsylvania for her adultery while she was domiciled in Pennsylvania. The decision seems to rest upon the principle that the injured party in the marriage relation must seek redress in the forum of the defendant, unless such defendant has removed from what was before the common domicil of both; but the rule seems to be limited to cases in which jurisdiction of the person cannot be acquired by a personal service or appearance within the state where the divorce suit is brought, for the court says: "Surely it needs no argument to prove that no one who has not shut himself out by his own voluntary act of flight from justice should be condemned without a hearing, or an opportunity to be heard." It is true that it was also said that the service of the notice upon the wife made no difference, because, when it is once determined that a court has not jurisdiction, notice, or even process duly served, cannot give vitality to the judgment; but this remark appears to have had reference to the service of notice in Pennsylvania, which was, of course, ineffectual to bring the defendant personally within the jurisdiction of the Tennessee court.

In Platt's Appeal, 80 Pa. 501 (where the divorce was refused recognition), the divorce was obtained by the husband in Michigan for desertion occurring while both parties were domiciled in Ohio, upon service by publication against the wife, who was a nonresident of Michigan and did not appear in the action. The facts of the nonresidence and the nonappearance of the wife as well as the fact that the cause of divorce did not arise in Michigan, are emphasized in the opinion.

In Fyock's Estate, 135 Pa. 522, 19 Atl. 1056, it was held that a divorce obtained by a husband against his wife in Nebraska was invalid, and did not affect the wife's right to letters of administration upon his estate after his death. In this case the husband and wife were originally domiciled in Pennsylvania, and the wife had obtained a decree of divorce *a mensa et thoro*, and the husband afterward went to Nebraska and obtained divorce there. It is not entirely clear, from the opinion, upon what ground the divorce was held invalid, nor does the mode of service adopted in the Nebraska case appear, but there was evidently no personal service in Nebraska, and the wife was not domiciled in that state.

In Com. v. Maize, 23 W. N. C. 572, the decision is that a decree of divorce obtained by the husband in another state for a cause occurring while the parties were domiciled in Pennsylvania will not be recognized in the latter state if the wife remained in Pennsylvania and was served there. It is true that in this case the court said that if a court has no jurisdiction, neither notice nor process duly served can give vitality to its judgment. This language, apart from the context, might seem to indicate that the reason the divorce was not entitled to recognition in Pennsylvania was that the court had no jurisdiction of the subject-matter, but in view of the context the reference to notice

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family of Dr. Benton have always considered her as one of its members. In letters, the mother of Dr. Benton refers to this daughter when she was a child as "baby Rachael." Whatever errors the mother may have committed, and however void the decree of divorce obtained in Indiana may have been, it would be a sad necessity if ever it becomes necessary under the law to decide that this daughter must be considered an outcast from all family ties, and be numbered as one among the disinherited of humanity. She, until recently, as we understand, had no cause to suspect that she was not the daughter of a legal marriage. It is true that in the last few years prior to his death the father, who, it seems, was an eccentric man, became estranged from his daughter. He was, it appears, opposed to her marriage, and her husband was not in favor with him; but in all this he was never heard to disown her. During his last illness the daughter called to see him. She failed in getting admission to his room, but not owing to any fault of hers. She was not at his funeral, it is true; but no one gave her notice of his death, upon whom it devolved to give the notice.

The mother of Dr. Benton and the other members of her family, while he lived, always looked upon him so far as the record discloses, as the husband of Mrs. Benton and the father of Rachael. The letters addressed to them by Mrs. Benton, mother of

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or process duly served evidently referred to a service out of the state.

In the following cases, also, where divorces granted in other states were refused recognition in Pennsylvania, the decisions are plainly upon the ground that there was no jurisdiction over the person of the defendant, and not upon the ground that the court had no jurisdiction of the subject-matter. Philadelphia use of Wetherby v. Wetherby, 15 Phila. 403; Com. v. Bolich, 18 Pa. Co. Ct. 401; Com. v. Ainsworth, 20 Pa. Co. Ct. 123; Com. v. Stevens, 25 Pa. Co. Ct. 68; Com. v. Taylor, 1 Susquehanna Leg. Chronicle, 15; Com. v. Shuler, 2 Pa. Dist. R. 552; Philadelphia Bd. of Charities & Correction v. Moore, 6 Pa. Co. Ct. 66.

Where but one party is domiciled in a state, and the other party is, and always has been, a nonresident thereof, but has had personal notice, through some channel, of the pending suit, and an opportunity to defend, of which he does not avail himself, a decree of divorce will be valid in the state where granted, but generally invalid in the state of his present domicil. Com. v. Steiger, 12 Pa. Co. Ct. 334. The notice here referred to is evidently a notice served out of the state.

The removal of the domicil of the husband and wife to another state after the occurrence of a cause for divorce while the parties were domiciled in Pennsylvania does not deprive a court of Pennsylvania of jurisdiction of a divorce suit at the instance of the wife, who has returned and resided in Pennsylvania one year prior to the bringing of the suit. Hollister v. Hollister, 6 Pa. 449.

If the decisions in the foregoing cases have been correctly interpreted, they may be reconciled with the general principle of international law prevailing in most of the other states, that the fact that neither of the parties was domiciled at the forum at the time the cause of divorce occurred does not defeat the jurisdiction over the subject-matter. In this view, the decisions rest, not upon lack of jurisdiction of the subject-matter, but upon lack of jurisdiction of the person of the defendant and the inability to proceed without jurisdiction of the person, when the cause of divorce occurred while both parties were domiciled out of the state, and the guilty party has never acquired a domicil in the state. (See further, as to the distinction here suggested, the remark in connection with the citation of the Massachusetts cases.)

The general question as to the right of a court to proceed without acquiring jurisdiction over the person of a nonresident is discussed in subdivision IV. b, 2, (b), (1) and (2), *infra*.

IV. *Jurisdiction of the person or of the res; foreign decrees upon constructive service.*

a. *In general.*

If a decree of divorce were strictly *in personam*, like a money judgment, for instance, there could be no doubt but that jurisdiction of the person of the defendant, as well as of the subject-matter of the suit, would be essential to enable the court to render a decree which would be valid either in the state where rendered or in other states, assuming that a decree of divorce is within the protection of the "due process of law" provision of the Federal Constitution (as to which see the latter part of division I., *supra*), for, without jurisdiction of the person of the defendant, the judgment would, under the decision in Pennoyer v. Neff, be contrary to due process of law. See authorities cited in *note* to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 577. Upon such assumption, it would also be clear, under that decision, that if the defendant were a nonresident, jurisdiction over his person could only be acquired by personal service within the state, or by his appearance.

So, on the other hand, if a decree of divorce were purely *in rem*, it would be clear, under the authorities above referred to, that jurisdiction of the person of the defendant would not be essential, but that a decree which would, at least, be valid in the state where rendered, could be rendered, even against a nonresident, upon reasonable constructive notice without appearance; and upon this assumption, it would seem, upon principle, that the courts of other states would not be at liberty to refuse it recognition in view of the "full faith and credit" provision of the Federal Constitution. But a decree of divorce is neither strictly *in personam* nor strictly *in rem*. It is anomalous in this respect, and it is to this fact that the great diversity of views with respect to the right of a court of a state, in which but one party is domiciled, to grant a divorce upon constructive service against the other, is attributable. These conflicting views are discussed in subsequent subdivisions.

b. *Decrees rendered upon constructive service.*

1. *When defendant a resident of state where rendered.*

(a) *In general.*

When the defendant is a resident of the state in which suit is brought, even if he is absent therefrom at the time and is served constructively only, it is immaterial whether the suit be governed by the principles applicable to a

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Dr. Benton, lead to the inference that they considered her as united in lawful wedlock. There remain two sisters and a brother of the late Dr. Benton. The sisters are the claimants. The brother has not sought to have the decree of divorce declared void or to attack the will. The plea of the sisters to have marriage of their brother decreed void and the child illegitimate is not persuasive. The license in due form is produced, and evidence of the marriage which took place in Cairo, Illinois. This was preceded by a decree of divorce. As relates to the daughter, we are thoroughly convinced that the marriage must be given complete legal effect. As relates to the father and mother, we are of the opinion that it falls within the principles laid down in *Smith* v. *Smith*, 43 La. Ann. 1148, 10 So. 248. As relates to Mrs. Benton, and particularly to the late Dr. Benton, we are not prepared to hold that plaintiff has made out such a case as requires us to decree that the marriage was not, at least, a putative marriage.

The good faith of the parties, sufficient to give it effect as such, has not been rebutted to an extent that would justify us in recalling the views heretofore expressed by us and in setting aside our original decree. Our order granting the rehearing is rescinded and recalled. Our former decree is reinstated, and is the decree of the court.

Blanchard, J., dissents.

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suit *in personam* or by those applicable to a proceeding *in rem*, since, even if the former govern so that jurisdiction of the person is necessary, it is well settled that such jurisdiction can be acquired against a resident defendant by a reasonable constructive or substituted notice, although he is absent from the state at the time. See *note* to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 577.

Thus, even in New York, where decrees rendered in other states under such circumstances against nonresidents are refused recognition, it is held that a decree rendered in another state against a resident of that state, upon constructive service, will be recognized although he was absent from the state at the time of the suit, and did not appear in the suit. Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 120; De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405; Campbell v. Campbell, 90 Hun, 233, 35 N. Y. Supp. 280, 693; *Re* Denick, 92 Hun, 161, 36 N. Y. Supp. 518; Lacey v. Lacey, 38 Misc. 106, 77 N. Y. Supp. 235.

It does not appear in all the foregoing cases that the defendant was actually out of the jurisdiction in which the divorce was rendered, but it does so appear in Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; in *Re* Denick, 92 Hun, 161, 36 N. Y. Supp. 518, and Lacey v. Lacey, 38 Misc. 106, 77 N. Y. Supp. 235, and it was assumed in Atherton v. Atherton that a decree of divorce rendered in Kentucky, upon constructive service upon the wife, who was actually living in New York, would have been valid if the wife had been legally regarded as domiciled in Kentucky, notwithstanding her actual residence in New York. In all the New York cases which refuse to recognize decrees rendered on constructive service, the fact that the defendant was a nonresident is emphasized.

And see also the Massachusetts cases cited in next section, which, without passing upon the question of the sufficiency of constructive service to support a divorce against a nonresident, have upheld decrees of divorce rendered in other states in favor of the husband upon such service, upon the theory that the wife, though absent from the state, was nevertheless legally domiciled there.

(b) *Domicil of wife as defendant.*

It follows, from the rule stated in the last subdivision, that when the wife is the defendant in the suit, it is important, from the point of view of the courts that hold that constructive service against a nonresident is insufficient to confer jurisdiction, to determine whether the wife, for the purposes of this rule, takes her husband's domicil. If she does, it is obvious, for the reasons stated in the last subdivision, that there will be no reason for refusing recognition of a decree rendered against her in another state upon constructive service without appearance, for upon that assumption she would be legally domiciled in the state where the decree was rendered (assuming that the husband was domiciled there), and therefore liable to be personally subjected to the jurisdiction of that court by constructive service, even if actually residing in another state.

The question as to the right of a wife to acquire a separate domicil for the purpose of bringing a suit has been discussed in subdivision III. a, *supra;* and it will be observed, from the cases there cited, that there is some difference of opinion whether such right is dependent upon the existence of an adequate cause for leaving the husband. The question is presented from a somewhat different point of view when the wife is the defendant in the suit, for while, as pointed out in that subdivision, a finding on the merits in her favor when she is plaintiff will ordinarily establish the existence of an adequate cause for leaving her husband, and thus support the jurisdiction, a finding on the merits in favor of the husband, when she is the defendant, will ordinarily negative the existence of such cause, and thus support the jurisdiction, even in a suit *in personam*. Therefore, if the existence of her separate domicil, when she is defendant, is dependent upon the existence of such a cause, it will ordinarily be necessary for the court of another state, which refuses to recognize the decree because rendered on constructive service, to impeach the finding on the merits so far as it affects the jurisdictional fact by negativing the condition upon which her right to acquire a separate domicil depends. That seems to have been the course adopted in Atherton v. Atherton, 155 N. Y. 129, 40 L. R. A. 291, 49 N. E. 933, where, notwithstanding the finding of the Kentucky court, on the merits, that the wife had abandoned the husband (which would negative the existence of an adequate cause for leaving him), the New York court found, as a fact, that she was justified in leaving him, and, upon that finding, based its conclusion that she had acquired a separate domicil in New York, and was therefore not bound by the Kentucky decree, which was rendered on constructive service.

So, in People v. Karlsloe, 1 App. Div. 571, 37 N. Y. Supp. 481, it was held that the wife, by reason of the husband's misconduct, retained a separate domicil in New York, and her domicil did not follow the domicil of her husband to Kentucky, so as to give the court of the latter state jurisdiction over her as a resident.

And in Mellen v. Mellen, 10 Abb. N. C. 329, where a decree rendered against the wife in an-

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other state on constructive service was refused recognition in New York, the jury in the New York case found that the wife did not desert her husband, notwithstanding that the desertion was the ground upon which the divorce was granted to him, though, in this case, the court seems to have taken the position that the commencement of the suit itself by the husband puts an end to the legal fiction of the identity of domicils. In Rundle v. Van Inwegan, 9 N. Y. Civ. Proc. Rep. 328, the right of the wife to acquire a separate domicil as affecting the jurisdiction to grant a divorce in favor of the husband was apparently made to depend upon the existence of an adequate cause.

In Hood v. Hood, 11 Allen, 196, 87 Am. Dec. 709, where a decree, rendered in Illinois against a wife on constructive service, was recognized in Massachusetts, the decision was expressly put upon the ground that while the wife was actually residing in Massachusetts, she was legally domiciled in Illinois because no justification for leaving the husband was shown.

So, in Loker v. Gerald, 157 Mass. 42, 16 L. R. A. 497, 31 N. E. 709, where a divorce was obtained by a husband in another state, upon service upon the wife in Massachusetts only, the decision is upon the ground that, while the wife was actually living in Massachusetts at the time of the divorce, she was legally domiciled with her husband in Colorado, since she had no excuse for living apart from him, and the legal fiction that her domicil followed his therefore applied.

In Burlen v. Shannon, 115 Mass. 438, the court said that the only exception to the rule that the domicil of the husband is the domicil of the wife is that an innocent wife may, under some circumstances, have a separate domicil for the purpose of sustaining a libel against a guilty husband; not that a wife who has left her domicil and is living apart from him without cause has such an exclusive domicil as will prevent him, if in good faith domiciled elsewhere, from obtaining a divorce from her in the place of his domicil; and there is a statement to the same effect in Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740.

If a wife is living apart from her husband without sufficient cause, his domicil is, in law, her domicil, and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicil, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, even though she never, in fact, resided in that state. Cheeley v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328. In this case, however, the divorce, which was obtained by the husband in the territory of Colorado, was held invalid, even within that territory, because the notice to the absent wife by publication did not comply with the statutes of the territory.

In Guest v. Guest, 3 Ont. Rep. 344, a decree of divorce obtained by the husband in Ohio while domiciled there, upon personal service upon the wife while living in Canada, was recognized as valid in Canada and as a bar to the wife's action for alimony, upon the ground that the husband being domiciled in Ohio, that state was also the domicil of the wife.

Harrison v. Harrison, 19 Ala. 499, and Thompson v. Thompson, 91 Ala. 591, 11 L. R. A. 443, 8 So. 419, which recognized decrees of divorce rendered upon constructive service against the wife, were also probably decided upon the ground that the wife's legal domicil was with her husband, and that therefore she was a resident of the state where the divorce was granted, and could be effectively served by publication, for it was expressly held in Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227, that a wife could not leave her husband's domicil in Alabama and acquire a separate domicil in South Carolina, so as to entitle her to maintain an action for divorce there, although she was forced by his cruel treatment to abandon him and seek the protection of her friends in South Carolina.

In Warrender v. Warrender, 2 Clark & F. 488, it was held that a wife's legal domicil was in Scotland where the husband was domiciled, and that she was amenable to the jurisdiction of the Scotch court, notwithstanding that since the execution of a separation agreement between the parties, she had resided abroad, and was residing abroad at the time of the divorce. In this case the wife appeared in the divorce suit.

In McGrew v. Mutual L. Ins. Co. 132 Cal. 85, 64 Pac. 103, however, the court took the position that the commencement of a suit by the husband itself puts an end to the legal fiction that she takes his domicil, and from that time her domicil is to be determined by the actual facts in the case. This seems to be the position in Kline v. Kline, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825, also. (And see Mellen v. Mellen, 10 Abb. N. C. 329.)

In Smith v. Smith, 4 Mackey, 255, it was held that a wife actually residing in the District of Columbia could not, for the purpose of defeating jurisdiction of a court of the District over an action for divorce by the husband, who was domiciled in Maryland, claim that her domicil was with him in the latter state. (The statute of the District was construed to give jurisdiction if the cause occurred within the District and the defendant resided there, though plaintiff resided elsewhere.) This decision seems to be without reference to the existence of an adequate cause for leaving the husband.

In Irby v. Wilson, 21 N. C. (1 Dev. & B. Eq.) 568, it was held that a wife who, prior to the granting of a divorce to her husband in Tennessee, had left the matrimonial domicil in that state, and come to North Carolina and resided there, had acquired a separate domicil in the latter state so that she could not be regarded as domiciled in Tennessee, and as, therefore, subject to the jurisdiction of a court of that state upon constructive service only. This decision also seems to be without reference to the existence of any adequate cause for leaving the matrimonial domicil, and, so far as it appears in the case, the wife had no reason whatever for leaving such domicil. The principle of the decision seems to be that the fiction that the wife takes the husband's domicil does not apply in a suit for divorce between them, but that their domicil in such case is to be determined by the actual facts.

In Colvin v. Reed, 55 Pa. 375, the court took the position that the domicil of the wife, who remained in the state where the common domicil was established at the time of the alleged cause of divorce, did not follow the husband's upon his subsequent removal to a new domicil, although she was the guilty party. In this case the wife deserted the husband while the parties were domiciled in Pennsylvania. He subsequently removed to Iowa and acquired a domicil there and procured a divorce upon constructive service, the wife remaining in Pennsylvania. The court held that, under the circumstances, her domicil did not follow that of the husband to Iowa, and that therefore the court had no jurisdiction over her. It will be observed that this case differs from the preceding in that in this case the wife remained at the original matrimonial domicil, while in the other case she left the original domicil and obtained a new one elsewhere.

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2. When defendant a nonresident.

(a) Validity, and effect on status, of decree in state where rendered.

See also I. *supra.*

Even when the defendant is a nonresident, is served constructively only, and does not appear, the validity of the divorce within the state where rendered, if authorized by the statutes of that state, seems to be generally conceded, even by those courts which hold that a decree rendered under such circumstances has no extraterritorial effect. In New York, where that doctrine prevails, the courts can scarcely refuse to admit the validity of the decree in the state where rendered, since the power to grant divorces, under exactly the same circumstances, is expressly conferred by statute upon the courts of New York, and the validity of such divorces, when rendered in New York, seems never to have been questioned by the courts of that state. As will be shown in subdivision IV. b, 2, (b), (2), *infra*, the New York doctrine does not, formally at least, proceed upon the theory that a decree of divorce rendered in another state, under such circumstances, is not entitled to recognition at all, but that its effect is only to establish the status of the resident spouse, and that, apparently, only within the state where rendered. In this view, if it can be maintained, there is, theoretically at least, no inconsistency between the denial, upon one hand, of the extraterritorial effect of such decrees rendered in other states, and the concession of their validity in the state where rendered, or the assumption of the right of New York courts to render decrees under the same circumstances, upon the other. But when, as in some of the cases, the doctrine is based upon the ground that a decree rendered under such circumstances is entirely without jurisdiction, and for that reason the courts of other states are not bound to recognize it under "the full faith and credit" provision of the Federal Constitution, it seems inconsistent to concede the validity of the decree in the state where rendered, or to exercise the power to grant divorces under such circumstances. The only theory upon which the decision can be reconciled with such concession or exercise of jurisdiction is that there is one standard of jurisdiction to be applied when the decree in the state where rendered is concerned, and another when its validity in other states is concerned. (For a discussion of this theory, see I. *supra.*)

In Wisconsin, while the validity of a statute of that state conferring jurisdiction upon its courts to grant divorces upon constructive service against nonresidents has with one exception been upheld by the courts of that state, they have, nevertheless, upon reasoning quite similar to that used by other courts which have refused to recognize such decrees when rendered in other states, seriously questioned the right of the courts of Wisconsin to take jurisdiction under such circumstances, notwithstanding the statute referred to. The question first arose in the case of Manley v Manley, 4 Chand. (Wis.) 97, where the jurisdiction of Wisconsin courts, under such circumstances, was upheld.

In Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702, the court felt constrained by the decision in the last case, to hold that a court of Wisconsin had jurisdiction to entertain a suit for divorce by a wife domiciled in that state against her husband domiciled in New York, proceeded against as a nonresident in the manner pointed out by the Wisconsin statute, although the marriage and the alleged cause of divorce occurred in New York, and the defendant was, and always had been, a resident of that state. The court said, however, that it could not adopt the reasoning in the Manley Case, and the decision in that case was adhered to only because of the rule *stare decisis.*

Gleason v. Gleason, 4 Wis. 64, is to the same effect as Hubbell v. Hubbell. The question in this case, also, was as to the jurisdiction of the Wisconsin court, and the cause was desertion of the husband by the wife, occurring while the parties were domiciled in New York and before the removal of the husband's domicil to Wisconsin.

In Shafer v. Bushnell, 24 Wis. 372, it was held that a decree of divorce obtained by a wife in Minnesota, where she had her actual bona fide domicil, for acts of cruelty committed in Wisconsin, was entitled to recognition in the latter state, notwithstanding that the husband, who was a resident of Wisconsin, was served only by publication and did not appear. The marriage was celebrated in Wisconsin, and the acts of cruelty were committed there. The court said: "It cannot, with any reason, be claimed that this state may fix and determine the status or legal relation of married persons domiciled here,—may grant valid *ex parte* decrees of divorce, releasing such persons from all duties and obligations connected with a former marriage,—and yet deny the effect of such decrees when granted by the courts of our sister states. According to principles of our own decisions [referring to Manley v. Manley, 4 Chand. (Wis.) 96; Hubbell v. Hubbell, 3 Wis. 664, 62 Am. Dec. 702; and Gleason v. Gleason, 4 Wis. 64], therefore, effect must be given to the judgment of the Minnesota court, although the plaintiff had only constructive notice by publication of the divorce suit." The question as to the effect of the decree arose in Wisconsin in consequence of an action brought by the divorced husband against a man whom the wife married after the divorce, for criminal conversation. A direction of a verdict for the defendant was sustained on appeal.

In Moyer v. Koontz, 103 Wis. 24, 79 N. W. 50, while it was conceded that a court of that state would have jurisdiction upon substituted service against a nonresident defendant to decree a divorce, or to set aside a decree fraudulently obtained, if the party who obtained it is still living, it was held that it could not take jurisdiction, upon such service, of a suit to set aside the decree after the death of the party who procured it, where its purpose was merely to affect the right to property out of the state. The decision is upon the ground that in such a suit there is no status or *res* involved, and that a decree, under such circumstances, would infringe the principle of international law as it existed among the states in 1790, and is still maintained, that the jurisdiction of a state does not extend beyond its boundaries, and, if carried into effect, would violate the 14th Amendment, which prohibits Wisconsin and all other states from enacting any law which would deprive any person of life, liberty, or property without due process of law. The court further said that the statutes of Wisconsin for service on nonresidents are subject to limitation that the cause of action therein required to exist must be one which affects property rights within the state, or which affects the status of a resident.

It will be observed that in the last case the question as to the jurisdiction of the Wisconsin court is discussed upon general principles of law relating to jurisdiction, and as though those principles applied as well to the question of jurisdiction of a Wisconsin court as to the

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jurisdiction of a court of another state whose decree a court of Wisconsin is asked to recognize; and it is also to be observed that the jurisdiction of the Wisconsin court was denied notwithstanding the case was within the terms of the statute authorizing service by publication against nonresidents, because, in the view of the court, the suit was not one *in rem*, and because a violation of the general principle of international law that the court has no right to proceed upon substituted service against a nonresident, unless the proceeding is *in rem*, would be contrary to due process of law, and therefore could not be authorized, even by statute. It is true that the action before the court directly affected vested property rights which were clearly within the protection of the due process provision, while it is not so clear that the marital relation itself is within the protection of that provision. It will be observed, however, that in the other Wisconsin cases cited above the power of a court of Wisconsin to proceed against a nonresident upon constructive service in a divorce suit is not regarded as finally and conclusively determined by the statute purporting to confer it, but is made to rest ultimately upon the doctrine—adopted reluctantly, it is true—that by virtue of the status involved a divorce suit is analogous to a proceeding *in rem*, in which, by the general principles of international law, constructive service is sufficient, even against a nonresident. It is clearly implied in these cases that the power of the court to grant a divorce, under such circumstances, would have been denied, notwithstanding the statute, if the court had been unable to adopt the view that a divorce suit is in the nature of, or analogous to, a proceeding *in rem* in such sense as to bring it within the principles of international law, which dispenses with jurisdiction of the person of the defendant in proceedings *in rem*. In other words, the decisions in these cases seem to proceed upon the theory that the test of jurisdiction is the same whether the validity of the decree in the state where rendered or in another state is concerned, and that in either case the jurisdiction is to be denied, notwithstanding the statute, unless it can be exercised conformably to the fundamental principles of international law, which make jurisdiction of the person of the defendant essential to a proceeding *in personam*, and dispense with it in a proceeding *in rem*.

It will also be observed that the opinion in Ditson v. Ditson, 4 R. I. 87, which has been frequently commended by the courts and text writers, though the actual question in the case was whether a court of Rhode Island should take jurisdiction in a divorce suit upon constructive service against a nonresident, discusses the question upon principles of general law, notwithstanding that the statute of the state provided for constructive service in such cases. It is true that the court in this case gave, as a reason why it felt at liberty to consider the question on general principles, that the statute was permissive merely, and not obligatory upon the court. Before entering upon the consideration of the question of the jurisdiction, however, the court remarked: "If, however, by the general law pertaining to this subject, a decree of divorce *a vinculo*, made here, be void elsewhere, unless both parties to the marriage are resident in this state at the time of the application, or the respondent has been served with notice in the state, or, being served with notice out of it, has appeared and submitted himself to our jurisdiction,—so far from feeling compelled by the language of our statute, as it stands at present, to pass such decree, we should feel compelled to refuse to pass them else they should bring upon the resident petitioner in such cases greater evils than those that our statute was designed to remedy." Here is a clear admission that all considerations of public policy require the same test of jurisdiction to be applied whether it is a question of the right of the court of a state to grant a divorce under the circumstances named, or a question as to the recognition by that state of a decree rendered under such circumstances in another state. Yet, it is, perhaps, implied that if the language of the statute had been obligatory, the court would have been obliged to enforce it regardless of its views with reference to the general principles of international law on the subject. In this case, as is shown in the next subdivision, it was held that the jurisdiction of the court could be upheld conformably to general principles of law; but if the decision on this point had been otherwise, would not the court have been justified in holding, assuming that the obligatory language of the statute had made it necessary to do so, that the statute, being in violation of a fundamental principle of international law, was itself a violation of due process of law, and therefore invalid?

In Butler v. Washington, 45 La. Ann. 279, 19 L. R. A. 814, 12 So. 356, where the jurisdiction of a court of Louisiana to grant a divorce upon substituted service was upheld, the question was treated as though the jurisdiction in such case must be tested by the 14th Amendment; and the decision rests upon the ground that, under the circumstances of the case, substituted service constituted due process of law.

In McCreery v. Davis, 44 S. C. 195, 28 L. R. A. 655, 22 S. E. 178, the South Carolina supreme court, referring to the *dictum* of Mr. Justice Field in Pennoyer v. Neff with reference to a divorce granted upon constructive service (see 1. *supra*), said: "But if it is intended to announce that such a conclusion would be proper in a case where a marriage contract was made in a state where both were domiciled, and in a state where divorce is not allowed, and where one of the parties to such contract of marriage should remove to a state where divorces are allowed, and there institute an action for divorce, causing the other party to the marriage contract to be served by publication alone, to which said latter party paid no attention, and a judgment for divorce was granted, we submit that such judgment is erroneous, so far as the same relates to the absent defendant, by the decisions of the Supreme Court of the United States. The defendant has the right to interpose as a defense to such wrong that he has been denied due process of law: to interpose for his protection from such judgment the 14th Amendment to the Constitution of the United States, which provides: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'"

In Blackinton v. Blackinton, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830, it was held that a court of Massachusetts had jurisdiction, upon a petition filed by a wife for separate maintenance who was residing in Massachusetts, against her husband who had left her without cause and become a citizen of another state, to make an order which could be enforced against his property within the commonwealth, or against his person if found therein, notwithstanding that there was no attachment of his property, and he was not served within the commonwealth, and did not appear. The decision is upon the ground that the proceeding was for the regulation of a status. Holmes, J.,

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who wrote the opinion said that jurisdiction in divorce suits was not confined to cases where personal service can be made upon the resident within the state, and that whatever might be thought of decisions like People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274, and Doughty v. Doughty, 28 N. J. Eq. 581, he did not understand that anyone denied that divorces granted against absent defendants after such notice as the law of the state prescribed are valid within the limits of the state granting them. (See discussion of this point in I. *supra*.)

So, in *Re* Hall, 61 App. Div. 266, 70 N. Y. Supp. 406, the court while conceding that a decree of divorce rendered in another state upon constructive service of process upon a person not domiciled in that state, who did not appear in the suit, would not be recognized as establishing the status of the parties as divorced persons in New York, said that it did establish their status as such within the bounds of the state where it was rendered, the plaintiff in the suit being domiciled there at the time the divorce was rendered.

In Deck v. Deck, 2 Swabey & T. 90, 29 L. J. M. C. N. S. 129, 2 L. T. N. S. 542, 8 Week. Rep. 666, the jurisdiction of an English court to grant a divorce at the suit of the wife upon service upon the husband at his domicil in the United States was upheld upon the ground that, the parties being natural born English subjects, the husband could not shake off the liability to the authority of the laws of his native country. The ground of the divorce in this case was adultery committed in America.

As already stated, the right of a court to grant a divorce against a nonresident on constructive service when the statute of the forum authorizes it seems generally to be conceded; and it is expressly held in McFarland v. McFarland, 4 Ind. 458; Rhyms v. Rhyms, 7 Bush. 316; Butler v. Washington, 45 La. Ann. 279, 19 L. R. A. 814, 12 So. 356; Trevino v. Trevino, 54 Tex. 261. (And see also the Wisconsin cases above cited.)

And in Garner v. Garner, 56 Md. 127, it is implied that personal service out of the state will be sufficient to confer jurisdiction to dissolve the marriage, though not to forbid the defendant to remarry.

(b) *Validity, and effect on status, of decree in other states.*

(1) *Doctrine that decree is entitled to recognition and determines status in all states.*

Deferring to a subsequent part of this subdivision, the discussion of the distinction between cases where the previous common domicil of the parties was in the state where the decree was rendered, and those where there was no such common domicil of the parties in that state, and the distinction between the different modes of substituted or constructive service, the proposition that a decree of divorce rendered in one state in favor of a bona fide resident of that state against a nonresident, upon reasonable constructive or substituted service, without appearance, is conclusive upon the courts of other states so far as the status, either within or without that state, of both parties, is concerned, is sustained by the following cases: Hekking v. Pfaff, 82 Fed. 403; Thompson v. State, 28 Ala. 12; Thompson v. Thompson, 91 Ala. 591, 11 L. R. A. 443, 8 So. 419; *Re* James, 99 Cal. 374, 33 Pac. 1122; Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; Hilbish v. Hattle, 145 Ind. 59, 33 L. R. A. 783, 44 N. E. 20; Wakefield v. Ives, 35 Iowa, 288; Kline v. Kline, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825; Van Orsdal v. Van Orsdal, 67 Iowa, 35, 24 N. W. 579; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Smith v. Smith, 43 La. Ann. 1140, 10 So. 248; Benton's Succession, 106 La. 494, 31 So. 123; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Gould v. Crow, 57 Mo. 200; Anthony v. Rice, 110 Mo. 223, 19 S. W. 423; Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340; Ditson v. Ditson, 4 R. I. 87; Thoms v. King, 95 Tenn. 60, 31 S. W. 983; Shafer v. Bushnell, 24 Wis. 372. (But see Cook v. Cook, 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443, I. b, 2, (b), (2), *infra*.)

See also cases cited in VI. a, 3 and VI. b, 1 and 2, *infra*, which assume such doctrine so far as the status of the parties is concerned.

It is true that in Hood v. State, 56 Ind. 263, 26 Am. Rep. 21, and Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841, the decrees were in fact held invalid and not entitled to recognition, but that was because it was found that the party who procured the divorce was not a bona fide resident of the state or territory where it was procured. (See III. a, 2, *supra*.) In both of these cases there is a clear affirmation of the validity and extraterritorial effect of decrees rendered against nonresidents upon constructive service, assuming that the plaintiff was a bona fide resident of the state where the decree was rendered. This principle is also expressly affirmed in Kline v. Kline, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825, although it is limited to the status of the parties, and is held not to apply so far as the decree undertakes to award the custody of the children of the marriage. There are some minor differences between the views taken in these cases with reference to the basis of the court's jurisdiction; but the general doctrine upon which they substantially unite is that there is a status involved in a divorce suit which assimilates it to a proceeding *in rem*, and which, therefore, obviates the necessity of jurisdiction of the person of the defendant. The clearest and most logical statement of this doctrine is, perhaps, to be found in the opinion in Ditson v. Ditson, 4 R. I. 87. As shown in the last subdivision, the question was treated in this case at large and upon general principles, although the exact point was whether a court of Rhode Island should take jurisdiction under the terms of a permissive statute authorizing a divorce upon constructive service against a nonresident. Considered from this point of view, the jurisdiction was upheld upon the ground that each state has the power to regulate the status of its own subjects and citizens, and that it cannot be deprived directly or indirectly of that power by the fact that the subjects and citizens of other states, as related to them, are interested in that status. In other words, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because nonresidents, foreigners, or domiciled inhabitants of other states have not, or will not, become, and cannot be made to become, personally subject to the jurisdiction of its courts. It is obvious that the doctrine here announced was not intended to be confined to cases where the parties previously had a common matrimonial domicil in the state, and the defendant has acquired a domicil in another state, since, in this case, the last common matrimonial domicil of the parties was in New York, and not in Rhode Island, and the defendant was never domiciled in Rhode Island.

In Hilbish v. Hattle, 145 Ind. 59, 33 L. R.

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A. 783, 44 N. E. 20, it was said that the court acts by virtue of the citizenship of the party before it, and, the marriage relation of the plaintiff being dissolved, the parties are no longer husband and wife.

In none of the cases thus far cited in this subdivision is any distinction made between a case where the common matrimonial domicil of the parties, prior to their separation, was in the state where the decree was rendered, and those where the parties never had a common domicil in that state. In all of these cases, except Kline v. Kline, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825, it appeared, as a matter of fact, that the last common matrimonial domicil of the parties was in a state other than that in which the divorce was granted, and that the defendant retained that domicil, or at least did not acquire a domicil in the state where the divorce was granted. And in most of these cases it appeared that the last common matrimonial domicil and the domicil of the defendant at the time of the suit were in the state, the court of which was asked to recognize the decree rendered in the other state.

It, of course, appeared in all of these cases that there was no personal service upon the defendant within the state where the divorce was rendered, and, while most of them insist that there must be a reasonable constructive notice, they do not make any distinction, in this respect, between service by publication, service through the mail, and personal service out of the state. In all of them except Hilbish v. Hattle, 145 Ind. 59, 33 L. R. A. 783, 44 N. E. 20; Van Orsdal v. Van Orsdal, 67 Iowa, 35, 24 N. W. 579; Smith v. Smith, 43 La. Ann. 1140, 10 So. 248; Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; Thoms v. King, 95 Tenn. 60, 31 S. W. 983,—the service was by publication without, so far as appears, any other notice to the defendant. In *Re* James, 90 Cal. 374, 33 Pac. 1122, it expressly appeared that the defendant did not know of the proceedings until after the divorce was rendered, and in Kline v. Kline it is stated in the opinion that it did not appear whether the wife had actual notice. In Dunham v. Dunham, Van Orsdal v. Van Orsdal, Hilbish v. Hattle, and Smith v. Smith, there was personal service upon the defendant out of the state; and in Thoms v. King, it expressly appears that the publication of notice was supplemented by mailing a copy of the notice to the defendant in another state; but in none of these cases is any distinction based upon this mode of service. In Hilbish v. Hattle the court very clearly regarded service out of the state as equivalent only to service by publication; and in Smith v. Smith the court expressly said that personal service extraterritorially could not subject the defendant to the personal jurisdiction of the court, but was at least equivalent to any other constructive service.

In New Jersey, however, a distinction has been based upon the fact whether the nonresident defendant had actual notice of the pendency of the suit or not. Thus, in Doughty v. Doughty, 28 N. J. Eq. 581, the court, while refusing to give any extraterritorial effect to such a decree rendered in another state upon service by publication only, intimated that the result would have been different if actual notice to appear had been served upon defendant, even if service had been made out of the state in which the decree was rendered. In Flower v. Flower, 42 N. J. Eq. 152, 7 Atl. 669, and Fairchild v. Fairchild, 53 N. J. Eq. 678, 34 Atl. 10, decrees of divorce rendered against nonresidents were denied any extraterritorial effect, it appearing in the former case that the service was by publication only, and in the latter, that the defendant never had notice of the pendency of the suit.

In Felt v. Felt, 59 N. J. Eq. 606, 47 L. R. A. 546, 45 Atl. 105, 49 Atl. 1071, however, the New Jersey court of errors and appeals held that a decree of divorce rendered in favor of the husband in another state in which he was domiciled would be recognized in New Jersey in a suit in the latter state by the wife against the husband for a divorce, notwithstanding that the wife was not a resident of the state in which the divorce was granted, and was not served with process therein, provided that a substituted service was made in accordance with the provisions of the statute of the other state, and that actual notice of the pendency of the suit was given to the wife, and a reasonable opportunity afforded her to put in a defense, and provided, further, that the ground on which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient cause for divorce.

It is to be observed, however, that the New Jersey courts treat the question as to the recognition of such a decree as purely one of comity, and not affected by the provision of the Federal Constitution requiring each state to give full faith and credit to the judicial proceedings of the others. The opinion in Doughty v. Doughty, 28 N. J. Eq. 581, says, in this connection: "In my opinion it is only judgments that ensue from jurisdiction regularly obtained over the parties by service of process upon them, or by voluntary appearance, or when the proceeding is strictly *in rem*, that carry with them these high sanctions, and which therefore are everywhere conclusive. Jurisdiction in divorce suits arising out of the status and domicil of one of the parties cannot impart to a judgment any such efficiency." While the fact that the defendant had actual notice of the pendency of the suit in the other state, by other means than personal service within that state, may affect the question of the recognition of such decree in another state when the question is considered purely as one of comity, it is apparent that such actual notice not imparted by service within the state is no more effectual to subject the defendant personally to the jurisdiction of the court than is constructive notice by publication, and, on the other hand, it seems to be well established that while, even in a proceeding *in rem*, the constructive service must be reasonable, yet constructive service by publication is as effective as personal service outside of the state in such cases. See, upon these questions, *note* in Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 577.

Simonds v. Allen, 33 Ill. App. 512, did not pass upon the validity of a divorce rendered against a nonresident upon service by publication only. It was held in that case, however, that in applying the rule that the validity of a marriage is to be tested by the law of the place where it was celebrated, the New York rule which denies the validity of such a divorce should be recognized for the purpose of testing the validity of a second marriage celebrated in that state by one of the parties to the divorce.

(2) *Jurisdictions in which foregoing doctrine is denied, or not clearly adopted.*

It is to be understood, whether expressly so stated or not, that the decisions herein cited which refuse to recognize decrees of divorce, otherwise valid, because the parties against

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whom they were rendered were not residents and were served constructively only, assume there was no appearance by the defendants. While, as is shown in subdivision VII. a, *infra*, there is considerable conflict of authority upon the question whether the appearance by defendant waives the objection to the jurisdiction based upon the fact that the party who procured the divorce was not domiciled in the state, there is no doubt that an objection to the jurisdiction based upon the mode of service, assuming that the plaintiff was domiciled in the state, is waived by the defendant's appearance. The distinction arises from the fact that the domicil of the plaintiff affects the jurisdiction of the subject-matter, while the mode of service merely affects the jurisdiction of the person.

District of Columbia.

In Barney v. De Kraft, 6 D. C. 361, the effect of a decree rendered in another state upon constructive service against a nonresident on the right to the custody of the children was the point involved, but the decision denying it such effect apparently applies to the judgment as affecting the status of the parties, as the court apparently adopts the view that a divorce suit is *in personam*.

Massachusetts.

As shown in III. d, *supra*, in some of the earlier Massachusetts cases the courts refused jurisdiction in divorce for a cause occurring while the matrimonial domicil was in another state, and the defendant was not, at the time of the suit, a resident of Massachusetts and could not be personally served therein; but it does not seem to be settled in this state whether a decree rendered under such circumstances in another state, upon constructive service against a nonresident, or whether a decree rendered in another state upon constructive service against a nonresident under any circumstances, will be recognized as determining the status of the parties in Massachusetts.

In Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733, where the husband had procured a divorce in Indiana, the court expressly refrained from considering the question whether the Indiana court had sufficient jurisdiction, upon service by publication, to warrant a decree of divorce which could be recognized as valid beyond the limits of that state, either on the ground that the domicil of the wife, who actually remained in Massachusetts, followed that of her husband and was transferred to Indiana, when he removed there; or on the ground that the tribunals of the state in which the libellant alone is domiciled can dissolve a marriage. Subsequently, in 115 Mass. 438, the Indiana decree was upheld upon the ground that the wife was not justified in refusing to accompany her husband to Indiana, and that she was therefore legally domiciled with him in that state at the time of the divorce.

See also Massachusetts cases to the same effect cited in IV. b, 1, (b), *supra*.

Cumnington v. Belchertown, 149 Mass. 223, 4 L. R. A. 131, 21 N. E. 435, held that a decree rendered in New York at the suit of a husband who had removed there from Massachusetts, not, however, for the purpose of procuring the decree, annulling the marriage upon the ground of fraud in concealing from him the fact of the prior insanity of the wife, is not binding in Massachusetts, where at the time the wife was in an insane asylum in that state, and was not served in any manner within the state of New York. The court distinguished the decree annulling the marriage from a decree of divorce, and said that it had no occasion to consider what would have been the effect of a decree of divorce rendered under such circumstances.

New Jersey.

In New Jersey, as already shown (IV. b, 2, (b), (1), *supra*), the decisions turn upon the points whether the nonresident defendant had actual notice, and whether the divorce was granted for a cause recognized by the law of New Jersey, and not upon the points whether he was personally served within the state or appeared so as to confer jurisdiction over his person. In this state, however, the question is treated as one of comity, not affected by the full faith and credit provision of the Federal Constitution.

New York.

This question has been much discussed in New York, and the doctrine that a decree of divorce rendered in another state in favor of a resident of that state, against a nonresident, upon constructive service without appearance, will not be given any extraterritorial effect, is well established in that state, at least when the matrimonial domicil of the parties was not in the state where the decree was rendered.

In Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225, an *ex parte* divorce granted in Vermont at the instance of the husband against the wife, who resided in another state and had no notice of the pendency of the proceedings, was held to be absolutely void, and not entitled to recognition in New York. The court said: "It must then be taken, I think, as the settled law of this state, that a judgment obtained in a sister state against a person not being within the jurisdiction of the court, or, having been served with process to appear, nor having appeared to defend the suit, will be absolutely void. This principle must apply equally to a divorce as to any other judgment."

In the last case, it will be observed, it is stated that the divorce was rendered *ex parte*, which would seem to imply that there was not even constructive service.

The doctrine that service by publication is insufficient to sustain a decree of divorce against a nonresident seems to have first been declared in New York in Vischer v. Vischer, 12 Barb. 640. This was held to be true, even upon the assumption that the plaintiff in the suit was a bona fide resident of the state where the divorce was granted. The court said: "It is a sound principle of law, as well as of natural justice, that no person should be bound by a judgment without an opportunity to be heard." There is no concession in this case that the decree would be valid or have any effect in the state where rendered. The implication is rather the other way, as the decision is upon the ground that that court had no jurisdiction. (The New York action was one for divorce, the parties being reversed from the positions which they occupied in the action in the other state.)

McGiffert v. McGiffert, 31 Barb. 69, is to the same effect as the preceding case.

In People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274, it was held that a decree of divorce rendered in another state, for a cause not a ground of divorce in New York, in favor of a resident of that state upon constructive service against a nonresident who did not appear, does not put an end to the matrimonial relation of the defendant in New York state. The defendant (the husband) in this case was domiciled in New York at the time of the decree of divorce. The question as to the validity of the decree arose in a criminal prosecution brought against him in New York for bigamy in remarrying in that state after the divorce. There are some expressions in the opinion which seem to indi-

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cate that in the view of the New York court the decree operated to determine the status of the resident spouse, not only within the state where rendered, but in all the states. In reply to the argument that a divorce suit is a proceeding *in rem*, or quasi *in rem*, the court asks: "Now if the matrimonial relation of the one party is the *res* in one state, is not the matrimonial relation of the other party a *res* in another state?" It then proceeds to argue that a decree *in rem* can only affect the *res* upon which the process of the courts can lay hold. But in another part of the opinion the court says: "We must and do concede, that a state may adjudge the status of its citizen towards a nonresident; and may authorize to that end such judicial proceedings as it sees fit; and that other states must acquiesce so long as the operation of the judgment is kept within its own confines. But that judgment cannot push its effect over the borders of another state to the subversion of its laws and the defeat of its policy, nor seek across its bounds the person of one of its citizens and fix upon him a status, against his will and without his consent, and in hostility to the laws of the sovereignty of his allegiance." This language seems to indicate that in the view of the court the decree could have no effect, even upon the status of the resident spouse, outside of the state where it was rendered. It will be observed that the Baker Case involved only the status of one of the parties, and therefore the difficulty of maintaining the position that the decree rendered in the other state determines the capacity of the resident spouse, but not of the nonresident, did not appear so clearly as in subsequent cases. The same is true in O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110, where the doctrine of the Baker Case was applied to a divorce rendered in another state in favor of the husband, in a suit in New York to have the marriage subsequently contracted by the wife (the defendant in the divorce suit) annulled on the ground that her former marriage was still in force. Here, as in the Baker Case, the status of but one of the parties to the divorce was involved.

In the following cases, however, where the doctrine of the Baker Case was applied, the suit in New York was for a divorce or separation, brought by the spouse against whom the decree was rendered in the other state (that is, by the spouse who was a nonresident of that state) against the spouse who obtained the decree in the other state (that is against the spouse who was a resident of that state). In these cases, therefore, the status of both spouses in New York was involved, and the court must necessarily have taken the position that the decree did not affect the status of even the resident spouse, outside of the state where it was rendered, since the divorce or separation asked for in the New York suit was granted, and such relief could only have been granted upon the assumption of a subsisting marriage relation, and such relation can scarcely exist between two persons only one of whom has the status of a married person. Cross v. Cross, 108 N. Y. 628, 15 N. E. 333; Williams v. Williams, 130 N. Y. 193, 14 L. R. A. 220, 29 N. E. 98; Atherton v. Atherton, 155 N. Y. 129, 40 L. R. A. 291, 49 N. E. 933; Winston v. Winston, 165 N. Y. 553, 59 N. E. 273; Bailie v. Bailie, 30 App. Div. 461, 52 N. Y. Supp. 228; McGown v. McGown, 19 App. Div. 368, 46 N. Y. Supp. 285. Affirmed in 164 N. Y. 558, 58 N. E. 1089; Mellen v. Mellen, 10 Abb. N. C. 329; Gebhard v. Gebhard, 25 Misc. 1, 54 N. Y. Supp. 406; Hamilton v. Hamilton, 26 Misc. 336, 56 N. Y. Supp. 122.

In Williams v. Williams, 130 N. Y. 193, 14 L. R. A. 22, 29 N. E. 98, the cases of Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328, and Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723, are distinguished upon the ground that in those cases only the validity and effect of the decree in the state where rendered were involved.

In Starbuck v. Starbuck, 62 App. Div. 437, 71 N. Y. Supp. 104, where the doctrine of the Baker Case was applied so as to hold that the divorce, which was obtained by the wife, did not affect her status in New York so as to cut off her right to dower, the court, after a discussion of the previous decisions in the state, says that the effect of these decisions is "that whatever effect is to be given the decree must be confined to the plaintiff and to the state in which it was granted, and that in this state it is without binding force or efficacy in any respect, for any purpose, and as to either party."

In the case next cited also it will be observed that the court must have taken the view that the decree did not affect the status of even the resident spouse, outside of the state where it was rendered.

The rule in the Baker Case was applied in *Re* Kimball, 155 N. Y. 62, 49 N. E. 331, to a divorce procured by a wife in North Dakota upon service of a summons upon the husband in New York, where he resided, so as to invalidate a marriage subsequently contracted between the wife and another man in New York after the divorce in question. The proceeding in New York was by the wife on an application for letters of administration upon the estate of the second husband. The rule was applied notwithstanding that after the death of the second husband an attempt was made to cure the defect in the Dakota divorce by procuring, with the consent of the first husband, an order entering his appearance in that suit *nunc pro tunc*.

In Lacey v. Lacey, 38 Misc. 196, 77 N. Y. Supp. 235, however, which was a suit for divorce in New York, by the wife who previously procured a divorce in another state upon constructive service, the court recurred to the view that the foreign decree determined the status of the resident spouse in all states notwithstanding that it recognized the absurdity of the resulting anomaly of a husband without a wife. There were other grounds for the decision in this case, however; one being that the husband was really domiciled in the other state at the time the divorce was granted there; and the other that in any event the wife, having procured the decree in the other state, was precluded from attacking it upon the ground that the court did not have jurisdiction of the husband. And see also Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, *infra*, where the view seems to be taken.

While the practical difficulties inherent in the theory that confines the effect of the decree strictly to the state where it is rendered, and denies it any effect on the status of either spouse outside of that state, are less numerous and less troublesome than those inherent in the theory which concedes that the status of the resident spouse is established for all states, but denies that the status of the nonresident spouse has been affected, still a practical difficulty is encountered in applying the former theory, when the spouse who procures the divorce remarries in the state where it was procured, and the validity of such remarriage comes in question in New York. In such case the resident spouse, having, *ex hypothesi*, the status of an unmarried person at the time and place of such remarriage, it

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would seem that such remarriage must be conceded to be valid in that state at least, and the court of New York must therefore choose between its theory denying the extraterritorial effect of the divorce on the status of either spouse, and the well-established doctrine of international law that a marriage valid where celebrated is valid everywhere. When confronted by such a condition, the courts of New York have adhered to the theory, and abandoned, or at least evaded, the rule.

Thus in McGown v. McGown, 19 App. Div. 368, a divorce was granted in New York upon the ground of the adultery of the wife with a man whom, before the commission of the acts alleged, she had married in North Dakota where she had obtained a divorce from her first husband (the plaintiff in the New York suit) upon constructive service, he being a nonresident. Hamilton v Hamilton, 26 Misc. 336, 56 N. Y. Supp. 122, is to the same effect; and so, apparently, is Davis v. Davis, 2 Misc. 549, 22 N. Y. Supp. 191, though it does not expressly appear in this case that the subsequent marriage took place in Massachusetts, where the divorce was granted.

It is true that in People v. Baker, and in most of the other New York cases in which that doctrine has been applied, the parties never had a common matrimonial domicil in the state where the decree was rendered, but that fact does not seem to have been regarded as material; and in Atherton v. Atherton, 155 N. Y. 129, 40 L. R. A. 291, 49 N. E. 933, the doctrine was applied to a decree of divorce rendered in Kentucky, notwithstanding that it appeared that the common matrimonial domicil of the parties at the time of the separation was in Kentucky, and that the husband still remained domiciled there, though, upon the assumption on which the case was decided by the court of appeals, the wife, at the time of the suit, had acquired a separate domicil in New York. (The effect of the reversal of this case by the United States Supreme Court in 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, will be subsequently discussed.)

It also appeared in most of the New York cases in which the doctrine of the Baker Case is applied that the defendant was a resident of New York at the time the divorce was rendered in the other state; but it is clear that that fact was important only as negativing a residence of the defendant in the state where the divorce was granted; and the doctrine was expressly applied in O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110, to a divorce rendered in another state in favor of the husband while the wife was domiciled in Canada.

Some of the language used in Lacey v. Lacey, 38 Misc. 196, 77 N. Y. Supp. 235, would seem to indicate that the court regarded the New York doctrine as confined to cases where the spouse against whom the divorce was rendered was domiciled in New York; but in this case such spouse was held to have been domiciled in the state where the decree was rendered.

As already shown, the New Jersey courts base a distinction upon the fact whether or not the nonresident defendant received actual notice of the pendency of the suit, but no such distinction is made in New York. In O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110, for instance, it expressly appeared that the defendant in the suit had actual notice, through the mails, of the pendency of the suit. When, as in New York, the doctrine rests upon the ground that there is no such *res* in a divorce suit as enables the court to render a decree which will have any extraterritorial effect without acquiring jurisdiction of the person of the defendant, it is clear, upon principle, that the fact that the defendant had actual notice of the pendency of the suit, imparted in any manner except by personal service within the state where the decree was rendered, is immaterial, since a process of a court which runs beyond the limits of the state in which the court is sitting is as ineffectual to confer jurisdiction over the person as a purely constructive notice by publication. And that is the opinion expressed in Jones v. Jones, 108 N. Y. 415, 15 N. E. 707.

While there seems to be no reported case in New York in which the doctrine of the Baker Case has been applied when the divorce rendered in the other state was for a cause (*i. e.* adultery) which would also be a ground of divorce in New York, it is not apparent, in view of the theory upon which the doctrine rests, how the fact in that respect can be material. As already shown, the theory is that there is no such *res* involved as will enable the court to render a decree which will have any extraterritorial effect, without having acquired jurisdiction over the person of the defendant. Since, therefore, the doctrine rests upon the lack of jurisdiction over the person of the defendant, it is not apparent how the cause of divorce, which merely goes to the jurisdiction over the subject-matter, can affect the question. Still, the desire to preserve the policy of New York that there shall be but one sufficient cause for divorce *a vinculo*, seems to have influenced the decision in People v. Baker; and in *Re* Morrison, 52 Hun, 102, 5 N. Y. Supp. 90 (affirmed without opinion in 117 N. Y. 638, 22 N. E. 1130), it was held that the rule in the Baker Case did not apply to a divorce obtained in Ohio, upon service by publication against the wife, who was at the time resident in New York, upon the ground of adultery committed by her in Ohio, while the parties were domiciled in the latter state, the marriage having also been celebrated in that state. The affirmance, by the court of appeals, of the decision of the general term, may have been upon the theory that the wife, although an actual resident in New York at the time of the divorce, had not acquired a separate domicil there, but was legally domiciled with her husband in Ohio. (There would seem to be some basis for this position since, so far as appeared, the wife had no justification for leaving her husband.) The decision of the general term, however, seems to proceed upon the theory that the wife had a separate domicil in New York, but that the case was distinguishable from the previous cases in which the doctrine of the Baker Case had been applied by reason of the fact that the divorce was for adultery, which would also be a ground of divorce in New York, in connection with the fact that at the time of the adultery the matrimonial domicil was in Ohio. The court says in this connection: "But it has not yet been decided, as already stated, that where, under precisely the same circumstances and under the same proof which we must assume was given in Ohio, a decree of divorce *a vinculo* would be granted by the courts of this state, we will not recognize such decree when granted by the laws of a sister state. By our own laws a husband or wife may maintain an action against the other party to a marriage to procure a judgment of divorce by reason of the defendant's adultery, where both the parties were residents of the state when the offense was committed, or where the offense was committed within the state, and the injured party, when the action was commenced, was a resident of this state."

The possibility of basing any distinction on the fact that the matrimonial domicil prior to

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of divorce rendered upon constructive service against nonresidents when both parties were domiciled out of the state at the time the cause of divorce arose and the defendant had at no time since been domiciled in that state. If, as has often been supposed, these decisions rest upon the ground of lack of jurisdiction of the subject-matter because the cause of divorce occurred while the common domicil was out of the state, they have no place in this subdivision, since, upon that assumption, the decree in the other state would not have been entitled to recognition, even if the defendant had been a resident of the state where the decree was rendered, or, being a nonresident, had been personally served within the state, or had appeared. But if the interpretation of these cases suggested in that subdivision is correct, the decision rests, not upon the ground of lack of jurisdiction of the subject-matter, but lack of jurisdiction of the person of the defendant and inability to proceed without such jurisdiction of the person when the common matrimonial domicil of the parties was outside of the state in which the decree was rendered at the time the cause of divorce occurred, and has never been within such state since that time, although one of the parties has acquired a domicil there. The insistence in these cases upon the point that the common domicil was not at the forum at the time the cause of divorce occurred, and was not there at any time prior to the divorce, would seem to indicate that in the view of the Pennsylvania court the constructive or substituted service against a nonresident might, so far as principles of international law are concerned, be sufficient if, at the time the cause of divorce occurred, the matrimonial domicil was in the state where the decree was rendered.

In Ralston's Appeal, 93 Pa. 133, it was held that a court of Pennsylvania had no jurisdiction to grant a divorce upon personal service upon the wife in another state where she was residing, although the husband was apparently domiciled in Pennsylvania at the time of the desertion relied upon as a ground of divorce. The decision, however, is upon the ground that the statute did not authorize personal service out of the state upon a nonresident in a divorce suit.

And in Love v. Love, 10 Phila. 453, the court refused to take jurisdiction of a divorce action by the husband against the wife, notwithstanding that the desertion occurred while the parties were domiciled in Pennsylvania, because since that time the wife had acquired a domicil in another state, and was served constructively only. The decision is expressly put upon the ground that the court had no jurisdiction over the person of the defendant, although it did have jurisdiction over the subject-matter.

South Carolina.

In McCreery v. Davis, 44 S. C. 195, 28 L. R. A. 635, 22 S. E. 178, it was held that an absolute decree of divorce rendered in Illinois at the instance of the wife, who had acquired a residence in that state, upon constructive service of process against her husband, who was domiciled in South Carolina, upon the ground of cruelty, which was not a cause of divorce either by the law of New York, where the marriage was celebrated, or by the law of South Carolina, where the matrimonial domicil was established, was not entitled to recognition in South Carolina. The question arose in an action by the husband against a third person to compel specific performance of an agreement by the latter to purchase real property, which was defended upon the ground that there was an outstanding right of dower in the wife. There are two alternative grounds of the decision. The first is that there was no such status or *res* involved in the marriage relation as to give the court of Illinois jurisdiction to proceed *in rem*. The other ground was that, conceding, for the sake of the argument, that the marriage created a *res*, which was within the jurisdiction of the Illinois court, the *res* was merely the status of the parties within Illinois, and that full faith and credit is given to the decree by acknowledging its effect on the status of the parties within Illinois without conceding that it affects their status outside of Illinois. In support of this latter position, the court refers to several cases in which it is held that the status of legitimacy acquired by a child born out of wedlock, by virtue of a statute or decree of his domicil, does not follow him out of the state of his domicil; also, to cases holding that the status of a guardian, as such, will not be recognized out of the state in which the appointment was made.

The fact that cruelty was not a ground of divorce *a vinculo*, either by the law of New York where the marriage was celebrated, or by the law of South Carolina where the matrimonial domicil was established, qualifies the decision in this case upon the question as to the recognition of a decree of divorce rendered in another state upon constructive service against a nonresident. The implication seems to be that if cruelty had been a ground of divorce in New York and South Carolina, the decree would have been recognized. The fact that the law of South Carolina does not admit any ground of divorce clearly influenced the decision in this case; but it is not apparent how it could legitimately do so. If the decree had been rendered in another country, instead of another state, the South Carolina court might legitimately have consulted its own public policy in that respect, and have refused to recognize the decree, even assuming that the court which rendered it had jurisdiction. But the court seems to proceed upon the theory that the effect of the full faith and credit provision of the Federal Constitution could only be avoided by holding that the court which rendered the decree had no jurisdiction, because there was no *res* involved, or that the effect of the decree was only to establish the status of the parties within the state where it was rendered, because the *res*, if any, only involved their status in that state. It is difficult to understand how the fact whether or not the marriage was dissoluble by the law of the place where it was celebrated, or that of the place where the original matrimonial domicil was established, can affect the question of the existence or nonexistence of a *res* which will enable a court to proceed to decree a divorce without jurisdiction of the person of defendant. The desire to preserve the policy of South Carolina on the subject of divorce was obviously the real motive for the decision, but the fact whether the ground on which the divorce is granted is or is not conformable to the policy of the state in which the divorce is set up can scarcely be regarded as a factor entering into the question whether a divorce suit involves a *res*,—a question that is not at all material upon the point of jurisdiction of the subject-matter, but is only important when the court has jurisdiction of the subject-matter but cannot acquire jurisdiction of the defendant personally.

Vermont.

In Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132, the only point involved was as to the validity of a decree of an award of alimony rendered in New York upon constructive serv-

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ice against a nonresident. The court, however, discussed the validity of a decree of divorce rendered under such circumstances when the marriage was celebrated and the parties at the time of the occurrence of the cause of divorce were domiciled outside of New York. The court questioned the validity of the decree even as affecting the status of the parties. In one part of the opinion the view seems to be adopted that a court has no jurisdiction of the subject-matter when the cause of divorce occurred while the parties were domiciled in another state, but in another part of the opinion the court seems to adopt the view that jurisdiction cannot be acquired by constructive service against a nonresident. It is difficult to determine whether the doubt in the mind of the court as to the validity of the decree as affecting the status of the parties arose from the view that the New York court had no jurisdiction of the subject-matter because the cause of divorce occurred while the parties were domiciled in another state, or from the view that a divorce suit is not a *res* in such sense as to enable the court to proceed without acquiring jurisdiction over the person of the defendant; or from a combination of these views.

Wisconsin.

In Cook v. Cook, 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443, the majority opinion took the position that although a marriage is a status, and every state has the right to fix, regulate, and control the same as to every person within its jurisdiction, even though one of the parties may actually reside in another state, yet where husband and wife were both for some years residents of Wisconsin and lived there as husband and wife, and the husband deserted the wife and went to another state, where he became a resident, and thereupon obtained a divorce in that state, upon constructive notice merely, and for a cause of divorce (desertion) alleged to have occurred a year prior to the time when he deserted his wife, and under a statute which made jurisdiction dependent entirely upon the fact of such husband's residence there against the wife who continued to reside in Wisconsin, and who was not personally served with notice, and who did not appear in the action, but was ignorant of its pendency until after the decree therein was rendered,—such judgment is not conclusive against the wife so as to bar a subsequent action by her in a court of Wisconsin against the same husband for a divorce, alimony, allowance, and division of lands situated in Wisconsin, especially where such foreign judgment of divorce was based upon an alleged cause of action which was false in fact. There is an able opinion by Taylor, J., who concurs in affirming the judgment, but for a different reason than that given by the majority opinion. He took the position that if the courts of Michigan have the power to fix the status of a citizen of that state in regard to the marriage relation in an action where the wife is not personally served and has no actual notice of the action and is a resident in fact of another state, it must necessarily affect the status of the wife, and she must also be released from the marriage relation. But while he was of the opinion that the judgment must be regarded as establishing the status of both parties, yet a court of equity in Wisconsin may, under the circumstances, entertain an action by the wife for alimony out of the property owned by the husband in Wisconsin. He assimilated this action to a proceeding to award alimony at the foot of a decree of divorce. He was of the opinion that, strictly speaking, the court of Wisconsin had no jurisdiction to decree the divorce at the instance of the wife, but that, as the husband could not have been prejudiced by the formal judgment for a divorce from a woman from whom he was already divorced, and as the order for giving alimony was undoubtedly a just allowance, under the circumstances, the judgment should be affirmed so far as the award of alimony is concerned. It does not seem possible to distinguish this case, upon the facts, from the case of Shafer v. Bushnell, 24 Wis. 372, where the decree of divorce rendered in another state was upheld. In that case, as well as in this, the parties had previously resided in Wisconsin, and the defendant in the divorce suit was still a resident of that state at the time the decree was rendered; the cause of divorce occurred while the parties were living together in Wisconsin; and the service of process was by publication without actual notice to the defendant. The earlier case, however, is not expressly overruled.

United States Supreme Court.

It is difficult to determine exactly the position of the United States Supreme Court upon the question whether the courts of one state are bound by the "full faith and credit" provision of the Federal Constitution to recognize a decree of divorce rendered in another upon constructive service against a nonresident. That court, in discussing in Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604, the effect of a decree of divorce, said: "The Constitution and laws of the United States give the decree the same effect elsewhere that it had in Indiana. 'If a judgment is conclusive in a state where it is rendered, it is equally conclusive everywhere' in the courts of the United States [citing 2 Story, Const. § 1313; Christmas v. Russell, 5 Wall. 302, 18 L. ed. 478]" But in this case the defendant appeared in the divorce suit and was therefore personally subject to the jurisdiction of the court.

In Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, Judge Field intimated that where one of the parties to a marriage, who has been guilty of acts for which, by the law of a state, a dissolution may be granted, has removed to another state, a divorce may be authorized without personal service of process, or personal notice to the offending party. But the remark is purely *obiter*, and, besides, seems to be confined to the validity of the decree in the state where rendered.

In Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328, where the service was by publication against the wife, who was absent from the territory where the divorce was granted, the court said "The courts of the state of the domicil of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offense for which the divorce is granted: and a divorce so obtained is valid everywhere." But this seems to be on the assumption that both parties are domiciled at the forum; and, in any event, the divorce in this case was held invalid because the statutes of the forum were not complied with.

In Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723, where a divorce granted by the territorial legislature of Oregon was upheld, although the wife was a nonresident of the territory and had no notice of the intended divorce, the question arose in a case concerning land which, at the time the divorce was rendered, was within the territory of Oregon, so that in this case there was no question as to the extraterritorial effect of the divorce.

If it were clear that the Supreme Court, in

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reversing in Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, the decision of the New York court of appeals in that case (155 N. Y. 129, 40 L. R. A. 291, 49 N. E. 933), had accepted as conclusive, as the court of appeals did, the finding of the lower court in New York that before the commencement of the divorce suit in Kentucky the wife had acquired a separate domicil in New York, the effect of that reversal would have been to repudiate the New York doctrine so far as it applies to cases where the last common matrimonial domicil of the parties was in the state where the decree was rendered, although before the commencement of the suit they had separated and the defendant had acquired a separate domicil in another state, leaving the question still open under other circumstances. But while the finding of the New York court is mentioned in the statement of facts prepared by Mr. Justice Gray, who wrote the prevailing opinion, and while it is nowhere expressly denied that the wife had acquired a separate domicil in New York, the decision seems to have been rendered upon the hypothesis that she had not acquired a separate domicil but was still legally domiciled with her husband in Kentucky where the divorce was rendered. Upon this hypothesis the decision is perfectly consistent with the New York doctrine which, as already shown (IV. b, 1, (a), *supra*), recognizes the decree when the defendant was a resident of the state where it was rendered though absent therefrom at the time and served constructively only. Indeed, it is clear that the decisions of the court of appeals in this very case turned upon the finding that the wife had acquired a separate domicil in New York. The Supreme Court, after referring to many of the cases upon the question, says: "The authorities above cited show a wide diversity of opinion existing upon this important subject, and admonish us to confine our decision to the exact case before us. This case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the state which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce granted after such notice had been given as was required by the statutes of Kentucky." And it was held that, under such circumstances, the decree should have been recognized by the New York courts. The foregoing language is, perhaps, not inconsistent with the idea that the wife had acquired a separate domicil in New York; but the purpose of much of the argument in the subsequent part of the opinion seems to be to negative the existence of such a separate domicil; and the following quotation, taken from the close of the opinion, seems to enforce that idea: "The wife not being within the state of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that state, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the state in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicil (which he denied), and would disprove his own ground of action that she had abandoned him in Kentucky." The view that the majority opinion did not accept the finding of the New York court on the question of the domicil of the wife as conclusive, but proceeded upon the theory that she was still domiciled in Kentucky, though actually in New York, at the time of the suit, is still further supported by the fact that the dissenting opinion of Mr. Justice Peckham is expressly, and in terms, based upon the finding of the New York court on that point. It seems probable, however, that the Supreme Court will eventually hold that decrees of divorce rendered upon reasonable constructive or substituted service, even against a nonresident, are entitled to recognition in other states under the "full faith and credit" provision of the Federal Constitution,—at least if the last common matrimonial domicil was in the state where the decree was rendered.

England.

The question as to the recognition in England of a decree of divorce rendered in a foreign country upon constructive or substituted service against a nonresident, when there was no objection to the jurisdiction of the foreign court, other than the mode of service and the nonresidence of the defendant, has not been definitely settled, though there are intimations in some of the opinions indicating that a foreign divorce granted under such circumstances will not be recognized in England. In Shaw v. Atty. Gen. L. R. 2 Prob. & Div. 156, 39 L. J. Prob. N. S. 81, 23 L. T. N. S. 322, 18 Week. Rep. 1145, the court refused to recognize a divorce obtained by the wife in Iowa upon service by publication; but the decision is upon the assumption that both parties, at the time of the divorce, were domiciled in England, which fact itself would defeat jurisdiction of the Iowa court. (III. a, 2, *supra*.) In Green v. Green [1893] P. 89, also, where a divorce was obtained by the wife in Pennsylvania upon personal service of citation upon the husband in England, the court seems to have proceeded upon the assumption that the wife was legally domiciled with her husband in England, it appearing that she left him of her own accord and without any justification. The court also alludes to the fact that the divorce was granted for a cause not recognized as a ground of divorce in England, and further says that the charge upon which the divorce was obtained was unfounded. In both the foregoing cases the fact that the defendant had never been domiciled in the country where the divorce was granted was emphasized, and there is at least a strong intimation that that fact alone would defeat the jurisdiction of the foreign court, but the decisions themselves cannot be regarded as going to that extent.

In Briggs v. Briggs, 28 Week. Rep. 702, L. R. 5 Prob. Div. 163, 49 L. J. Prob. N. S. 38, where a divorce obtained by the husband in Kansas was refused recognition, it was expressly found that the husband had not abandoned his English domicil at the time he procured his Kansas divorce; and the court further regarded this case as subject to the rule in Lolley's Case (III. b, *supra*).

Summary.

It will be observed from the citations in this subdivision that some of the cases refuse to accord extraterritorial effect to a decree of divorce rendered in another state upon constructive service without appearance, irrespective of where the matrimonial domicil was prior to the time the party against whom the decree was rendered became a nonresident; that some of the cases accord full extraterritorial effect to decrees of divorce rendered under such circumstances, irrespective of the location of the previous matrimonial domicil; and that there is

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a tendency upon the part of other cases to give the decree extraterritorial effect when it was rendered in the state of the previous matrimonial domicil of the parties, and to deny it such effect under other circumstances. If the principles applicable to a decree *in personam*, on the one hand, or those applicable to a decree *in rem* on the other, were to be strictly applied, there would seem to be little support in principle for the position taken by the last class of cases; and upon either hypothesis it would also seem to be entirely immaterial whether or not the defendant had actual notice of the divorce suit, or upon what grounds the divorce was granted. But there is, perhaps, a danger of overdrawing the analogy between decrees of divorce and decrees *in personam*, on the one hand, and between decrees of divorce and decrees *in rem*, on the other; and, in considering the question as to the recognition in one state of decrees of divorce rendered in another upon constructive service against nonresidents, it may be proper to take into consideration facts and circumstances which would have no place if a decree of divorce were to be strictly referred to the class of decrees *in personam*, or to the class of decrees *in rem*. It may be mentioned, in this connection, that the theory suggested in subdivision I. *supra*, namely, that the same considerations which will justify a court of one state in refusing to recognize a decree of divorce rendered in another upon the ground that the latter court was without jurisdiction, will justify, and, indeed, require, the position that the decree is not valid even in the state where rendered,—may be applied whatever view a court takes as to the particular circumstances which will justify the refusal of a court of one state to recognize a decree granted in another.

V. *Custody of children when international elements involved.*

A decree of divorce rendered in Alabama while both parties were residing there, which gives the custody of a child of the marriage to the mother, puts the mother, as to the control of the child, in the place of the father, and makes her custody and control legal. Therefore, habeas corpus will not issue in Georgia at the instance of the father for the possession of the child on the ground that it is illegally retained by the mother. Hammond v. Hammond, 90 Ga. 527, 16 S. E. 265.

A valid decree of divorce rendered in favor of the wife, in another state, where both parties then resided, awarding the custody of a child of the marriage to the wife, is conclusive as between the husband and wife as to the fitness and competency of the one, and the unfitness and incompetency of the other, to have the care and control of the child, and that question will not be re-examined by the courts of New York. The decision, however, is binding upon the child only for the time being, and as soon as the circumstances of the custodian change, or other circumstances arise which will make it for the best interest of the child that there should be a change, it will be the duty of the court in which the decree was originally made, or of any other court having jurisdiction, to make such change. People *ex rel.* Allen v. Allen, 40 Hun, 611.

A decree of divorce rendered in another state, though upon constructive service against a nonresident, will be held conclusive in Iowa unless modified, reversed, or set aside for cause shown to the jurisdiction, in a habeas corpus proceeding in Iowa for the custody of a child which was awarded to the mother by the decree, it appearing that the child was born in the state where the decree was rendered, and was living there at the time it was rendered. Wakefield v. Ives, 35 Iowa, 238.

In Kline v. Kline, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825, however, it was held that a decree of divorce rendered in Wisconsin in favor of the husband, who was domiciled there, upon constructive service against the wife, who had acquired a separate domicil elsewhere, was valid and entitled to recognition in Iowa, so far as the status of the husband and wife were concerned, but was without jurisdiction and not entitled to recognition so far as it attempted to fix the custody of the minor children, who, at the time of the divorce, were living with the wife in Iowa. Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779, is to the same effect as the preceding case. In the latter case it appeared that the divorce was rendered without actual notice to the wife; in the former, it is stated in the opinion that it does not appear that she had any knowledge whatever of the divorce proceedings until after the decree. It seems doubtful, however, whether the fact of actual notice or not, unless imparted by personal service within the state, would be material, since even actual notice imparted by constructive service or service out of the state is insufficient to subject a nonresident defendant personally to the jurisdiction of the court.

So, in *Re* Vetterlein's Petition, 14 R. I. 378, the court expressed a doubt whether a decree of divorce rendered in another state, so far as it affects the custody of a child, could have any force outside the jurisdiction in which it was rendered, even if it were effective to divorce the husband and wife. It does not expressly appear where the husband, against whom the decree was rendered, was domiciled at the time of its rendition; but he was probably a nonresident, since it appears that he had no notice of the petition. The question, however, was not decided, since the divorce was held invalid for all purposes because of the nonresidence of the wife who procured it.

In De la Montanya v. De la Montanya, 112 Cal. 101, 32 L. R. A. 82, 44 Pac. 345, it was held that a court of California had no jurisdiction to award the custody of the children to the plaintiff in the divorce suit, notwithstanding that the defendant and the children were domiciled in that state, where, at the time of the suit, they were absent therefrom, and the defendant was served only by publication and did not appear. It is to be observed, however, that this court, contrary to the weight of authority, holds that constructive service is insufficient to support a judgment *in personam*, even against a resident of the state, if absent therefrom at the time of the action.

In Stetson v. Stetson, 80 Me. 483, 15 Atl. 60, it was held that the custody of a child might be awarded, in a suit for divorce, to a parent who resides without the state. The court said that the removal of the child from the state would not remove him from the jurisdiction of the court, since that had already attached, and that the decree, so far as it awarded the custody of the child, was a conditional one subject to modification and change, and that upon any proper process for a change, the mother, to whom the custody of the child was awarded, wherever she may be, will be bound to take notice, and, though she may not be personally within the jurisdiction of the court, the subject-matter is, so that the judgment of the court will be valid and binding upon her, and, by the provisions of the Constitution of the United States, may be enforced against her though in another state.

In Baily v. Schrader, 34 Ind. 260, it was held

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that where a court, having jurisdiction of the parties and the subject-matter, granted a divorce and awarded the custody of the children to one of the parties until the further order of the court, it retains jurisdiction to change the order as to the custody of the children, notwithstanding that the party to whose custody they were awarded by the original decree has become a nonresident of the state, and does not appear upon the hearing of the application to change the order.

VI. *Effect upon property rights of divorce involving international elements.*

a. *Alimony.*

1. *Award of, upon constructive service.*

(a) *Against resident.*

In Hamill v. Talbott, 72 Mo. App. 22, it was held that a judgment for alimony rendered in another state upon constructive service of process against the defendant, who was absent from the state at the time, was binding upon him in Missouri, notwithstanding that judgment for alimony is purely *in personam* as any other money judgment. The decision, however, is upon the ground that the defendant was a citizen of the state in which the judgment was rendered, and, therefore, the court could obtain jurisdiction on constructive service to render even a personal judgment against him. It is clear that the decision would have been different if the defendant had been a nonresident.

It is competent for the legislature to authorize the courts of the state to render personal judgments for alimony in divorce cases upon constructive notice against citizens of the state, but it cannot authorize such judgments upon such notice against citizens of another state unless they submit to the jurisdiction of the court by voluntarily appearing. Beard v. Beard, 21 Ind. 321; Lytle v. Lytle, 48 Ind. 200. In both these cases the validity of the judgment in the state in which it was rendered was involved.

In De la Montanya v. De la Montanya, 112 Cal. 101, 32 L. R. A. 82, 44 Pac. 345, however, it was held that that part of a decree in a divorce suit which granted alimony and provided for the custody and control of the children should be vacated and set aside upon motion of the defendant, where the service of summons was by publication, notwithstanding that the defendant was a resident of the state at the time of the commencement of the action, but was absent therefrom at that time. The decision is upon the ground that constructive service only gives jurisdiction to determine the status of the parties,—whether the defendant is a resident temporarily absent from the state, or a nonresident. So far as relates to residents temporarily absent from the state, however, it seems to be opposed to the weight of authority, not only of cases on the specific question of alimony, but of cases involving other personal judgments against residents on constructive service. (See, upon the general question, *note* to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 577, I. b.)

But it was held in Keerl v. Keerl, 34 Md. 21, that a court of equity has no jurisdiction to decree alimony when both husband and wife are nonresidents, even though the husband has property within the jurisdiction of the court. In this case, however, the property was not specially proceeded against, as it was in the preceding case.

In Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340, the court, referring to a decree of divorce rendered against the husband (a nonresident) on service by publication, said: "But the Illinois decree, having been rendered upon the constructive service and without any appearance on behalf of the defendant, the portion of the decree relating to alimony perhaps is of no validity save as to the property within the jurisdiction of the court pronouncing it."

(b) *Against nonresident.*

It is clear, both on principle and authority, that an award of a certain sum of money as alimony without proceeding specially against property in the state, upon constructive service against a nonresident who did not appear, is not binding in the state where rendered or elsewhere, even if such service is sufficient to uphold the decree so far as it affects his status, since in any view the part of the decree that awards alimony is purely personal. (For the authorities on this point, see *note* to Pinney v. Providence Loan & Invest Co. (Wis.) 50 L. R. A. 577, I. a, *Alimony.*)

In addition to the cases there cited, it was also held in Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132, and Larson v. Larson, 33 So. 717, that an award of alimony granted in one state upon constructive service against a nonresident is not valid in another, whatever may be true of the decree so far as it affects the status of the parties.

But it was held in Wesner v. O'Brien, 56 Kan. 724, 32 L. R. A. 289, 44 Pac. 1000, that a court of Kansas had jurisdiction upon constructive service in a divorce suit to award alimony, even against a nonresident, out of real property in Kansas, where the plaintiff prayed that the land should be decreed to the wife as alimony, and the publication notice contained a particular description of the land and the nature of the relief demanded.

2. *Enforcing award of, in other state.*

A decree for alimony rendered in any state of the United States by a court having jurisdiction of the subject-matter and the parties will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. Barber v. Barber, 21 How. 582, 16 L. ed. 226. This was a suit in equity in the United States district court for Wisconsin to recover arrears of alimony allowed by a decree *a mensa et thoro* rendered in New York.

In a previous action between the parties to the foregoing case, brought in a state court of Wisconsin to enforce the decree for alimony, it was held (Barber v. Barber, 1 Chand. (Wis.) 280, 2 Pinney (Wis.) 297) that a decree for alimony would not support an action at law in another state. As already shown, the suit which came before the United States Supreme Court was in equity, so that the question whether an action at law would lie was not presented. The weight of authority, however, establishes the proposition that an action at law may be maintained in a state court or a Federal court in one state or territory for the recovery of alimony already accrued under a decree granted in another state or territory. Knapp v. Knapp, 59 Fed. 641; Dow v. Blake, 148 Ill. 76, 35 N. E. 761; Brisbane v. Dobson, 50 Mo. App. 170; Bullock v. Bullock, 57 N. J. L. 508, 31 Atl. 1024; Bennett v. Bennett (N. J. Eq.) 49 Atl. 501. In the latter case, however, it was held that a suit in equity would not lie in New Jersey to enforce an award of alimony made in another state, because there was an adequate remedy at law.

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In Allen v. Allen, 100 Mass. 373, the court said the prevailing opinion seems to be that an action at law lies on a final decree of a court of equity in another jurisdiction for the payment of a specific sum of money; and while the court denied the right to enforce a domestic decree for alimony by an action at law, it said that there was a manifest distinction between foreign and domestic decrees in that respect, in that it may be that within the jurisdiction of a chancery court its powers and processes to compel obedience to its own decrees are so ample and potent that other tribunals will not entertain independent suits for that purpose, while in the case of a foreign court, or one in another state, the remedy of a suit to enforce such a decree may be necessary to prevent failure of justice.

The fact that the courts of the state in which the decree was rendered have the power to modify it does not preclude an action thereon in another state. Trowbridge v. Spinning, 23 Wash. 48, 54 L. R. A. 204, 62 Pac. 125; Dow v. Blake, 46 Ill. App. 329, Affirmed in 148 Ill. 76, 35 N. E. 761.

But such an action will not lie upon an interlocutory order for alimony. McClung v. McClung, 11 W. N. C. 122.

And a judgment on the decree will not necessarily be limited to the arrears for one year preceding the commencement of the suit. Brisbane v. Dobson, 50 Mo. App. 170.

And the decree is conclusive upon the merits of the suit in which it was obtained. Knapp v. Knapp, 59 Fed. 641.

In Rogers v. Rogers, 15 B. Mon. 364, it was held that a decree rendered in Ohio, where both of the parties were then domiciled, granting alimony to a wife from whom the husband had previously obtained a divorce in Kentucky, could not be questioned in an action in Kentucky to subject the real estate of the husband in that state to the payment of the alimony awarded, notwithstanding that she appeared in the original Kentucky suit in which the divorce was granted, and did not, as she might have done under the statutes of that state, litigate her right to an allowance out of the husband's property. The decision is upon the ground that, even if the wife, by her failure to present her claim to a portion of the estate of the husband in the Kentucky suit in which the divorce was granted, ought to have been precluded from asserting it in another action, it would not follow that the decree rendered by the court of Ohio would, for that reason, be invalid or void for want of jurisdiction. At most, it would only be erroneous, and, until reversed, would be entitled to the same legal force and effect as any other valid decree.

In De Brimont v. Penniman, 10 Blatchf. 436, Fed. Cas. No. 3,715, it was said that the only cases in which a decree of divorce granting alimony has been held to support an action in another jurisdiction, were under the influence of the Constitution of the United States, referring to Barber v. Barber, 21 How. 582, 16 L. ed. 226.

A decree for alimony, not in a divorce suit, rendered by an Ohio court having jurisdiction, will, at the suit of the wife against the husband, be enforced in West Virginia. Stewart v. Stewart, 27 W. Va. 167.

As a debt of record the courts of New York should give full credit and effect to a judgment for alimony rendered in another state in an action in which the court of that state had jurisdiction; but as to its provisions for future alimony and for equitable remedies to enforce compliance, it does not fall within the rule of the Federal Constitution. Lynde v. Lynde, 162 N. Y. 412, 48 L. R. A. 679, 56 N. E. 979, Affirmed in 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555.

The provisions of the New York Code for an enforcement of a direction, in a judgment of divorce, for the payment of alimony, by equitable remedies, pertain only to such judgments as are recovered in New York, and not such as are recovered in another state. Lynde v. Lynde, 162 N. Y. 412, 48 L. R. A. 679, 56 N. E. 979.

In an action on a foreign judgment of divorce awarding alimony to plaintiff, no other relief can be had than a recovery for past-due alimony. Equity has no jurisdiction to sequester defendant's property, or compel him to give security for future alimony. Wood v. Wood, 7 Misc. 579, 28 N. Y. Supp. 154.

A court of New Jersey will not entertain a bill which has for its object the enforcement of an order made by a court of New York, pursuant to a decree of divorce rendered in that state, directing the husband to mortgage land in New Jersey to secure the payment of the alimony awarded by the decree. Bullock v. Bullock, 51 N. J. Eq. 444, 27 Atl. 435, Affirmed in 52 N. J. Eq. 561, 27 L. R. A. 213, 30 Atl. 676. The decision is upon the ground that the full faith and credit provision of the Federal Constitution extends only to judgments or decrees, and has no reference whatever to process in the nature of an execution. The court concedes that a decree for the payment of alimony obtained in a sister state may be enforced in New Jersey, but that the method of enforcing it is to be a new suit instituted in New Jersey, the effect of the decree of the sister state being merely to determine the rights of the parties as to the merits of the controversy. In other words, the decision is upon the ground that the enforcement of the decree in New Jersey shall be according to the form of procedure in New Jersey, rather than the form of procedure in the state where the decree was rendered.

A decree of divorce obtained by a wife in Oregon, where both parties were domiciled, which awarded her a certain amount as alimony upon condition that it be accepted by her in full satisfaction of all her right, title, and interest in and to lands owned by the husband and situated without the state of Oregon, and directed that upon the payment of such amount by the husband to the clerk of the court, or upon the recovery of such amount on execution and its payment over to the clerk, the wife shall file a release and conveyance of all her estate and interest in such property,—does not directly operate upon community real property owned by the husband and wife in Washington, nor, in the absence of evidence of the circumstances of the payment, is she estopped to claim such land as against the husband's widow by a second marriage, because after the issuance of an execution for the alimony, the amount was paid to the wife without any conveyance or release of lands by her as provided by the decree. Gratton v. Weber, 47 Fed. 852.

In Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227, it was held that a decree of divorce obtained by a husband in Alabama on the ground of abandonment by the wife did not bar her right to recover the amount previously accrued under a decree for separate maintenance obtained by her in South Carolina, but that it was a bar to any future recovery, since the purpose of the South Carolina decree was to enforce the obligations and duties springing out of the relation of the marriage, and its continued enforcement was dependent upon the existence of that relation, and therefore it ceased to operate when that relation was dissolved, notwithstanding that the South Carolina court, not recognizing the doctrine of di-

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vorce, did not fix upon that as a period terminating the provision made by its decree for the wife.

3. Effect of divorce in one state or country upon right of action for alimony in another.

There is some difference of opinion among the courts which admit the sufficiency of constructive service to support a decree of divorce, so far as it affects the status, upon the question whether such a decree bars an action for alimony in another state.

Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017, conceded the validity of a decree of divorce rendered in another state, where the husband was a resident, against the wife, on constructive service by publication, so far as it affected the marriage status, but it was held that the judgment was neither *res judicata*, nor an estoppel as to the question of alimony, and that, therefore, the wife, having remained domiciled in Minnesota, might maintain an action in that state for alimony to be awarded out of the husband's property in that state, notwithstanding the dissolution of the marriage relation. The decision is upon the ground that the action on constructive service is in the nature of a proceeding *in rem;* that it seizes nothing but the marriage status, and that the only reason why the seizure of that was sufficiently complete to give jurisdiction to condemn and destroy it is because it cannot be severed as to one without being severed as to both; one cannot remain married while the other becomes single.

In Cox v. Cox, 19 Ohio St. 502, 2 Am. Rep. 415, it was held that while a decree of divorce obtained by a husband in another state upon constructive service only against the wife who was domiciled in Ohio, having been previously deserted by her husband there, was sufficient to dissolve the marriage relation, it did not preclude the right of the wife to maintain an action in Ohio for alimony. The decision is upon the ground that it is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed, and the court said that in arriving at the conclusion as to alimony it made no distinction between a decree rendered under the circumstances of the case in a foreign, and one rendered in a domestic, forum. The ground of the decision as to the effect of the decree to dissolve the marriage is that, marriage being a relation involving the social status of a party to it, the state of which the complaining party is a bona fide resident has the right to determine his matrimonial status; and in view of the new relations that may be formed in consequence of the dissolution of the marriage, in the state where the decree is pronounced, that public policy requires the recognition and the validity of such decrees in other states. The court said, however, that the principle upon which the validity of such decrees rests does not require that they should be allowed to operate in the foreign jurisdiction beyond the dissolution of the marriage.

In D'Arusmont v. D'Arusmont, 1 Ohio Dec. Reprint, 393, it was held that a decree of divorce obtained by a wife in Tennessee, pending a suit for alimony commenced by her in Ohio, did not preclude her right to alimony in the Ohio suit. The court said: "It is enough, however, that when the complainant filed her bill she was a married woman, and that she is now merely asking a clear legal consequence of a divorce obtained pending these very proceedings, and with strict reference to them." In this case the Tennessee court apparently had jurisdiction over the person of the husband.

In Rodgers v. Rodgers, 50 Kan. 483, 43 Pac. 779, the court uses language broad enough to indicate that in its opinion a decree of divorce obtained by the husband in another state upon service by publication against the wife, who was a resident of Kansas, though sufficient to establish the status of both parties in Kansas, would not affect her right of action for alimony in that state under any circumstances; but the alimony in this case was granted out of homestead property in Kansas, and in one part of the opinion the decision seems to be put upon the ground that she had acquired a vested interest in such property and could not be devested thereof by a decree of a court of another state. The effect of the decision is probably limited by the particular facts of the case, since the opinion does not, expressly at least, overrule the previous decision in Roe v. Roe, 52 Kan. 724, 35 Pac. 888, where it was held that a decree of divorce obtained by the husband under such circumstances, the wife having no actual notice of the pendency of the suit, was a full and complete bar to an action by the wife for alimony in Kansas, assuming that the law of the state where the divorce was rendered authorizes the granting of alimony in a divorce suit.

And a divorce rendered in another state, in favor of the husband, upon constructive service against a nonresident, must be regarded as a valid decree, and as entitled to full credit and effect in Illinois as such, and is a complete bar to the wife's claim for separate maintenance. Knowlton v. Knowlton, 153 Ill. 158, 39 N. E. 995.

In Graves v. Graves, 36 Iowa, 310, 14 Am. Rep. 525, it was held that a wife might maintain an action for alimony in Iowa, notwithstanding that her husband had obtained a decree of divorce in another state; but the decision is upon the assumption that the decree of divorce was void because it was obtained by fraud, and was rendered without jurisdiction.

In Van Orsdal v. Van Orsdal, 67 Iowa, 35, 24 N. W. 579, it was held that if a decree of divorce against the wife in another state upon constructive service would not prevent a court of her domicil from awarding her alimony out of property belonging to the husband within its jurisdiction, it would be true only of property owned by him at the time the divorce was granted, and not of property subsequently acquired.

In Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942, it was held that a suit in equity would lie against the husband for alimony, notwithstanding that he had previously obtained a decree of divorce in that state upon service by publication against the wife, who was, at the time, a resident of Wisconsin, and had no knowledge of the divorce proceedings. In this case, however, the wife alleged fraud in the procuring of the divorce, and prayed that the decree of divorce might be held fraudulent and void to the extent and to the end that she might be restored to her rights of property.

In Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340, it was held that a decree of divorce obtained by the wife in another state upon service by publication against her husband, a nonresident, precluded her from thereafter maintaining an action for alimony in Nebraska, notwithstanding that the award of alimony was not binding as to property without the jurisdiction of the court which granted it. The decision is upon the ground that the continued existence of the marriage relation is a necessary condition of the right to apply for alimony. The fact that no divorce was sought in the Nebraska suit would not, of itself, have

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been an obstacle to the allowance of alimony, since it had been previously held in that state that a court of equity has jurisdiction to allow alimony to a wife as an independent right, where no divorce or legal separation is sought. Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942, was distinguished upon the ground that there the divorce was obtained *ex parte* and in fraud of the wife's right of maintenance and support, while, in the case at bar, the party applying for alimony in Nebraska herself obtained the divorce in Illinois and a decree awarding her all the husband's property situate in that state.

A decree of divorce obtained in another state, in which the court has jurisdiction of both parties, and which awarded the custody of a child of the marriage to the wife, but made no allowance for its support and maintenance, prevents an allowance in New York to the wife for the support and maintenance of the child. Rich v. Rich, 88 Hun, 566, 34 N. Y. Supp. 854. In this case, however, the defendant appeared in the divorce suit.

b. *Dower.*

1. *When divorce obtained by husband.*

The general principle (assuming that a decree of divorce rendered in one state is sufficient to dissolve the marriage relation in all states) is that its effect upon the dower rights of the wife in property in another state is to be determined, not by the law of the state where it was rendered, but by the law of the state where the property is situated (*lex rei sitæ*). Thus, in Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483, where a wife from whom her husband had obtained a divorce in another state was held not to be entitled to dower in his lands in Kentucky, the decision was expressly put upon the ground that the Kentucky statute providing that a divorce bars all claims to curtesy or dower applies to all valid divorces no matter by what sovereignty granted; and it was expressly stated that the decree of divorce rendered in the other state did not, by its own force, affect the right to property in Kentucky. So, also, in Rendleman v. Rendleman, 118 Ill. 257, 8 N. E. 773; Gould v. Crow, 57 Mo. 200, and Thoms v. King, 95 Tenn. 60, 31 S. W. 983, where a divorce obtained by the husband in another state was held to cut off the wife's right of dower in land in Illinois, Missouri, and Tennessee respectively, the decisions were upon the ground that that would be the effect of the decree according to the statutes of those states (*lex rei sitæ*). In the latter case the general statement is made that the effect of the decree of divorce in one state upon the dower right of the wife in the real property of the husband in another is the same as a domestic divorce. That statement is undoubtedly true in the absence of a statute of the state where the land is situated, affecting the question, and, perhaps, furnishes a rule of statutory construction when there is such a statute; but it does not necessarily follow from the general principle that the effect of the divorce on the dower right is to be determined by the *lex rei sitæ*, that a decree rendered in another state will have the same effect upon such right as a domestic decree.

It was held in Van Cleaf v. Burns, 118 N. Y. 549, 23 N. E. 881, that a decree of divorce rendered in favor of the husband in another state by a court having jurisdiction of the subject-matter and of the parties, for a cause not regarded as adequate by the law of New York, would not deprive the wife of her then existing dower rights in land in New York,—at least in the absence of evidence that under the laws of the state where the divorce was rendered it has that effect; and it was subsequently held in the same case (133 N. Y. 540, 15 L. R. A. 542, 30 N. E. 661), that the fact that it would have that effect by such law would not change the decision. The decision is upon the ground that the "misconduct" contemplated by the New York statute providing that in case of divorce dissolving a marriage contract for the misconduct of the wife she shall not be endowed, refers only to misconduct of a kind which authorizes a divorce *a vinculo* in New York (*i. e.*, adultery) and not to any act which may be termed misconduct and converted into a cause of divorce by the legislature of any state. The court said, in the course of its opinion, that adequate force could be given to the Illinois judgment by recognizing its effect upon the status of the parties thereto, without giving it the effect of cutting off the wife's existing dower right in lands in New York.

So, in Starbuck v. Starbuck, 62 App. Div. 427, 71 N. Y. Supp. 104, the opinion was expressed, although the point was not actually decided, that, even if the decree of divorce obtained by the wife in another state on the ground of cruelty were binding upon her in New York, it would not preclude her right of dower in real property acquired by the husband after the divorce. This is upon the ground that the decree of divorce could not have any greater effect upon her right of dower than a valid limited divorce procured by her in the state of New York for the same cause.

In Mansfield v. McIntyre, 10 Ohio, 27, it was held that a provision of the Ohio statute that when the cause of divorce shall arise from the aggression of the wife she shall be barred of her right of dower applied only to divorces granted in Ohio, and not to divorces granted in other states. The statute being eliminated as a factor in the case, the court held that a decree of divorce rendered in favor of the husband in another state, though it must be recognized as valid in Ohio, did not bar the wife's right of dower in the husband's property in Ohio. In reply to the objection that a woman to be entitled to dower must be the widow of the decedent, the court argued that that was not necessarily so, since by the law of Ohio a divorce, while it operates to release both parties from the obligations of the contract, does not bar the right of dower if it was decreed in consequence of the aggression of the husband.

In Rogers v. Taylor, 8 Ohio Dec. Reprint, 666, the court adhered to the doctrine in the preceding case that the statute only applied to divorces granted in Ohio, but nevertheless held that a wife who was divorced in another state by reason of her wilful absence was not entitled to dower in real property of the husband in Ohio. The court said that the case stood as if there were no finding whether the ground of the divorce were the wife's fault or the husband's, and that at common law the mere fact of the divorce extinguished the contingent right of dower. The court further said that at one time it was held that the provision of the Ohio statute that where a divorce should be granted by reason of the aggression of the wife she should be barred of her dower, raised a presumption that if the divorce should be granted not on that ground she would not be barred (citing the preceding case), but that it had since been held that the provision of the Ohio statute preserving the right of dower to a wife who is divorced by reason of the aggression of her husband is a provision outside of and in addition to the provision made by the dower act (implying that in the absence of such a provi-

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sion the right would not be preserved). The court further said that, the claimant not being the widow of the deceased, and the divorce not being granted by reason of his aggression, she had no claim to dower under the divorce act.

In Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055, it was held that a divorce obtained by a husband against his wife in another state, upon service by publication, she not being a resident of the state at the time, did not affect her property rights in Ohio. Two grounds were given for the decision, one, that for aught that appeared the divorce may have been granted on some ground not recognized as a ground of divorce by the laws of Ohio, so that it cannot be said that it was granted for any aggression of hers within the meaning of the Ohio statute relating to the effect of a divorce upon dower rights. This ground is evidently based on the assumption that the court of the other state had full jurisdiction; but it was also held that the court which rendered the divorce had no jurisdiction of the person of the wife, and that it was not competent for it to affect such rights as she had acquired in the property of the husband under the laws of Ohio.

The latter ground seems to suggest a distinction based upon the fact whether or not the court which rendered the decree had jurisdiction of the person of the defendant, even assuming that the decree, without such jurisdiction of the person, would be sufficient to determine the status of the parties. This seems to be the only case in which such a distinction is suggested. Of course, courts which adopt the doctrine that a decree of divorce rendered upon constructive service against a nonresident does not affect even the status of the parties outside of the state where it was rendered, would necessarily hold that dower rights dependent on the marital status would not be affected by such decree. But since the inchoate right of dower during the lifetime of the husband is not ordinarily regarded as a vested right of property, it seems scarcely consistent for a court, which adopts the doctrine that a decree rendered under such circumstances is sufficient to dissolve the marriage relation in all states, to deny its effect on the dower right merely because the court did not have jurisdiction of the person of the defendant. In Gould v. Crow, 57 Mo. 200, *supra*, the decree was rendered in another state against a nonresident upon service by publication. It was there held that the decree had no extraterritorial effect except so far as the *res* was concerned, and it was accordingly held that a provision as to alimony would have no extraterritorial effect; but that, the marriage status being acted upon and dissolved, the relation became severed and continued so in all other states, and that property rights depending alone upon its continued existence must cease, not only in the state where the decree was rendered, but in all other dominions. This seems to be the logical result, so far as dower is concerned, of the adoption of the doctrine that constructive or substituted service is sufficient to uphold a decree of divorce against a nonresident.

2. *When divorce obtained by wife.*

In Barrett v. Failing, 111 U. S. 523, 28 L. ed. 505, 4 Sup. Ct. Rep. 598, the court takes the position that in the absence of a statute of the *lex rei sitæ* preserving dower, a divorce, even if obtained by the wife in another state, puts an end to her right of dower, and that preservation of her right of dower, after such divorce, depends upon the *lex rei sitæ* and that the question whether a statute of one state securing or denying the right of dower in case of divorce extends to a divorce granted in another state having jurisdiction of the cause and parties depends very much upon the terms of the statute and upon its interpretation by the courts of the state in which it was passed and in which the land is situated. In this case it was held that a divorce granted to the wife in California, by a court having jurisdiction of the subject-matter of the parties, cut off her right of dower in real property in Oregon, and that she was not within § 495 of the Oregon Code of Civil Procedure, providing that whenever a marriage shall be declared void or dissolved the party at whose prayer such decree shall be made shall, in all cases, be entitled to the one undivided one-third part in his or her individual right, in fee, of the whole of the real estate owned by the other at the time of such decree. The decision is upon the ground that the section only applies to divorces granted by the courts of Oregon. This construction was influenced by the fact that the section provides for the entry of a decree in accordance with the provision referred to, and that it had been held by the supreme court of Oregon that, even where the wife obtained a decree of divorce in that state, the title to the one third of the husband's real property cannot vest in her without a provision to that effect in the decree. Another fact that influenced this construction of the section was that, as it originally stood, it declared that if the marriage should be dissolved on account of the adultery or conviction of a felony of either party, the adverse party should be entitled as tenant in dower, or by curtesy, as the case may be, in the real property of the other, the same as if the party convicted of felony, or committing adultery, were dead. It seems to have been assumed that the wife would have been entitled to the benefit, under the section as it originally stood, even though the divorce were obtained in another state. It does not appear in this case what the ground of the divorce was other than that it was granted for the misconduct of the husband; nor does it appear what the effect on the dower right would be under the law of California, where the divorce was granted.

A divorce obtained by the wife in another state cuts off her right to one third in value of the real estate of the husband, which is substituted by the Code of Iowa in lieu of dower in case the wife survives the husband. Marvin v. Marvin, 59 Iowa, 699, 13 N. W. 851; Boyles v. Latham, 61 Iowa, 174, 16 N. W. 68. The decisions are upon the ground that a woman who has procured a divorce does not have the status of a surviving wife within the meaning of the Code.

In McGill v. Deming, 44 Ohio St. 645, 11 N. E. 118, it was held that a wife who procured a divorce from her husband in California, while both were domiciled there, was entitled to dower in his real estate in Ohio, of which he was seised during the coverture, although after the decree of divorce and during his life she remarried. This decision, however, is upon the ground that the California divorce, being granted on the ground of the ill treatment and intemperance of the husband, must be regarded as granted for the aggression of the husband within the Ohio statute, which provides that where a divorce is granted for the aggression of the husband, if the wife survives him, she shall be entitled to her right of dower in his real estate of which he was seised during the coverture. The court took the view that the statute applied to divorces granted without the state, as well as those granted within, if they

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could be deemed granted for the aggression of the husband. The court, after referring to the statement in Cox v. Cox, 19 Ohio St. 511, 2 Am. Rep. 415, that the principle upon which rest the decrees of divorce granted by the tribunals of other states does not require that they should be required to operate in the foreign jurisdiction beyond the dissolution of the marriage, said that it may with reason be also said that justice between the parties does not require that such divorces shall, in all cases, have no effect upon property except in the forum where they are decreed. While it is a principle of general recognition that real, or immovable, property ought to be left to be adjudged by the law of the place where the property is situated, as not within the reach of extraterritorial law, it is not inconsistent with the principle to accord to a foreign divorce the same effect upon real property located beyond the forum of a decree that is given to divorces of the same class decreed within the jurisdiction where such property is situated.

c. *Other property rights*

It is obvious that if the marriage relation is effectually dissolved by a divorce, any rights, other than vested rights, of either spouse in the property of the other, dependent upon such relation, are defeated by the divorce.

Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bonds of matrimony, puts an end to all obligations of either party to the other, and to any right which either has acquired by the marriage in the other's property, except so far as the court granting the divorce, in the exercise of an authority vested in it by the legislature, orders it to be transferred or alimony to be paid by one party to the other. Barrett v. Failing, 111 U. S. 523, 28 L. ed. 505, 4 Sup. Ct. Rep. 598.

A decree of divorce rendered in another state in favor of the husband is a bar to any right to real property of the husband in Indiana, which the wife might otherwise claim, as his widow, after his death. Hilbish v. Hattle, 145 Ind. 59, 33 L. R. A. 783, 44 N. E. 20. The decision is upon the ground that the decree of divorce destroys the marriage relation.

In Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071, it was held that the effect of a divorce obtained by a wife in another state was to exclude her from any interest in his property not specially mentioned, reserved, or provided for in the decree of divorce. This apparently would have been the effect of a divorce rendered in Kansas.

In Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200, it was held that a decree of divorce obtained by the wife in Illinois, the husband appearing in the action, terminated his property rights in her estate in North Carolina. It was so held notwithstanding that the marriage was celebrated in North Carolina, the alleged cause of divorce occurred in North Carolina, and was insufficient, by the law of that state, to warrant a divorce, but was only cause for a separation.

In Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154, which was a controversy between the wife of a decedent and a woman with whom he entered into a ceremony of marriage after he had obtained a decree of divorce, in another state, from the wife, which, however, was void because without jurisdiction, the court held that while the second wife had no right to any share in the property which the decedent had at the time of his attempted marriage to her, yet she should not be deprived of her right to participate in the property subsequently acquired through their joint efforts, it appearing that she contracted the marriage in good faith and in reliance upon the validity of the decree of divorce. The decision does not proceed upon the theory that her right to share in the subsequently acquired property was dependent upon her status as a wife, for it was held that the second marriage was invalid, and that she was therefore not the lawful wife of the decedent. The decision is upon the ground that having, by their joint efforts, acquired the property, she should not be excluded from the community, although the parties did not sustain the relation of husband and wife.

In McGrew v. Mutual L. Ins. Co. 132 Cal. 85, 64 Pac. 103, it was held that a statute of Hawaii, providing that when a divorce is decreed for the adultery of the wife the husband shall hold her personal estate forever, did not apply to a policy of insurance on the life of the husband payable to the wife, notwithstanding that she was served with process in the divorce suit and appeared therein by attorney, where, before judgment, she removed to, and acquired a domicil in, California. The decision is upon the ground that, since she was domiciled in California at the time of the judgment for divorce, the statute of Hawaii had no operation on her or her personal property. The judgment of divorce itself in this case did not purport to affect property rights.

VII. *Impeaching decree granted in other state.*

a. *On jurisdictional facts.*

For general subject of appearance by nonresident to give jurisdiction of a divorce case, see *note* to Ellis's Appeal (Minn.) 23 L. R. A. 287.

Waiving, for the present, the question as to the effect of appearance by the defendant in the divorce suit, which is subsequently referred to in this subdivision, it is well settled that, at least in the absence of such appearance, the recital in the proceedings of the jurisdictional fact of plaintiff's domicil, or residence in the sense of domicil, in the state or territory where the divorce was granted, may be impeached, when the divorce comes in question in another state, by extrinsic proof that the plaintiff was not in fact bona fide domiciled in the former state at the time the suit was commenced. Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551, Affirming 157 N. Y. 719, 53 N. E. 1123; Streitwolf v. Streitwolf, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553, Affirming 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683; Thompson v. State, 28 Ala. 12; *Re* James, 99 Cal. 374, 33 Pac. 1122; Strait v. Strait, 3 Mac Arth. 415; Watkins v. Watkins, 125 Ind. 163, 25 N. E. 175; Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; State v. Fleak, 54 Iowa, 429, 6 N. W. 689; Neff v. Beauchamp, 74 Iowa, 92, 36 N. W. 905; Litowich v. Litowich, 19 Kan. 451, 27 Am. Rep. 145; Smith v. Smith, 43 La. Ann. 1140, 10 So. 248; Benton's Succession, 106 La. Ann. 494, 31 So. 123; Gregory v. Gregory, 78 Me. 187, 57 Am. Rep. 792, 3 Atl. 280; Sewall v. Sewall, 122 Mass. 158, 23 Am. Rep. 299; Adams v. Adams, 154 Mass. 290, 13 L. R. A. 275, 28 N. E. 260; Reed v. Reed, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720; State v. Armington, 25 Minn. 29; Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108; Leith v. Leith, 39 N. H. 20; Dumont v. Dumont (N. J. Eq.) 45 Atl. 107; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Cross v. Cross, 108 N. Y. 628, 15 N. E. 333; De Meli v. De Meli, 120 N. Y. 485, 24

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N. E. 996; Munson v. Munson, 60 Hun, 189, 14 N. Y. Supp. 692; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; Chaney v. Bryan, 15 Lea. 389; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Dormitzer v. German Sav. & L. Asso. 23 Wash. 132, 62 Pac. 862.

If upon the inspection of a record from another state want of jurisdiction is disclosed as to a necessary party, the judgment or decree will be held void and of no effect as to such party, even in a collateral proceeding. Morey v. Morey, 27 Minn. 265, 6 N. W. 783. The action was ejectment by the divorced wife, the divorce being set up by the defendants, who claimed under the husband.

In Hilbish v. Hattle, 145 Ind. 59, 33 L. R. A. 783, 44 N. E. 20, it was held that a decree of divorce rendered in another state was not subject to collateral attack because it was not shown in the petition for divorce that the plaintiff was a resident of the state.

And in Rendleman v. Rendleman, 118 Ill. 257, 8 N. E. 773, it was held that where the record in a divorce suit in another state is authenticated in strict conformity to the act of Congress, and there is nothing upon the face of it, or otherwise, to indicate the contrary, it will be presumed that the court had jurisdiction of the subject-matter.

So, in view of the provision of the Federal Constitution that full faith and credit shall be given in each state to the judicial proceedings in any other, the judgment or decree of a court of general jurisdiction in a sister state should not be held void on the ground that such court was deceived and misled as to the existence of jurisdictional facts, and assumed to exercise jurisdiction when it had no right to do so, unless the evidence is of such satisfactory character as to exclude any other reasonable conclusion. Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. 595.

In Com. v. Blood, 97 Mass. 538, however, it was held that there is no presumption that a court of record in another state has jurisdiction to grant a divorce: but that its powers in the case must be shown and appear to have been strictly pursued. The decision is upon the ground that jurisdiction over a subject of divorce is a special authority not recognized by the common law. This position is contrary to the great weight of authority, and the courts seem generally to have assumed that the same presumption would be indulged in support of the jurisdiction of a court of record in a divorce suit as in any other case.

It was expressly held in Trowbridge v. Spinning, 23 Wash. 48, 54 L. R. A. 204, 62 Pac. 125, that the presumption of regularity of the proceedings in the courts of another state, resulting in a decree of divorce, dispensed with an allegation, in a bill to enforce the decree, that the cross complaint on which the decree was based was duly served.

In most of the preceding cases the evidence by which the jurisdictional fact of the residence of the plaintiff was impeached undoubtedly showed a lack of good faith on the part of the plaintiff in inducing the finding by the court which rendered the decree that he was a bona fide resident of that state: but the doctrine, as declared by these cases, is not limited to cases where fraud can be shown.

In Magowan v. Magowan, 57 N. J. Eq. 322, 42 Atl. 330, however, it was held that the ascertainment by the court granting the decree of divorce of the jurisdictional fact of the bona fide residence of the plaintiff within the state is conclusive, not only in the courts of that state, but in every other jurisdiction where the validity of the judgment comes in question, unless such determination has been procured by fraud. In this case, however, the finding as to residence was successfully impeached, the fraud being predicated of the false testimony of the plaintiff with respect to his residence before the court in which the decree was rendered, or his intentional withholding of the real facts from the court. If fraud may be predicated of such false testimony or concealment of essential facts, the qualification that the determination must have been procured by fraud does not seem to be practically very important, though it might, perhaps, operate to prevent the impeachment of the finding so far as it rests upon the inference drawn by the court of the other state from the actual facts respecting the residence of the plaintiff. The same qualification is stated in the case of Fairchild v. Fairchild, 53 N. J. Eq. 678, 34 Atl. 10, although, in this case, it is stated the defendant appeared in the divorce suit.

It will be observed that the rule is stated with the qualification that the impeached evidence negatives the residence of the plaintiff in the state where the divorce was rendered at the time the suit was commenced. It has been held that if the plaintiff was a resident of the other state at that time the finding as to the length of his residence cannot be impeached, notwithstanding that the defendant was served only by publication, and did not appear. Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Kern v. Field, 68 Minn. 317, 71 N. W. 393. State v. Armington, 25 Minn. 29; *supra*, was distinguished in the former case on the ground that both parties in that case were residents of Minnesota when the divorce action was commenced elsewhere and the pretended judgment obtained.

It will be further observed that the rule is stated with the qualification that there was no appearance by the defendant in the suit: and as a matter of fact it did not appear in any of the cases cited to sustain the rule that there was any appearance, though they do not expressly limit the rule to cases where there was no appearance.

In Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132, however, it was held that a decree of divorce rendered in another state in which the defendant appeared could not be attacked in New York in a collateral action because the plaintiff in the divorce action was not a resident of the other state at the time. The court said it would be unnecessary to say what the effect might be if it were alleged that the plaintiff in the divorce suit had never been within the state in which the divorce was rendered, although he may have authorized the bill to be filed, since it is conceded that he was there, and sufficient facts were alleged to give the court of the other state power to decide the question of domicil, and that the judgment was not void if it be conceded that the decision was erroneous. It was stated, as an additional reason for the application of the rule in this case, that judgment had been enforced for nearly sixteen years before it was attacked.

Johnson v. Johnson, 67 How. Pr. 144, is to the same effect as the preceding case.

Turpin v. Turpin (Tenn. Ch. App.) 58 S. W. 763, while recognizing the general doctrine that a court of a state in which neither party is domiciled has no jurisdiction to grant a divorce, held that such a decree rendered in Washington would not be set aside in Tennessee, where neither party was domiciled, although neither party was domiciled in Washington at the time the suit was begun and the decree rendered, it appearing that the defendant in the divorce suit, pursuant to an agree-

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ment with the plaintiff, appeared in the suit and admitted the false allegations in the complaint, and that the complainant was domiciled in Washington, although she knew them to be false.

In Ferry v. Ferry, 9 Wash. 239, 37 Pac. 431, it was held that a wife who appeared in a divorce suit brought by her husband, and filed a cross bill for divorce and obtained a decree in her own favor without questioning the residence of the husband in the state, was estopped from afterward attacking the jurisdiction of the court to grant the divorce on the ground that the husband was a nonresident, in an action between the parties involving property rights.

In Waldo v. Waldo, 32 Mich. 94, 17 N. W. 701, it was held that an Indiana divorce could not be impeached in a private collateral action in Michigan by evidence tending to show that the residence of the complainant in the divorce suit was not such as to give the Indiana court jurisdiction. The defendant appeared in that case and joined issue on the merits, but this fact is not expressly stated as a qualification of the decision. The action was one involving property rights between the wife, who procured the divorce, and the son of a man whom she afterwards married.

In Loud v. Loud, 129 Mass. 14, it was held that a wife who appeared in a suit for divorce brought by the husband in another state, and afterward executed a release, reciting the divorce obtained by him, and for a pecuniary consideration discharged all her claims upon him or his estate, could not impeach the decree by proof that the husband's domicil at the time of the divorce continued to be in Massachusetts, without proving that he went to the other state in violation of the Massachusetts statute for the purpose of procuring a divorce. The court said that it was even a question whether the decree could be so impeached, even in the absence of an estoppel by the acts of the wife, but the question was not decided.

In Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333, however, the court held that the recital of the jurisdictional fact of domicil in a decree of divorce rendered in another state was not conclusive upon the court of Massachusetts, notwithstanding that the defendant appeared in the action. The court did not expressly accept or repudiate for general purposes the distinction insisted upon by some courts between cases in which there was an appearance and those in which there was none, as affecting the right to impeach the decree upon the jurisdictional facts; but with respect to decrees of divorce coming within Pub. Stat. chap. 146, § 41, providing that when an inhabitant of the commonwealth goes into another state or country to obtain a divorce for a cause which occurred in the commonwealth, a divorce so obtained shall be of no force or effect in the commonwealth, the legislature of Massachusetts had conferred the right to so impeach the decree irrespective of whether there was an appearance or not. The court further said that the possibility of such a distinction as is sanctioned by *Re* Ellis, 55 Minn. 401, 23 L. R. A. 287, 56 N. W. 1056, *infra*, allowing a divorce in another state to be impeached on jurisdictional facts for purposes of the criminal law, but denying such right as between the parties and so far as concerns the property rights, was done away with by the statute already alluded to.

The United States Supreme Court, in affirming the decision in the Andrews Case, seems to take the broad ground, without reference to the Massachusetts statute, that the appearance of the defendant in the South Dakota divorce suit was ineffectual to waive the plaintiff's lack of domicil in that state, because it was a matter that went to the jurisdiction over the subject-matter, and such jurisdiction cannot be conferred by consent. It is also to be observed that in this case the question as to the recognition of the South Dakota decree arose between the defendant in the divorce suit, who appeared in that suit, and another woman whom the husband married after the divorce, both claiming to be his widow; and that the decision of the Massachusetts court refusing to recognize the South Dakota divorce, and holding that the party against whom it was granted was the widow, was upheld, notwithstanding that the Massachusetts courts expressly found, in addition to her appearance, that, so far as she had power to do so, she had connived at and acquiesced in the South Dakota divorce, and preferred no claim thereafter to be the wife of the party who procured it until after his death, when she asserted her right to administer his estate as his widow; and further, that the second wife contracted the marriage in good faith and in ignorance of any illegality in the divorce.

In discussing the question as to the right to contradict the determination of the court which rendered the divorce as to the jurisdictional fact of domicil, the Minnesota supreme court, in *Re* Ellis, 55 Minn. 401, 23 L. R. A. 287, 56 N. W. 1056, divided the cases in which the question might arise into three classes: First, proceedings between the state of the parties' actual residence and one of the parties; second, proceedings between the parties in the state of their residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it; third, proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended. It was held that the determination might be contradicted in either the first or second class, but not in the third class, to which the case in question belonged. The question arose, in this case, between the wife who procured the divorce and who alleged in her complaint that she was a resident of the state where it was granted, and a woman whom the husband subsequently married. The husband in this case appeared in the divorce action. The third class of cases is distinguished from the first upon the ground that in the first the interests of the state are involved, and it cannot be bound by the action of the parties.

In People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260 (a prosecution for bigamy founded upon the remarriage of a man after procuring a divorce in a state in which neither of the parties to the first marriage ever resided), it was held that as to the state of Michigan, at least, the decree of divorce might be impeached by showing the nonresidence of the parties, notwithstanding the appearance of the defendant. The court said that it might be that the appearance of the defendant would prevent him from afterwards attacking the jurisdiction of the court on this ground if the matter of the divorce were one of private concern exclusively; but that the state where the parties were domiciled was interested, and, not having consented to the proceedings by a foreign tribunal not having authority over the subject-matter, it was not precluded from impeaching the decree on such ground.

It will be observed that this case belonged

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to the first of the classes enumerated in the preceding case, the state being a party to the proceeding; and this distinguishes it from Waldo v. Waldo, 52 Mich. 94, 17 N. W. 710, which came within the third class, the action in Michigan being a private one to which the state was not a party.

Of course, if the broad position taken by the United States Supreme Court in Andrews v. Andrews, 187 U. S. —, 47 L. ed. —, 23 Sup. Ct. Rep. 237, that even the appearance of defendant in the divorce suit will not waive the lack of domicil, is sound, it is obvious that personal service within the state is ineffectual to obviate the jurisdictional defect.

It has already been pointed out in IV. b, 2, (b), (2), *supra*, that the appearance by defendant waives any objection to the jurisdiction based on the fact that he was a nonresident and was served constructively only. The distinction between the two jurisdictional objections is that one goes to the jurisdiction of the subject-matter, and the other to the jurisdiction of the person.

In none of the cases above cited to the effect that the finding of the court which rendered the decree upon jurisdictional fact of the residence of the plaintiff may be impeached when the decree comes collaterally in question in another state was the attack made by the party who obtained the divorce or by his or her privies. In most of the cases it was made by the party against whom the decree was rendered, or by the state in a criminal prosecution. While the right of the party who obtained the decree or his or her privies, to impeach the finding, is not expressly denied in any of these cases, it is obvious that there are objections based on the doctrine of estoppel, that might be made against the right of such person to impeach the finding, that would not obtain against the party against whom the decree was rendered, or against the state, or a third person, not a privy of either party.

In Elliott v. Wohlfrom, 55 Cal. 384, it was held that the grantees of a husband, who obtained a decree of divorce in another state, could not, in an action against the grantees of the wife, attack the judgment upon the ground that the alleged appearance of the wife appearing in the record of the divorce action was fraudulently procured by the husband, and was unauthorized by the wife. This was upon the ground that the fraud rendered the judgment voidable only, and not void, and that the husband, in a subsequent controversy with the wife, could not take advantage of his own fraud: and that the respective grantees of the parties occupy, in that respect, no better or worse position than their several grantors.

A party obtaining an invalid decree of divorce in another state is not estopped from denying its validity. Holmes v. Holmes, 4 Lans. 388. This decision is upon the ground that since the divorce did not dissolve the marriage, the courts will not allow either party to deny the existence of the marriage, and that the parties themselves had no power, either in form or effect, to dissolve the marriage contract.

In *Re* Swales, 60 App. Div. 599, 70 N. Y. Supp. 220, it was held that a wife who had obtained a divorce in Illinois was estopped to question the jurisdiction of the Illinois court upon the ground that she was not a resident of the state at the time of the divorce, in a proceeding by her in New York upon letters of administration upon the estate of the divorced husband. But see Starbuck v. Starbuck, 62 App. Div. 437, 71 N. Y. Supp. 104, and Lacey v. Lacey, 38 Misc. 196, 77 N. Y. Supp. 235. *supra*, IV. b, 2, (b), (2).

In Bonaparte v. Bonaparte [1892] P. 402, the Scotch divorce was held invalid because neither of the parties was domiciled in Scotland, notwithstanding that the validity of the divorce arose upon a petition for a declaration of nullity of marriage preferred by the corespondent in the divorce suit, who subsequently married the divorced wife, notwithstanding that he was the active party in procuring the decree, and was fully aware of all the circumstances. This decision is upon the ground that the contract of marriage is to be regarded in a different light and as governed by different principles than other contracts.

Werner v. Werner, 30 Ill. App. 159, held that a foreign decree of divorce was invalid and might be disregarded by the court of Illinois, because it appeared upon the record that the statute of the forum with reference to service by publication was not complied with. Part of the relief asked for in the Illinois action was that the foreign decree be set aside. It was held that the courts of Illinois did not have jurisdiction to do that, but that they had the right to disregard it, and afford any relief to the wife that she would be entitled to if it had not been rendered.

b. *On the merits; fraud.*

A peculiar situation is presented by the case of Atherton v. Atherton, 155 N. Y. 129, 40 L. R. A. 291, 49 N. E. 933. In that case a decree was rendered in Kentucky, the husband's domicil, for the cause of desertion. It was obtained upon the assumption that the wife was a resident of Kentucky, and she was served constructively upon the ground of her absence from the state. The New York court impliedly concedes that upon that assumption the Kentucky court would have had jurisdiction, but it was found, as a matter of fact, that the wife had acquired a separate domicil in New York at the time of the divorce. Her right to acquire such separate domicil was based upon the finding that she was justified in leaving her husband, and that her sole reason for so doing was his cruel and inhuman treatment. The finding of the Kentucky courts on the merits, the cause of action being for desertion, would seem to negative such justification, since if she were justified in leaving him, she could scarcely be guilty of desertion. The result is that the decree was impeached in New York upon a finding of a fact affecting the jurisdiction which was necessarily negatived by the decision of the Kentucky court upon the merits. It seems to be well established that a court of another state cannot go behind the decree upon the merits, though it may do so upon a jurisdictional fact: but in this case the fact that went to the jurisdiction also went to the merits.

A decree of divorce rendered by a court of another state which had jurisdiction of the subject-matter and of the parties is, of course, conclusive as to the merits in the absence of fraud. There are intimations in the following cases that such a decree may be attacked for fraud, even if the alleged fraud does not go to the jurisdiction, though in those cases the question seems to have been as to the jurisdiction. Amory v. Amory, Fed. Cas. No. 333, Overruling 3 Biss. 266, Fed. Cas. No. 334; Thompson v. State, 28 Ala. 12; Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81; Dumont v. Dumont (N. J. Eq.) 45 Atl. 107; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Supreme Council of R. A. v. Carley, 52 N. J. Eq. 642, 29 Atl. 813.

In Supreme Council of R. A. v. Carley, 52 N. J. Eq. 642, 29 Atl. 813, the court held that

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where the court of the other state which rendered a decree of divorce subsequently set it aside a court of New Jersey had no power to reinstate the judgment, even if it is convinced that the vacating of the judgment in the other state was induced by fraud.

VIII. *Suits for same cause in different jurisdictions.*

A court in which a divorce suit is pending is not, in the absence of fraud, justified in disregarding a decree of divorce rendered in another state in favor of the defendant in the pending suit, merely because the suit in which it was rendered was commenced after the suit in which it is sought to be introduced. Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; Williams v. Williams, 53 Mo. App. 617; Fairchild v. Fairchild, 53 N. J. Eq. 678, 34 Atl. 10; Jones v. Jones, 108 N. Y. 415, 15 N. E. 707.

And this is true even if before the commencement of the suit in the other state the plaintiff therein had, as defendant in the pending suit, filed an answer therein setting up, by way of recrimination (without, however, asking for a divorce), the same facts which she afterward set up in her bill in the suit in the other state. Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841. In this case, however, it was held that, under the circumstances of the case, the party who procured the decree in the other state was guilty of a fraud in concealing from the court which rendered it the pendency of the other suit, and that the decree was therefore void and not entitled to recognition in Illinois.

In Turner v. Turner, 44 Ala. 437, it was held that a decree of divorce obtained by the husband in Indiana upon service by publication after the commencement of a suit by the wife in Alabama for a divorce was not a bar to the Alabama suit, and the decree of divorce and for alimony rendered in that suit was affirmed. It is not entirely clear whether the decision is upon the ground that the jurisdiction of the Alabama court, having attached, could not be ousted by the Indiana decree, or upon the ground that, even if the Indiana decree was valid so far as it affected the status of the parties, it did not settle the wife's right to alimony.

In Rebstock v. Rebstock, 2 Pittsb. 124, however, it was held that where the defendant in a divorce suit commenced in Pennsylvania has submitted to the jurisdiction of the court by denying the merits of the application, she cannot oust the jurisdiction of the court by obtaining a decree of divorce in an action subsequently commenced in another state.

A decree of divorce obtained at the suit of the husband in Illinois upon substituted service against the wife, who was resident in Tennessee and did not appear, cannot be attacked in the latter state, either upon the theory of *res judicata*, or fraud, because the husband had previously commenced an action for divorce on the same ground in Mississippi, which had been voluntarily dismissed by him before issue joined, and did not apprise the Illinois court of that fact. Thoms v. King, 95 Tenn. 60, 31 S. W. 983.

A woman who for a long period of time acquiesced in a divorce obtained by the husband in another state, during which time he twice married without any objection by her, is estopped, after his death, to claim as his widow, notwithstanding that the decree could have been avoided if impeached in time, because a divorce on similar grounds had been previously refused the husband in Pennsylvania,—especially where she had actual notice. Richardson's Estate, 132 Pa. 292, 19 Atl. 82.

G. H. P.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *Appt.*,
v.
Harry P. MacKNIGHT.

(.....N. C.....)

The practice of osteopathy is not within the provisions of a statute making the practice of medicine or surgery without a license a misdemeanor.

(October 21, 1902.)

APPEAL by the State from a judgment of the Superior Court for Moore County acquitting defendant of practising medicine without a license, contrary to the provisions of the statute. *Affirmed.*

The facts are stated in the opinion.

Mr. **W. J. Adams,** for appellant:

Although no punishment is prescribed by its terms, a breach of the statute is a misdemeanor.

N. C. Code, § 1097; *State* v. *Bloodworth*, 94 N. C. 918; *State* v. *Addington*, 121 N. C. 539, 27 S. E. 988.

In the construction of statutes, technical words, when used in reference to a technical subject, must be given the meaning they have when applied to the particular art or science with reference to which they are used, *i. e.*, their technical meaning, unless evidently used in a different sense, in which case the intention controls.

23 Am. & Eng. Enc. Law, p. 324.

If the statute is not ambiguous, the courts are not allowed to consider extraneous reasons, or to resort to the preamble of the act, in order to give its words any other than their technical meaning, if they have such signification.

Randall v. *Richmond & D. R. Co.* 107 N. C. 750, 11 L. R. A. 460, 12 S. E. 605.

Nor, where the language of the statute is clear, will the courts inquire into the purpose of its enactment.

State v. *Eaves*, 106 N. C. 752, 8 L. R. A. 259, 11 S. E. 370.

The word "medicine," whenever and

NOTE.—For other cases in this series as to practice of osteopathy, see State v. Liffring (Ohio) 46 L. R. A. 334; Nelson v. State Bd. of Health (Ky.) 50 L. R. A. 383; Little v. State (Neb.) 51 L. R. A. 717; State v. Gravett (Ohio) 55 L. R. A. 791, and Bragg v. State (Ala.) 58 L. R. A. 925. See also the following case of Parks v. State.

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wherever used, has reference to the subject of a science or art,—a technical word denoting the science or art of curing diseases; and one who engages in the practice of it is a scientist or artist, professionally known by the name of "physician" or "doctor."

Bragg v. *State* (Ala.) 58 L. R. A. 925, 32 So. 767.

The defendant is engaged in the practice of medicine and the branches thereof, and in prescribing for the cure of diseases for a fee or reward.

Hewitt v. *Charier*, 16 Pick. 353; *Bibber* v. *Simpson*, 59 Me. 181; *Davidson* v. *Bohlman*, 37 Mo. App. 576; *Eastman* v. *People use of State Bd. of Health*, 71 Ill. App. 236; *People* v. *Gordon*, 194 Ill. 560, 62 N. E. 858; *Little* v. *State*, 60 Neb. 749, 51 L. R. A. 717, 84 N. W. 248; *State* v. *Buswell*, 40 Neb. 158, 24 L. R. A. 68, 58 N. W. 728; *Bragg* v. *State* (Ala.) 58 L. R. A. 925, 32 So. 767; *State* v. *Gravett*, 65 Ohio St. 289, 55 L. R. A. 791, 62 N. E. 325; *State* v. *Van Doran*, 109 N. C. 868, 14 S. E. 32; *State* v. *Call*, 121 N. C. 643, 28 S. E. 517.

Mr. **Robert D. Gilmer,** Attorney General, also for appellant.

Mr. **Harry MacKnight,** *in propria persona:*

This statute is penal,—a criminal statute,—and should be construed strictly.

State v. *Midgett*, 85 N. C. 539; *Coble* v. *Shoffner*, 75 N. C. 43.

The practice of osteopathy is not within a statute making the practice of medicine or surgery without a license a misdemeanor.

Smith v. *Lane*, 24 Hun, 632; *State* v. *Midgett*, 85 N. C. 538; *Coble* v. *Shoffner*, 75 N. C. 42; *State* v. *Liffring*, 61 Ohio St. 39, 46 L. R. A. 334, 55 N. E. 168; *State* v. *Mylod*, 20 R. I. 632, 41 L. R. A. 428, 40 Atl. 753; *Nelson* v. *State Bd. of Health*, 22 Ky. L. Rep. 439, 50 L. R. A. 383, 57 S. W. 501.

To deny the right to the free and untrammeled use of one's hands upon the body of a sufferer, for his benefit, at his request, is to deny constitutional right.

State v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 755, 28 L. ed. 590, 4 Sup. Ct. Rep. 652; U. S. Const. 14th Amend.; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62.

Clark, J., delivered the opinion of the court:

Chapter 117, Laws 1885, amending Code, § 3132, under which this bill was drawn, reads as follows: "Section 3132. And any person who shall begin the practice of medicine or surgery in this state, for fee or reward, after the passage of this act, without first having obtained license from said board of examiners, shall not only not be entitled to sue for or recover, before any court, any medical bill for services rendered in the practice of medicine or surgery, or any of the branches thereof, but shall also be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $25 nor more than $100, or imprisoned, at the discretion of the court, for each and every offense: Provided, that this act shall not be construed to apply to women who pursue the avocation of a midwife: And provided further, that this act shall not apply to regularly licensed physicians or surgeons resident in a neighboring state." This last clause has since been modified. Laws 1889, chap. 181. The constitutionality of this act was discussed and affirmed. *State* v. *Call*, 121 N. C. 643, 28 S. E. 517. The simple question, therefore, upon the facts set out in the special verdict, is whether one who practises "osteopathy" is indictable if he has not procured the license required for anyone by the above section before beginning "the practice of medicine or surgery."

The special verdict finds that the defendant's "treatment of his patients did not consist in the administration of drugs or medicines, but in manipulation, kneading, flexing, and rubbing the body of his patients, and in the application of hot and cold baths, and in prescribing rules for diet and exercise; . . . that the defendant was engaged in the general practice of osteopathy, and professed to effect the cure of diseases by the practice of that science; that he also practised hypnotism and suggestion under hypnotism." It is also found that "upon two occasions he used a small surgeon's knife in opening an abscess in the mouth of one Shedd, but charged no fee for his services." The only surgery was "without fee or reward," an act of charity, and that was incidental, and not in the usual course of the practice of osteopathy. It cannot be said that one "practises medicine and surgery" when he uses neither drugs, medicine, nor surgery. Section 3124 requires the "board of medical examiners" to examine all applicants "to practise medicine or surgery" in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, and the practice of medicine," almost all of which would be useless knowledge to exact of an osteopath, who declines to use medicine, drugs, or surgery, and whose treatment consists solely in kneading, flexing, and rubbing the body, applying hot and cold baths, and prescribing diet and exercise. It cannot be conceived that the legislature would require the above examination for a profession which eschews the use of drugs and surgery. The medical society of this state, being "allopaths," would certainly not recognize an "osteopath" as one of their body, any more than they would a "homeopath," nor license anyone to pursue that calling with their diploma as his authority so to do; and if they would not, and we were to hold it indictable to practise osteopathy without such license, it would be a judicial prohibition upon the exercise of that phase of healing.

In *Smith* v. *Lane*, 24 Hun, 632, construing a statute very similar to ours, it is said: "To entitle a person to a certificate under this provision, it would be necessary that he should be qualified either to practise medicine or surgery in all its branches.

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If that was not made to appear, he could receive no certificate under the provisions of this act. For that reason, it appears to be quite manifest that the object of the legislature in the enactment of this chapter was only to provide for regulating the practice of medicine or surgery, as those terms are usually or generally understood; and, confining them to such significance, it is evident that they would not include the occupation of the plaintiff. The practice of medicine is a pursuit very generally known and understood, and so, also, is that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the functions of the latter are limited to manual operations, usually performed by surgical instruments or appliances. It was entirely proper for the legislature, by means of this chapter, to prescribe the qualifications of the persons who might be intrusted with the performance of these very important duties. The health and safety of society could be maintained and protected in no other manner. . . . No such danger could possibly arise from the treatment to which plaintiff's occupation was confined." In *State* v. *Liffring*, 61 Ohio St. 39, 46 L. R. A. 334, 55 N. E. 168, the same conclusion was reached, and also in *Nelson* v. *State Bd. of Health*, 22 Ky. L. Rep. 439, 50 L. R. A. 383, 57 S. W. 501. From this last case we learn that osteopathy originated with Dr. A. T. Still of Kirksville, Missouri, in 1871, and that at a college of osteopathy in that state in 1900 (when that opinion was filed) there were over 500 students from 29 states, besides several from Canada. And there are doubtless other colleges of osteopathy, for the special verdict finds that the defendant exhibited a diploma from the Columbia College of Osteopathy in Illinois.

It is argued to us that the science, if it be a science, of osteopathy, is an imposition. Of that we, judicially speaking, know nothing. It is not found as a fact in this verdict. We only know that the practice of osteopathy is not the "practice of medicine or surgery" as commonly understood, and therefore it is not necessary to have a license from the board of medical examiners before practising it. If it is a fraud and imposition, and injury results, the osteopath is liable both civilly and criminally. Certainly, "baths and diet" could be advantageously prescribed to many people. Rubbing is well enough, if the patient is not rubbed the wrong way. The real complaint is that osteopaths restrict themselves to these remedies, and do not resort to drugs and surgery; but that very fact establishes that they do not violate the law requiring a license to practise medicine and surgery. Doubtless there is an appeal to the imagination, but that is a necessary ingredient in all systems of healing. Who does not know that a prescription by a physician in whom the patient has implicit confidence is oftentimes more effective than the same treatment by one in whom he has none, and that at times bread pills and other harmless prescriptions are administered with good results? The aim of medical science, which is now probably the most progressive of all the professions, is simply to "assist nature." Osteopathy proposes to do that by other methods than by the use of medicines or the surgeon's knife.

We attach no weight to the argument that the defendant hung out his sign and advertised himself as "Doctor." The special verdict finds that he had a diploma from a college of osteopathy bestowing that title upon him. There are many kinds of doctors, besides doctors of medicine,—as doctors of laws, doctors of divinity, doctors of physics, and veterinary doctors, and others still. Besides, in this country, so far, at least, as titles go, "honors are easy." We know from common knowledge that druggists' clerks are ordinarily addressed as "doctor," justices of the peace are usually called "judge," and a teacher of the saltatory art always styles himself "professor," while "Yarborough House colonels" and "honorables" by courtesy of like tenor are almost as

"Thick as autumnal leaves that strow the brooks
In Vallombrosa."

Certainly the courts cannot abate a man as a nuisance because some one gives him, or he gives himself, a title.

If the general assembly shall deem osteopathy a legitimate calling, it may see fit, possibly, to secure educated and skilled practitioners by requiring an examination and license by learned osteopaths of applicants for license; but certainly the examination would be on subjects appropriate to secure competency therein, and not on an entirely different course of learning, such as that prescribed for applicants to practise "medicine or surgery." *State* v. *Gravett*, 65 Ohio St. 289, 55 L. R. A. 791, 62 N. E. 325. Dentistry is not the "practice of medicine or surgery;" but it is a related profession, as is also pharmacy, and each has its prescribed course of examination of applicants for license. Whether the same rights and dignity shall be bestowed on osteopathy is a matter for the general assembly; or, if it is found to be a fraud and imposition, its exercise is indictable. It seems that it more nearly approximates "nursing" in many respects (though different in others), when taught as a profession, as it now is.

The state has not restricted the cure of the body to the practice of medicine and surgery,—"allopathy," as it is termed,—nor required that, before anyone can be treated for any bodily ill, the physician must have acquired a competent knowledge of allopathy and be licensed by those skilled therein. To do that would be to limit progress by establishing allopathy as the state system of healing, and forbidding all others. This would be as foreign to our system as a state church for the cure of souls. All the state has done has been to enact that, when one wishes to practise "medicine or surgery," he must, as a protection to the public (not to the doctors), be examined and licensed by those skilled in "surgery and

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medicine." To restrict all healing to that one kind—to allopathy, excluding homeopathy, osteopathy, and all other treatments—might be a protection to doctors in "surgery and medicine;" but that is not the object of the act, and might make it unconstitutional, because creating a monopoly. The state can only regulate for the protection of the public. There is also "Divine Science" (which some one has said is neither divine nor a science), and there may be other methods still. Whether these shall be licensed and regulated is a matter for the lawmaking power to determine before any question in that respect can come before the court. Certainly a statute requiring examination and license "before beginning the practice of medicine or surgery" neither regulates nor forbids any mode of treatment which absolutely excludes medicines and surgery from its pathology. All that the courts can declare upon the facts found in the special verdict is that the defendant's practice is not "the practice of medicine or surgery," and no license from the medical board of examiners is required.

No error.

INDIANA SUPREME COURT.

George P. PARKS, *Appt.*,
v.
STATE of Indiana.

(.....Ind.....)

1. **An affidavit and information for practising medicine** without a license, contrary to the provisions of a statute, is sufficient if in the form prescribed by the statute.
2. **A judgment entered on general verdict of guilty** upon an information for practising medicine without a license, one count of which is good and sustained by the evidence, will not be set aside on appeal because some counts of the information are insufficient.
3. **Requiring a magnetic healer to procure a license** before engaging in the healing art does not deprive him of his liberty or property without due process of law, or deny him the equal protection of the laws.
4. **A statute requiring a license of all who announce to the public their readiness to heal,** cure, or relieve those suffering from disease is not void on the ground that the classification is unjust and arbitrary because it exempts duly licensed physicians of other states whose practice extends into the state, opticians, and nurses.
5. **Permitting the licensing of osteopaths,** while excluding mental healing, is not an unlawful discrimination which will render the statute void.
6. **A title, "An Act Regulating the Practice of Medicine,** Surgery, and Obstetrics" is sufficient to cover a definition of the practice of medicine, and to designate those who must obtain a license before engaging in such practice.
7. **A magnetic healer who styles himself "Professor,"** and holds himself out to the public as a healer of disease, and whose treatment in a particular case consisted of holding an affected limb and rubbing it, is within the terms of a statute requiring a license of persons who announce to the public a readiness to cure disease, or who use in connection with their names the word "Professor," or any word intended to designate them as practitioners of medicine in any of its branches.

(October 7, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Lawrence County convicting him of practising medicine without a license. *Affirmed.*

The facts are stated in the opinion.

Mr. **Spencer B. Peugh,** for appellant:

The law in question, so far as the acts charged and proved against appellant are brought within its purview by the act of 1901, is unconstitutional and void.

Griffin v. *State ex rel. Griffiths,* 119 Ind. 520, 22 N. E. 7; *State ex rel. Law* v. *Blend,* 121 Ind. 514, 23 N. E. 511.

It is not a police regulation. To be such, it must be reasonable and necessary, and adapted to the use for which it was enacted.

Minnesota v. *Barber,* 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Mugler* v. *Kansas,* 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Re Jacobs,* 98 N. Y. 98, 50 Am. Rep. 636; *Jamieson* v. *Indiana Natural Gas & Oil Co.* 128 Ind. 583, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; *State* v. *Gerhardt,* 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Ritchie* v. *People,* 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454.

The acts of appellant do not fall within the meaning of the term "practice of medicine" as used in the decided cases, and are not injurious to the public health.

State v. *Liffring,* 61 Ohio St. 39, 46 L. R. A. 334, 55 N. E. 168; *People use of State Bd. of Health* v. *Blue Mountain Joe,* 129 Ill. 370, 21 N. E. 923; *Smith* v. *Lane,* 24 Hun, 632; *Nelson* v. *State Bd. of Health,* 22 Ky. L. Rep. 438, 50 L. R. A. 383, 57 S. W. 501.

Before an act can be considered as a valid police regulation, there must be some ap-

NOTE.—As to practice of osteopathy, see preceding case of State v. MacKnight (N. C.), and *footnote* thereto.

As to right of Christian scientists to practise without license, see, in this series, State v. Buswell (Neb.) 24 L. R. A. 68; and State *ex rel.* Swarts v. Mylod (R. I.) 41 L. R. A. 428.

As to constitutionality of regulations as to practice of medicine generally, see cases in *note* to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579.

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parent danger to the public, and the remedy must be a means of eradicating the evil.

Loesch v. *Koehler*, 144 Ind. 278, 35 L. R. A. 682, 41 N. E. 326.

It is a fundamental right of every American citizen to adopt and follow such industrial pursuit, not injurious to the community, as he sees fit.

People v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

Appellant has an estate in his profession, of which the act deprived him without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

State v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350.

The right of appellant to contract and dispose of his labor is guaranteed by the Constitution.

U. S. Const. 5th & 14th Amendments; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; Fed. Const. Bill of Rights, § 1.

The law in question is prohibitive, not only against appellant and his class, but against the public who desire to contract for his services, because it makes the employment unlawful.

Com. v. *Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350.

The act discriminates in favor of nonresidents.

State v. *Pennoyer*, 65 N. H. 113, 5 L. R. A. 709, 18 Atl. 878; *Scholle* v. *State*, 90 Md. 729, 50 L. R. A. 411, 46 Atl. 326.

The provision that the act shall not apply to nurses and those who practise optometry grants them a privilege or immunity, and denies to appellant the equal protection of the laws.

Barbier v. *Connolly*, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Missouri* v. *Lewis*, 101 U. S. 22, *sub nom.* *Bowman* v. *Lewis*, 25 L. ed. 989; *Scholle* v. *State*, 90 Md. 729, 50 L. R. A. 411, 46 Atl. 326.

If appellant's acts are a practice of medicine, his system is a system or school of medicine, and cannot be discriminated against.

State v. *Mylod*, 20 R. I. 632, 41 L. R. A. 428, 40 Atl. 753; *White* v. *Carroll*, 42 N. Y. 161, 1 Am. Rep. 503; *Eastman* v. *State*, 109 Ind. 280, 58 Am. Rep. 400, 10 N. E. 97.

No man incurs a penalty unless the acts which subject him to it are clearly within both the spirit and the letter of the statute imposing such penalty.

Ex parte McNulty, 77 Cal. 164, 19 Pac. 237.

Messrs. **Merrill Moores** and **Cassius C. Hadley**, with *Mr.* **William L. Taylor**, Attorney General, for appellee:

The medical law of 1897 was constitutional.

Dent v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Eastman* v. *State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *State ex rel. Burroughs* v. *Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750.

The amendment of 1901 did not materially change the law.

Acts 1897, p. 255; Acts 1901, p. 475.

While it in no way changed the rules of evidence, such a change would have been unobjectionable.

Ralston v. *Lothain*, 18 Ind. 305; *Robinson* v. *State*, 84 Ind. 453; *Heagy* v. *State ex rel. Forkner*, 85 Ind. 263; *Sage* v. *State*, 127 Ind. 19, 26 N. E. 667.

The amendment would have been valid if it had imposed additional qualifications and restrictions.

Gray v. *Connecticut*, 159 U. S. 77, 40 L. ed. 81, 10 Sup. Ct. Rep. 985; *Hawker* v. *New York*, 170 U. S. 200, 42 L. ed. 1007, 18 Sup. Ct. Rep. 573; *Little* v. *State*, 60 Neb. 752, 51 L. R. A. 719, 84 N. W. 248; *State* v. *Gravett*, 65 Ohio St. 289, 55 L. R. A. 791, 62 N. E. 325; *People* v. *Reetz*, 127 Mich. 87, 86 N. W. 396; *People* v. *Gordon*, 194 Ill. 560, 62 N. E. 858.

The manual treatment administered by the appellant was covered by the original law. A surgeon is "one whose profession or occupation is to cure disease or injuries of the body by manual operation."

Ex parte Crabb, 25 L. J. Bankr. N. S. 49; *Allison* v. *Haydon*, 4 Bing. 621: Bouvier's, Black's, and Rapalje & Lawrence's Dictionaries; *Little* v. *State*, 60 Neb. 749, 51 L. R. A. 717, 84 N. W. 248; *State* v. *Buswell*, 40 Neb. 158, 24 L. R. A. 68, 58 N. W. 728; *People* v. *Gordon*, 194 Ill. 560, 62 N. E. 858; *Jones* v. *People use of State Bd. of Health*, 84 Ill. App. 453; *Eastman* v. *People use of State Bd. of Health*, 71 Ill. App. 236; *People use of State Bd. of Health* v. *Jones*, 92 Ill. App. 447; *Benham* v. *State*, 116 Ind. 112, 18 N. E. 454; *Mayer* v. *State*, 64 N. J. L. 327, 45 Atl. 624; *Com.* v. *St. Pierre*, 175 Mass. 51, 55 N. E. 482.

The amended act does not take away property without due process of law.

Dent v. *West Virginia*, 129 U. S. 123, 32 L. ed. 626, 9 Sup. Ct. Rep. 231; *State ex rel. Burroughs* v. *Webster*, 150 Ind. 619, 41 L. R. A. 218, 50 N. E. 750; *France* v. *State*, 57 Ohio St. 1, 47 N. E. 1041; *State ex rel. Hygea Medical College* v. *Coleman*, 64 Ohio St. 386, 55 L. R. A. 108, 60 N. E. 568; *State* v. *Gravett*, 65 Ohio St. 289, 55 L. R. A. 791, 62 N. E. 326; *State ex rel. Kellogg* v. *Currens*, 111 Wis. 431, 56 L. R. A. 252, 87 N. W. 561; *State Bd. of Health* v. *Roy*, 22 R. I. 538, 48 Atl. 802; *Re Campbell*, 197 Pa. 587, 47 Atl. 860; *People* v. *Phippin*, 70 Mich. 18, 37 N. W. 888; *People* v. *Reetz*, 127 Mich. 87, 86 N. W. 396; *Ex parte Spinney*, 10 Nev. 335; *People* v. *Hasbrouck*, 11 Utah, 302, 39 Pac. 918; *Fox* v. *Territory*, 2 Wash. Terr. 301, 5 Pac. 803; *State* v. *Carey*, 4 Wash. 427, 30 Pac. 729.

The amended act is not objectionable as class legislation, as it affects nonresident physicians.

France v. *State*, 57 Ohio St. 23, 47 N. E. 1041; *State* v. *Van Doran*, 109 N. C. 869, 14 S. E. 32; *Fox* v. *Territory*, 2 Wash. Terr. 301, 5 Pac. 603; *Com.* v. *Wilson*, 19 Pa. Co. Ct. 521; *Com.* v. *Finn*, 11 Pa. Super. Ct. 626; *Re Campbell*, 197 Pa. 587, 47 Atl.

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860; *State ex rel. Kellogg* v. *Currens*, 111 Wis. 431, 56 L. R. A. 252, 87 N. W. 561.

Nor as it affects nonitinerant opticians, nurses, and osteopaths.

State ex rel. Kellogg v. *Currens*, 111 Wis. 436, 56 L. R. A. 252, 87 N. W. 561; *Scholle* v. *State*, 90 Md. 739, 50 L. R. A. 413, 46 Atl. 326; *Com.* v. *Wilson*, 19 Pa. Co. Ct. 525; *Com.* v. *Finn*, 11 Pa. Super. Ct. 624; *State* v. *Call*, 121 N. C. 647, 28 S. E. 517; *State* v. *Bair*, 112 Iowa, 466, 51 L. R. A. 776, 84 N. W. 532; *Little* v. *State*, 60 Neb. 751, 51 L. R. A. 718, 84 N. W. 248; *Eastman* v. *People use of State Bd. of Health*, 71 Ill. App. 238; *Nelson* v. *State Bd. of Health*, 22 Ky. L. Rep. 438, 50 L. R. A. 383, 57 S. W. 501; *State* v. *Liffring*, 61 Ohio St. 39, 46 L. R. A. 334, 55 N. E. 168; *Com.* v. *Thompson*, 24 Pa. Co. Ct. 667; *People* v. *Gordon*, 194 Ill. 560, 62 N. E. 860; *Jones* v. *People use of State Bd. of Health*, 84 Ill. App. 455.

Nor as it affects schools of medicine.

Allopathic State Bd. of Medical Examiners v. *Fowler*, 50 La. Ann. 1374, 24 So. 809; *Dowdell* v. *McBride*, 18 Tex. Civ. App. 645, 45 S. W. 397, 92 Tex. 239, 47 S. W. 524; *State* v. *Carey*, 4 Wash. 429, 30 Pac. 729; *Re Campbell*, 197 Pa. 588, 47 Atl. 860; *People* v. *Gordon*, 194 Ill. 560, 62 N. E. 860.

The title is sufficient to include magnetic healers.

Jones v. *People use of State Bd. of Health*, 84 Ill. App. 453; *People* v. *Gordon*, 194 Ill. 560, 62 N. E. 860; *People use of State Bd. of Health* v. *Blue Mountain Joe*, 129 Ill. 376, 21 N. E. 923; *Little* v. *State*, 60 Neb. 753, 51 L. R. A. 719, 84 N. W. 248; *People* v. *Phippin*, 70 Mich. 13, 37 N. W. 888; *Re Campbell*, 197 Pa. 588, 47 Atl. 860; *Harding* v. *People*, 10 Colo. 391, 15 Pac. 727; *State* v. *Ottman*, 6 Ohio S. & C. P. Dec. 268; *Allopathic State Bd. of Medical Examiners* v. *Fowler*, 50 La. Ann. 1368, 24 So. 809; *State ex rel. Wyane* v. *Lee*, 106 La. 400, 31 So. 14.

Gillett, J., delivered the opinion of the court:

Appellant was prosecuted, by affidavit and information, for practising medicine without a license. There were three counts in the affidavit and information. Appellant moved to quash each count thereof, but his motion was overruled, and he excepted. Upon issue joined, a trial was had, that resulted in a finding of guilty as charged in each count. Judgment was rendered in accordance with the finding. A motion for a new trial, in connection with a proper assignment of error, presents the further question as to the sufficiency of the evidence.

The first count of the affidavit and information was in the form prescribed by statute. § 8, p. 475, Acts 1901 (Burns's Rev. Stat. 1901, § 7323c). It is contended notwithstanding, that the charge is insufficient because of uncertainty. In *Benham* v. *State*, 116 Ind. 112, 18 N. E. 454, which was a prosecution for a like offense, the charge was in the same general form, and it was held sufficient by this court. It was there said: "We are of opinion, however, that the indictment in this case is not open to the objection that it does not state the offense charged with sufficient certainty. The offense charged against appellant herein is purely a statutory offense,—that is, it was created and defined and its punishment prescribed by the provisions heretofore quoted of the above-entitled act of April 11, 1885. In such a case it has been held by this court, as a general rule, that an indictment or information will be sufficient to withstand a motion to quash if it charge the offense in the language of the statute, or in terms substantially equivalent thereto. *Howard* v. *State*, 87 Ind. 68; *State* v. *Miller*, 98 Ind. 70; *Ritter* v. *State*, 111 Ind. 324, 12 N. E. 501; *Trout* v. *State*, 111 Ind. 499, 12 N. E. 1005. In the case under consideration it is conceded on behalf of appellant that the offense charged is a statutory offense, and that the indictment charges him with such offense substantially in the language of the statute. In *Eastman* v. *State*, 109 Ind. 279, 58 Am. Rep. 400, 10 N. E. 97, the appellant was prosecuted, as we may infer from the opinion of the court, as is the defendant in the case in hand, for unlawfully practising medicine without having first procured from the proper clerk a license so to do. In the case cited the sufficiency of the charge seems to have been challenged, and upon this point the court there said: 'The offense is charged in the language of the statute, and this is sufficient. *State* v. *Miller*, 98 Ind. 70, and cases cited; *Gracter* v. *State*, 105 Ind. 271, 4 N. E. 461; *Antle* v. *State*, 6 Tex. App. 202.'" P. 114, 116 Ind., and p. 455, 18 N. E. Various acts may enter into the offense, but the acts, whether many or otherwise, constitute but one substantive offense, created by § 1 of the act of 1897 (Burns's Rev. Stat. 1901, § 7318), namely, the offense of practising medicine, surgery, or obstetrics without a license. As was said by this court in *Shilling* v. *State*, 5 Ind. 443: "Whenever the charge consists of a series of acts, they need not be specially described, because they are not the offense itself, but merely go to make up the evidence of the offense." It is proper to consider in addition the effect of the provision of the statute as to what shall be a sufficient charge. We cite as authorities bearing upon this question the following cases: *Riggs* v. *State*, 104 Ind. 261, 3 N. E. 886; *State* v. *Learned*, 47 Me. 426, 433; *State* v. *Corson*, 59 Me. 137; *Wolf* v. *State*, 19 Ohio St. 248; *Turpin* v. *State*, 19 Ohio St. 540; *Cathcart* v. *Com.* 37 Pa. 108; *Goersen* v. *Com.* 99 Pa. 388; *State* v. *Morgan*, 112 Mo. 202, 20 S. W. 456, and cases there cited. As there was no relaxing of the requirement that the ultimate substantive offense should be stated, we think, especially in view of the above authorities, that there has been no denial of the right of appellant to demand the nature and cause of the accusation against him.

It appears from the evidence that at the time in question the appellant practised magnetic healing, and had done so for eight years prior thereto; that he did not use

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medicines or surgery; that he held himself out as a magnetic healer, advertised as such, and styled himself "Professor;" that he was not a graduate of any school of medicine, and had no license; that he diagnosed cases entirely by the nerves; that on the 8th day of April, 1901, one Edward Garvey came to him to be treated for a lame ankle; that, after examining the ankle, appellant diagnosed the case as rheumatism, and proceeded to give treatment, which consisted, at least in so far as there was anything manual about it, in holding the afflicted parts and rubbing them. An effort upon the part of appellant, while testifying as a witness, to describe magnetic healing, was prefaced by the statement that "it is pretty hard to describe for people to understand." At this point he was interrupted by the court, and the subject does not seem to have been pursued further. Appellant charged and received $1 for the treatment that he gave said Garvey. There can be no question as to appellant's guilt, if the act under which he was convicted is valid.

Assuming, for the time being, the validity of the statute, we do not think that any question is presented as to the sufficiency of the second and third counts of the affidavit and information. The rule of the criminal law is that when there is a good count and a bad count, and a general verdict of guilty is returned, on which judgment is rendered, it will be presumed on appeal that the judgment was rendered on the good count. *Powers* v. *State*, 87 Ind. 97. It is true that the finding affirmatively appears to have been based on each count, but in a case of this kind, where there is one sufficient count (assuming the validity of the statute), and that count is established by evidence of a single, substantive transaction, admitted by the appellant, we think that questions as to the sufficiency of other counts of the affidavit and information are moot questions.

The prosecution in this case is based on the act of March 8, 1897 (Acts 1897, p. 255), and its subsequent amendments. Burns's Rev. Stat. 1901, §§ 7318–7323e. Certain sections of the act of 1897 were amended by an act passed in 1899. Acts 1899, p. 247. By an act passed in 1901, § 8 of the original act was amended, and certain sections of said amended act of 1897 were in turn amended. Acts 1901, p. 475. The act as it now stands is too long to set out here. It will reasonably suffice to set out that portion of § 8 of the act, as amended in 1901, that precedes the provision as to what a charge of violating the act shall contain. Said first portion of the section referred to is as follows: "To open an office for such purpose, or to announce to the public in any way a readiness to practise medicine in any county of the state, or to prescribe for, or to give surgical assistance to, or to heal, cure, or relieve, or to attempt to heal, cure, or relieve, those suffering from injury or deformity, or disease of mind or body, or to advertise, or to announce to the public in any manner, a readiness or ability to heal, cure, or relieve those who may be suffering from injury or deformity, or disease of mind or body, shall be to engage in the practice of medicine within the meaning of this act: provided, that nothing in this act shall be construed to apply to or limit in any manner the manufacture, advertisement, or sale of proprietary medicines. It shall also be regarded as practising medicine within the meaning of this act, if anyone shall use in connection with his or her name the words or letters, 'Dr.,' 'Doctor,' 'Professor,' 'M. D.,' or 'Healer,' or any other title, word, letter, or designation intending to imply or designate him or her as a practitioner of medicine or surgery in any of its branches: provided, that this act shall not be construed to apply to nonitinerant opticians who are at this time engaged in, or who may thereafter engage in, the practice of optometry in this state, nor to professional or other nurses." The act of 1897, as amended in 1899, and as further amended in 1901, must be construed as though the amendments as they now exist had been incorporated in the original statute. *Blakemore* v. *Dolan*, 50 Ind. 194; *Pomeroy* v. *Beach*, 149 Ind. 511, 49 N. E. 370. The appellant challenges the validity of the amended statute as applied to him. This challenge is based largely on the claim that the amended statute is in conflict with the 14th Amendment to the Federal Constitution. That amendment is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The privileges and immunities clause of this amendment has no application to the denial that is complained of here. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Cooley, Const. Lim. 5th ed. pp. 491, 492.

But the last two clauses of the amendment challenge our attention. These are plain restrictions upon the exercise of arbitrary and capricious power over persons and property when exercised by the state through any of its agencies. *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. This amendment greatly expanded the power of the Federal courts over state legislation, and conferred a like power upon the courts of the state, except in instances where like restraints were already embodied in the Constitutions of the states. As to the provision concerning due process of law, it was said by the Supreme Court of the United States in *Holden* v. *Hardy*, 169 U.

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S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383: "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard; as, that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense." In *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231, it was said by Mr. Justice Field, in pronouncing the opinion of the court: "The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in *Yick Wo* v. *Hopkins*, speaking by Mr. Justice Matthews: 'When we consider the nature and the theory of our institutions, . . . the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of purely personal and arbitrary power.' 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. See also *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Davidson* v. *New Orleans*, 96 U. S. 97, 104, 107, 24 L. ed. 616, 619, 620; *Hurtado* v. *California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111; *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512, 519, 29 L. ed. 463, 465, 6 Sup. Ct. Rep. 110." P. 124, 129 U. S., p. 623, 32 L. ed., and p. 234, 9 Sup. Ct. Rep. The right to contract, as a means of acquiring property, is put on the same footing as the right to property. *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231. In the case last cited it was said: "It is undoubtedly the right of any citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate, acquired in them,—that is, the right to continue their prosecution,—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." P. 121, 129 U. S., p. 625, 32 L. ed., and p. 233, 9 Sup. Ct. Rep. It was not, however, the effect of the last two clauses of the 14th Amendment to emasculate the just powers of the states. The authority of the state remains to so control the conduct of individuals by reasonable laws as to protect the welfare of the community. As said by Judge Cooley: "Any accurate statement of the theory upon which the police power rests will render it apparent that a proper exercise of it by the state cannot come in conflict with the provisions of the Constitution of the United States. If the power extends only to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive anyone of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities." Cooley, Const. Lim. 6th ed. 707. See also *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The most extensive and pervading power existing in the states by virtue of their general sovereignty is the police power. "By the public police and economy," said Sir William Blackstone, in his Commentaries on the Laws of England, "I mean the due regulation and domestic order of the Kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Bl. Com. p. 162. "This power is, and must be, from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. ed. 394, 404. There are doubtless some rights of a purely personal and private character that their possessor does not surrender to the whole people by becoming a member of organized society. *Munn* v. *Illinois*, 94 U. S. 113, 124, 24 L. ed. 77, 83. But it is evident that he must concede to society, in return for the enjoyment of its privileges, a large measure of authority over his conduct and possessions, and that in the process of development from a rude state of society to a complex civilization the zone of personal and private rights that are beyond legislative control must constantly diminish. *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. The maxim, *Sic utere tuo ut alienum non lædas* ("So use your own that another you may not injure"), is the source of the police power, and furnishes the implied condition upon which every member of society possesses and enjoys his property. *Munn* v. *Illinois*, 94 U. S. 113, 124, 24 L. ed. 77, 83; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 566, 43 L. ed. 552, 555, 19 Sup. Ct. Rep. 281. Under the law of eminent domain, the owner of property is entitled to compensation when his property is actually taken, and, while the distinction between the exercise of this power and that of the police power may

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sometimes be difficult to perceive in practice, yet in their leading theories they are broadly differentiated, by reason of the fact that if the imposition of the burden or the control of the privilege can be affirmed as an act done within the scope of the police power, under existing laws, then there is no right of compensation. To that extent must the individual right be subordinated to the public weal. Under this power, various burdens are imposed: Criminals are deprived of their liberty; the implements of crime are destroyed; vice and pauperism are controlled; noxious trades are regulated; nuisances are suppressed; children are required to attend school; the property of infants and persons *non compos* is placed in the control of others; the construction of buildings in populous neighborhoods is regulated; provision is made for the greater safety of passengers upon railways and steamboats; employers are required to provide safe places in which the work of their employees is to be performed; the hours of work, in employments deleterious to the health, limited; the employment of children in factories prohibited; pure-food laws are enacted; physicians, dentists, and druggists are licensed; and so the list might be almost indefinitely expanded by specific instances of authorized legislative regulations enforcing the social compact, for the protection of life, health, morals, property, and the general weal of the community, until we perceive that definition is impossible, and that the whole matter of the legislative element of sovereignty, as opposed to individual liberty, must, in the absence of other constitutional restriction, be left, as the Federal Supreme Court has declared, to the gradual processes of judicial inclusion and exclusion, as the cases presented for decision require. *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

For hundreds of years the matter of the conservation of the public health has been a leading matter of police control. If a man holds himself out to the community as a person skilled in the science of healing, and on that ground seeks the opportunity to exercise the skill he claims to possess, his business becomes impressed with a public character, and he is therefore subject to reasonable regulation in its prosecution. This court upheld the medical law, as it stood in the year 1897, in *State ex rel. Burroughs* v. *Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750, and the authority of a state, in the exercise of its police power, to pass a reasonable law upon that subject, was affirmed by the United States Supreme Court in *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231. Upon the authority of these cases, and the many cases decided by the courts of other states, and cited in the case of *State ex rel. Burroughs* v. *Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750, we might, perhaps, without discussion, have decided most of the questions involved in this case: but as the statutes upon which the judgments in those cases rest are different from the statute here under consideration, and as the appellant assails said act as an unwarranted invasion of his pursuit of a business that he claims is at least harmless, it has seemed to us proper to consider, to some extent, the authority of the state to control him in the exercise of such pursuit. In *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231, it was said: "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires, not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications." P. 122, 129 U. S., p. 623, 32 L. ed., and p. 233, 9 Sup. Ct. Rep.

Counsel for appellant denounce the law in question as "an attempt to determine a question of science, and control the personal conduct of the citizen without regard to his opinion, and in a matter in which the public is in no wise concerned." We think, on the contrary, that the matter is one of very considerable concern, and that the legislature is the appropriate tribunal to determine the degree of learning that those who gain a livelihood by seeking to relieve the bodily ailments of others should possess. While it is true that the often-quoted definition of "police" power afforded by Chief Justice Shaw in *Com.* v. *Alger*, 7 Cush. 85, contains the limitation that such laws must be wholesome and reasonable, yet it is evident, as the power to enact laws has been confided to the legislative department, that a very large measure of authority is vested in that department to determine what is reasonable and wholesome in the enactment of statutes under the police power. The courts would never venture to run a race of opinion with the legislature upon questions of mere expediency. Such a course would be a gross judicial usurpation of power.

Appellant's counsel particularly objects to the classification that the statute provides for, on the ground that it is unjust and arbitrary. In the exercise of the police power there must needs be a considerable discretion vested in the legislature, whereby some people have rights or suffer burdens that others do not. Nevertheless, if the objection mentioned has any real basis, the statute must be condemned by the courts. As said in *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357: "The 14th Amendment, in declaring that no state 'shall deprive any person of life, lib-

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erty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prosecution and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." P. 31, 113 U. S., p. 924, 28 L. ed., and p. 359, 5 Sup. Ct. Rep. The statute of a state that deprives any person of his life, liberty, or property without due process of law, or that denies to any person within the jurisdiction of the state the equal protection of the laws, cannot be upheld on the theory that it is an exercise of the power of classification. *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. It is undoubtedly true, as stated by Judge Cooley, that a proper exercise of the police power cannot come in conflict with the national jurisdiction, but, after all, the ultimate test of propriety must be found in the limitations of the 14th Amendment, since it operates to hedge in the field of the police power to the extent of preventing the enforcement of statutes in denial of the rights that the amendment protects. Especially in cases where statutes are enacted that deny to persons the right to follow their accustomed vocations in life, while the same right is granted to others, are the courts insistent that there must be some substantial basis in reason and justice for the discrimination. The *Connolly Case*, above cited, is the latest expression of the United States Supreme Court upon this general subject. In that case what is popularly termed an "anti-trust act," denying to offending corporations the right to enforce their contracts by suit, was condemned because of a section thereof that provided that the provisions of the act should not apply to agricultural products or live stock while in the hands of the producer or raiser. In disposing of the question the court, at page 563, 184 U. S., page 691, 46 L. ed., and page 441, 22 Sup. Ct. Rep., said: "It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time indirectly to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes . . . shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce." Of course, the point decided in the above case is only illustrative of the proposition that enactments within the domain of the police power may be obnoxious to the Federal Constitution by reason of an arbitrary exercise of the power of classification. The power of reasonable classification, however, exists. *Missouri* v. *Lewis*, 101 U. S. 22, 31, *sub nom. Bowman* v. *Lewis*, 25 L. ed. 989, 992; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Hayes* v. *Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350. And in cases where there is room for the presumption that a substantial and just reason furnished the basis for legislation enacted in the carrying out of a public purpose, the exercise of the legislative discretion in the establishing of a classification must be respected by the courts. *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

We do not think that there is involved in this case a question as to the authority of the legislature to discriminate against a particular school of practitioners. We are not judicially advised that magnetic healing, so-called, is so far based on co-ordinated, arranged, and systematized knowledge that it can be termed a science, or that any considerable degree of instruction is a prerequisite to its prosecution, as it is actually practised by those whose knowledge does not go beyond the manifestation of the phenomena of magnetism. It may have been the judgment of the legislature, in its implied exclusion of appellant, that both the limitations of value that the treatment possessed and the dangers attending it made it wise to confine its use to a body of men in whose hands it would be safer to intrust it, because of their education in subjects relevant to its administration. The legislature, in judging of a matter of this kind, was authorized to give heed to the opinions of scientific men, and, presuming that it did so, it doubtless found substantial reason for the act of exclusion complained of. Judged by such authority, it appears that, while the practice of magnetic healing is based on some elements of ascertained knowledge, yet that its prosecution is attended with danger to such a degree that the legislature was justified in its effort to take it out of the hands of empirics. Thus, J. G. McKendrick, professor of the institutes of medicine, University of Glasgow, in concluding his learned article on "Animal Magnetism" in the Encyclopædia Britannica, says: "It is evident that animal magnetism or hypnotism is a peculiar physiological condition excited by perverted action of certain parts of the cerebral nervous organs, and that it is not caused by any occult force emanating from the operator. Whilst all the phenomena cannot be accounted for, owing to the imperfect knowledge we possess of the functions of the brain and cord, enough has been stated to show that just in proportion as

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our knowledge has increased has it been possible to give a rational explanation of the phenomena. It is also clear that the perverted condition of the nervous apparatus in hypnotism is of a serious character, and therefore that these experiments should not be performed by ignorant empirics for the sake of gain, or with a view of causing amusement. Nervous persons may be seriously injured by being subjected to such experiments, more especially if they undergo them repeatedly, and it should be illegal to have public exhibitions of the kind alluded to. The medical profession has always been rightly jealous of the employment of hypnotism in the treatment of disease, both from fear of the effects of such operations on the nervous systems of excitable people, and because such practice is in the border land of quackery and of imposture. Still, in the hands of skilful men, there is no reason why the proper employment of a method influencing the nervous system so powerfully as hypnotism should not be the means of relieving pain or of remedying disease." As appellant was without the license provided for by statute, it may be presumed that he was engaged in empiricism, which is defined as a practice of medicine (using that term in its popular sense) founded on mere experience, without the aid of science or a knowledge of its principles. The state has by no means denied the right to seek to relieve persons afflicted with rheumatism by the process of manipulating and kneading the diseased or affected parts, with or without the element of hypnotic suggestion, but the legislature has sought to deny to all persons the right to do the acts denominated by statute as "engaging in the practice of medicine" unless they possess the certificate required. The statute in question, in its general scope, goes no further than to establish a standard that may be attained by reasonable application, and the means has an appropriate relation to the end. There is plainly, as applied to the case in hand, no arbitrary or unreasonable deprivation of right. In the language of the court in *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231: "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

We will now proceed to consider the elements in the legislative scheme of classification of which complaint is particularly made. The Amendment of 1899 provides that the law shall not apply "to any physician or surgeon who is legally qualified to practise in the state or territory in which he resides, when in actual consultation with a legal practitioner of this state, nor to any physician or surgeon residing on the border of the state and duly authorized to practise under the laws thereof, whose practice extends into the limits of this state. Provided, that such practitioner shall not open an office or appoint a place to meet patients or receive calls within the limits of this state." The people of the state ought not to be deprived of the opportunity to call in consultation with their own physicians and surgeons eminent and skilful physicians and surgeons of other states, and considerations of convenience to the people doubtless prompted the establishing of the exception to the operation of the law in the case of physicians and surgeons residing on the borders of the state. Even the members of this class must be authorized to practise under the laws of the states in which they respectively live, where it may be fairly presumed that there are reasonable restrictions. Like provisions have been upheld by other courts. *France* v. *State*, 57 Ohio St. 11, 47 N. E. 1041; *State* v. *Van Doran*, 109 N. C. 864, 14 S. E. 32; *Fox* v. *Territory*, 2 Wash. Terr. 297, 5 Pac. 603; *Com.* v. *Wilson*, 19 Pa. Co. Ct. 521; *Com.* v. *Finn*, 11 Pa. Super. Ct. 620; *Scholle* v. *State*, 90 Md. 729, 50 L. R. A. 411, 46 Atl. 326. The lines of employment of the optician and that appellant was pursuing are so diverse as to raise no question as to the power of the legislature to discriminate between them. There is in this instance wanting the "like circumstances" necessary to raise any question of arbitrary discrimination. *Missouri* v. *Lewis*, 101 U. S. 22, 31, *sub nom.* *Bowman* v. *Lewis*, 25 L. ed. 989, 992; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Hayes* v. *Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350. The exception in favor of professional and other nurses might present a question of difficulty if appellant were only charged with an act that might be properly described as nursing, but he is impliedly charged under the first count with a violation of the statute in other particulars,—particularly in the manner in which he held himself out. As said by the supreme court of Illinois in *People* v. *Gordon*, 194 Ill. 560, 571, 62 N. E. 858, 861; "We all agree that the objects and purposes of this and similar statutes are to protect the sick and suffering, and the community at large, against the ignorant and unlearned, who hold themselves out as being possessed of peculiar skill in the treatment of disease,—from holding themselves out to the world as physicians and surgeons without having acquired any knowledge whatever of the human system, or the diseases and ailments to which it is subject. Without some knowledge of the location and offices of the various nerves, muscles, and joints, the manipulation of those parts and the flexing of the limbs cannot be intelligently, if, indeed,

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safely, practised. Merely giving massage treatment or bathing a patient is very different from advertising one's business or calling to be that of a doctor or physician, and, as such, administering osteopathic treatment. The one properly falls within the profession of a trained nurse, while the other does not."

Appellant's counsel further objects to a classification that excludes appellant from following his business, while it permits the granting of licenses to practise osteopathy. "Osteopathy" is defined by the Annual Encyclopædia for 1900 (p. 554) as: "A method of treating diseases of the human body without the use of drugs, by means of manipulations applied to various nerve centers,—chiefly those along the spine,—with a view to inducing free circulation of the blood and lymph, and an equal distribution of the nerve forces. Special attention is given to the readjustment of any bones, muscles, or ligaments not in the normal position." The encyclopædia names some seven osteopathic colleges, and states that the prescribed course of study covers a period of four terms, of five months each, and that the curriculum includes, in addition to the theory of clinical demonstration of osteopathy, demonstrative and descriptive anatomy, histology, chemistry, physiology, hygiene, pathology, physiological psychology, dietetics, obstetrics, and minor surgery. The classification under consideration seems to be based on mental competency, and is far from arbitrary. We think, therefore, that this objection is without merit.

Appellant's counsel further contend that the section of the statute of 1901 that we have quoted is invalid for the want of a sufficient title. Section 19 of article 4 of the Indiana Constitution ordains that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." As the acts of 1899 and 1901 both purport to be amendatory of the act of 1897, it is proper to determine the question raised by considering whether, if § 8 had been a part of the original act, it would have been sufficiently entitled. The title of the last-mentioned act reads as follows: "An act regulating the practice of medicine, surgery, and obstetrics, providing for the issuing of licenses to practise, providing for the appointment of a state board of medical registration and examination and defining their duties, defining certain misdemeanors and providing penalties, and repealing all laws in conflict therewith and certain acts therein specified." It is not required that the title to an act should be an epitome of the act. It is the "subject" of the act, and not the "matters properly connected therewith," that the Constitution requires to be "expressed in the title." As stated by Frazer, J., in *Hingle* v. *State*, 24 Ind. 28, 32: "The mischiefs intended to be prevented by the section were two: First, the passage of any act under a false and delusive title, which did not indicate the subject-matter contained in the act,—a trick by which members of the legislature had been deceived into the support of measures in ignorance of their true character; second, the combining together in one act of two or more subjects, having no relation to each other,—a method by which members, in order to procure such legislation as they wished, were often constrained to support and pass other measures obnoxious to them, and possessing no intrinsic merit." The subject of the act in question may be said to be a regulation of the practice of medicine, surgery, and obstetrics. Is this subject sufficiently definite to authorize the enactment in question? It seems to us that the matters mentioned in said amendatory section are, at least for the most part, matters properly connected with the subject stated. It was certainly competent for the legislature to submit in connection therewith a fairly relevant definition of the "practice of medicine." We are not called upon to determine whether all of the acts mentioned in said section can properly be denominated as practising medicine. It is only necessary to determine whether the appellant has brought himself within the statutory definition of the practice of medicine, in so far as the acts therein mentioned can be said, in a substantial sense, to amount to practising medicine. The term "practice of medicine" is, at least in its popular sense, generic in its character. *People use of State Bd. of Health* v. *Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923; *People* v. *Gordon*, 194 Ill. 560, 571, 62 N. E. 858, 861; *Little* v. *State*, 60 Neb. 753, 51 L. R. A. 717, 84 N. W. 248; *State ex rel. Wynne* v. *Lee*, 106 La. 400, 31 So. 14. This court has announced that it is its disposition, in the enforcement of the constitutional mandate under consideration, not to embarrass legislation by unnecessary strictness in the enforcement of the requirement. *State* v. *Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469, and cases there cited. In the case of *Re Campbell*, 197 Pa. 581, 588, 47 Atl. 860, 861, it was said: "The purpose of the act is indicated in the phrase 'to regulate the practice of medicine and surgery.' This gives notice to anyone desiring to enter the practice that its provisions do or may concern him. Nothing more is required."

It is our conclusion that appellant was engaged in the practice of medicine, since he held himself out as a magnetic healer, and his method of treatment was, at least in part, the method that medical practitioners sometimes employ. If it was competent for the legislature to have enacted the amendment of 1901 as a part of the act of 1897, it is immaterial whether the acts on which appellant's conviction was based were or were not a violation of law in the interim. As the act of 1901 is now a part of the law of 1897, it follows that appellant was properly convicted. We find no available error.

The judgment is affirmed.

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NAPPANEE CANNING COMPANY *et al.*, *Appts.*,
v.
REID, MURDOCK, & COMPANY.

(.....Ind.....)

Directors of an insolvent manufacturing corporation may apply its assets to their own unsecured claims against it, and to its obligations upon which they are individually liable, although the result is to deprive persons who have contracted with it of any remedy for breach of its contracts.

(*Hadley, J., dissents.*)

(October 8, 1902.)

APPEAL by defendants from a judgment of the Circuit Court for Elkhart County in favor of plaintiff in an action brought to recover damages for breach of contract and to set aside a trust deed alleged to have been given in fraud of plaintiff's rights. *Reversed in part.*

The facts are stated in the opinion.

Messrs. **Van Fleet & Van Fleet** for appellants.

Messrs. **Baker & Miller, H. G. Colson,** and **James H. Drake** for appellee.

Dowling, Ch. J., delivered the opinion of the court:

Action by the appellee, Reid, Murdock, & Co., against the appellants to recover from the Nappanee Canning Company damages for the breach of an alleged contract of said company to deliver to the said Reid, Murdock, & Co. 2,000 cases of tomatoes, and also to set aside, as fraudulent, a mortgage or deed of trust executed by the said Nappanee Canning Company to one Samuel Mosiman to secure the payment of divers debts owing by the said Nappanee Canning Company to its directors and to other persons and corporations, for all of which its directors were liable. A demurrer to the complaint was overruled. The appellants answered in denial, and filed a plea of *non est factum* as to the contract in writing set out in the complaint. The record does not show any submission or trial of the cause, but a special finding of facts, with conclusions of law thereon, is set out, to each of which conclusions the appellants separately excepted. Motions for a *venire de novo* and for a new trial were overruled, and judgment was rendered against the Nappanee Canning Company for $1,100, and against all the appellants, vacating and setting aside the mortgage or deed of trust as to each director of the company, and sustaining it as to the other creditors whose debts were secured by it. Various errors are assigned, but it will be necessary to consider only the second, which questions the correctness of each conclusion of law, and the fourth, which challenges the ruling of the court on the motion for a new trial.

The facts found by the court which are material to the determination of the cause on this appeal are substantially as follows: On the 7th day of April, 1897, the Nappanee Canning Company was a manufacturing corporation organized under the laws of the state of Indiana, having its principal office at the town of Nappanee, in this state; and the appellee, Reid, Murdock, & Co., was a corporation organized under the laws of Illinois, and doing business in Chicago. On said day the appellant the Nappanee Canning Company sold and agreed to deliver to the appellee, Reid, Murdock, & Co., 2,000 cases of tomatoes; such delivery to take place, in lots of 1,000 cases, not later than September 15 and October 1, 1897, to be paid for in cash at sixty days, at the rate of 62½ cents per dozen, delivered in Chicago, Illinois, less 1½ per cent on prompt delivery. The Nappanee Canning Company did not deliver the tomatoes. The market price advanced, and, in consequence of the failure of the Nappanee Canning Company to perform its agreement, the appellee, Reid, Murdock, & Co., was compelled to purchase tomatoes elsewhere at prices exceeding the contract price by $1,100. On October 5, 1897, the Nappanee Canning Company was insolvent, and that fact was known to its directors; its assets amounting to $9,000, and its liabilities to $19,000, all of which were then past due. The directors of the Nappanee Canning Company were its co-appellants, Berlin, Uline, Coppes, Hartman, Wysong, Whisler, Armey, Albin, and Emmert; Berlin being the president, and Uline the secretary, treasurer, and general manager, of the company. The directors were sureties, or were otherwise legally liable for all of the debts of the canning company, and, to protect themselves against loss, they caused a mortgage or deed of trust of all the property of the canning company, real and personal, to be executed by that corporation, by its president and secretary, to one Mosiman, as trustee, to secure (1) the expenses of the trust; (2) all debts due from the corporation for tomatoes bought in 1897; (3) the debts due to the Farmers' & Traders' Bank of Nappanee, Indiana, evidenced by notes executed by the directors for moneys used for said company, amounting to $4,712.10; (4) an account owing to Coppes Bros. & Zook; (5) a note for $1,100 due to one Barber, and certain other debts due to divers persons and corporations, aggregating $5,000; the claims classified as Nos. 1, 2, and 3 to be first paid in full. The trustee was to continue the business until he could effect a sale of the property of the corporation. Samuel D. Coppes and Harry E. Coppes were partners trading un-

NOTE.—For officers and directors of insolvent corporation as preferred creditors, see also cases in *note* to Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. (Tex.) 22 L. R. A. 802; also Brown v. Grand Rapids Parlor Furniture Co. (C. C. App. 6th C.) 22 L. R. A. 817; Corey v. Wadsworth (Ala.) 23 L. R. A. 618; Schufeldt v. Smith (Mo.) 29 L. R. A. 830; Blair v. Illinois Steel Co. (Ill.) 31 L. R. A. 269; James Clark Co. v. Colton (Md.) 49 L. R. A. 698; and American Exch. Nat. Bank v. Ward (C. C. App. 8th C.) 55 L. R. A. 356.

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der the name of Farmers' & Traders' Bank, and Coppes Bros. & Zook were stockholders of the Nappanee Canning Company. The corporation continued to do business for about two weeks after the mortgage or deed of trust was made, and was managed by Uline, its secretary, treasurer, and general manager. None of the beneficiaries of said mortgage or deed of trust, excepting Coppes Bros. & Zook and the directors of the corporation, knew that the said mortgage or deed of trust was to be made until after it was executed, and none of the creditors of the company, excepting those just named, was demanding payment of the claims against it. The financial condition of the canning company was better on October 5, 1897, than on April 7, 1897. The company had other contracts for tomatoes, to the amount of at least 2,000 cases, which it refused to fill. The claims mentioned in said mortgage or deed of trust, and secured thereby, were just and bona fide debts of the said canning company, and said mortgage or deed of trust was executed by the authority of the entire board of directors of said corporation. The canning company immediately put Mosiman in possession of the property described in the mortgage or deed of trust, but without any expectation or intention that the factory would run or business be done more than two weeks. The acts of the directors in so securing to themselves, as indemnity, the property of the canning company, were intended to make it impossible, and did make it impossible, for the appellee, Reid, Murdock, & Co., ever to enforce its contract, or to recover damages for the nonperformance thereof, and they meant thereby to shield themselves from further liability. Samuel Mosiman paid nothing for the property mentioned in the mortgage or deed of trust. The Nappanee Canning Company executed the said mortgage or deed of trust on October 5, 1897, for the express purpose of enabling said directors to indemnify themselves against all liability incurred by either of them in its behalf, and with the further intention of leaving no property out of which the appellee, Reid, Murdock, & Co., could make any part of its claim, if it had a claim, and for the further reason that after the making of the contract with the appellee, Reid, Murdock, & Co., the price of tomatoes had advanced about 30 cents per dozen. The said contract with the appellee, Reid, Murdock, & Co., was broken, and the mortgage or deed of trust was executed for the purpose of enabling the canning company and its directors to reap the benefit of the advance in the price of tomatoes. The execution of the mortgage or deed of trust was a fraud upon the appellee, Reid, Murdock, & Co., and as to the said appellee it is void. Said mortgage or deed of trust is valid as to the mortgagees, Barber, Mittenthal (guardian), Blumberg, Searer, and the City National Bank of Goshen. Mosiman is not entitled to any compensation for his services as trustee under said mortgage or deed of trust. The Nappanee Canning Company is indebted to the appellee, Reid, Murdock, & Co., in the sum of $1,100.

The conclusions of law on the foregoing finding of facts are thus stated: "(1) That plaintiff is entitled to recover from the defendant the Nappanee Canning Company $1,100. (2) That the trust deed is void as to the following persons, namely: Francis E. Berlin, Barney Uline, Frank Coppes, Tobias Hartman, Henry Wysong, Jacob S. Whisler, Joseph S. Armey, John W. Albin, Ephraim Emmert, Coppes Bros. & Zook, and Farmers' & Traders' Bank. (3) That as to the City National Bank of Goshen, Indiana, Isaac Blumberg, and George Searer, and George Barber, M. H. Mittenthal, as guardian, said trust deed is valid, and plaintiff's rights are subject thereto."

The important questions in the case are presented by the exception to the second conclusion of law, and by the motion for a new trial. Was the mortgage or deed of trust invalid as to the appellants, who were directors of the Nappanee Canning Company? Does the evidence sustain the finding that the appellee, Reid, Murdock, & Co., is entitled to recover $1,100 from the canning company?

In this state it is settled by a long course of decision that an embarrassed or insolvent debtor may lawfully prefer one or more of his creditors, by payment, mortgage, pledge, or deed, to the exclusion of the others. No statute forbids such preferences. No rule of law is understood to prevent them. *Ball* v. *Barnett*, 39 Ind. 53, and cases cited; *Lowry* v. *Howard*, 35 Ind. 170, 9 Am. Rep. 676; *McCormick* v. *Smith*, 127 Ind. 230, 26 N. E. 825; *Carnahan* v. *Schwab*, 127 Ind. 507, 26 N. E. 67; *John Shillito Co.* v. *McConnell*, 130 Ind. 41, 26 N. E. 832; *Peed* v. *Elliott*, 134 Ind. 536, 34 N. E. 319; *Rockland Co.* v. *Summerville*, 139 Ind. 695, 39 N. E. 307; *Heiney* v. *Lontz*, 147 Ind. 417, 46 N. E. 665; *Snyder* v. *Jetton*, 137 Ind. 449, 37 N. E. 143. The fact that the person whose debt is so preferred is a wife or other near relative does not affect the validity of such preference. *Shaeffer* v. *Fithian*, 17 Ind. 463; *Kyger* v. *F. Hull Skirt Co.* 34 Ind. 249; *Sims* v. *Rickets*, 35 Ind. 181, 9 Am. Rep. 679; *Goff* v. *Rogers*, 71 Ind. 459; *Hogan* v. *Robinson*, 94 Ind. 138; *Hoes* v. *Boyer*, 108 Ind. 494, 9 N. E. 427; *Jones* v. *Snyder*, 117 Ind. 229, 20 N. E. 140; *Laird* v. *Davidson*, 124 Ind. 412, 25 N. E. 7; *Dillen* v. *Johnson*, 132 Ind. 75, 30 N. E. 786; *Fulp* v. *Beaver*, 136 Ind. 319, 36 N. E. 250; *Adams* v. *Curtis*, 137 Ind. 175, 36 N. E. 1095. In these cases the court seems to have proceeded upon the principle that, if the debt was just and the transaction honest, the preference would stand. So, too, it has been uniformly held that where a partnership exists, and the partners have possession of the partnership property, it may, notwithstanding the insolvency of the partnership, be applied by the partners to the payment or securing of the debts of the individuals composing the firm. *M'Donald* v. *Beach*, 2 Blackf. 55; *Frank* v. *Peters*, 9 Ind. 313; *Schaeffer* v. *Fithian*, 17 Ind. 463; *Johnson* v. *McClary*, 131 Ind. 105, 30 N. E. 888; *Old National Bank* v. *Heckman*, 148

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Ind. 490, 47 N. E. 953. Manufacturing corporations, in this state, are governed by the same rules as individuals, and, although embarrassed or insolvent, may secure one or more creditors by mortgage, or otherwise, to the exclusion of all others, though equally meritorious. *Smith* v. *Wells Mfg. Co.* 148 Ind. 333, 46 N. E. 1000; *Henderson* v. *Indiana Trust Co.* 143 Ind. 561, 40 N. E. 516; *Levering* v. *Bimel*, 146 Ind. 545, 45 N. E. 775, and authorities cited; *Sanford Fork & Tool Co.* v. *Howe, B. & Co.* 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621. It is important to note at this point that this court is fully committed to the doctrine that an insolvent manufacturing corporation does not hold its property in trust for its creditors, or subject to any lien, legal or equitable, in their favor, in any other manner than such property is held by an insolvent individual debtor. *First Nat. Bank* v. *Dovetail Body & Gear Co.* 143 Ind. 534, 543, 42 N. E. 924; *Henderson* v. *Indiana Trust Co.* 143 Ind. 561, 40 N. E. 516; *Levering* v. *Bimel*, 146 Ind. 545, 45 N. E. 775; *Smith* v. *Wells Mfg. Co.* 148 Ind. 333, 46 N. E. 1000. It has also been held that an insolvent foreign corporation may mortgage its lands in this state to secure a bona fide antecedent debt, where such action is not prohibited by the statutes of the foreign state. *Nathan* v. *Lee*, 152 Ind. 232, 43 L. R. A. 820, 52 N. E. 987. And this court has expressly decided that the fact that the debt is due to a director or other officer, or that such director or officer is surety for its payment, does not deprive the corporation, although insolvent, of the right to prefer it. *Levering* v. *Bimel*, 146 Ind. 545, 554–556, 45 N. E. 775. The rules which have been applied in such cases are exhaustively examined in *Levering* v. *Bimel*, 146 Ind. 545. 554–556, 45 N. E. 775, and the conclusions announced in that case are fortified by very full and satisfactory references to the leading text-books and to the previous decisions of this court. That case covers the entire ground of the present controversy, excepting only the validity of a preference given to a director where the vote of the director himself is necessary to authorize the execution of the mortgage or other instrument securing the debt. Counsel for appellees do not deny the soundness of the principles laid down in the foregoing cases. They say: "We are aware of the fact that our court is in line with the Federal courts, and the better-considered cases in the state courts, in not adhering to the doctrine of the so-called trust-fund theory respecting the assets of insolvent corporations; and we admit that it is the settled law of Indiana that until the court, by its officers, takes charge of the property of an insolvent corporation, it has the same power and control over its property as an individual would have over his property under like circumstances." But counsel say that "the sum and substance of our contention on this branch of the case is that the law will never permit a body of directors of an insolvent corporation to act as grantors for the corporation, in parceling out to themselves, as grantees, the assets of the corporation upon their unsecured claims, to the exclusion of other unsecured creditors. To permit this would be to violate the very spirit of equity. It is right that the directors of an insolvent corporation should have the power, so long as they retain dominion, to dispose of the assets and prefer creditors to the same extent that a partnership or an individual can."

In deciding the question before us, it is to be borne in mind that a manufacturing corporation, under the statutes of this state, is strictly a private association, organized and conducted for private purposes only, enjoying no special privileges, and owing no duty to the public or to its creditors except such as is imposed by the terms of the statute under which it is formed, and by those general rules which apply to individuals engaged in business. Until its property passes into the custody of the law by seizure under proceedings in attachment, or by the appointment of an assignee, trustee, or receiver, the corporation may sell, transfer, pledge, or mortgage its property in the same manner and subject to the same restrictions only as apply to the case of a private person. Such property is in no respect held in trust for the creditors of the association. The law of this state gives them no lien or claim upon such property. They have no right to look to the corporation or its directors to protect their interests. They deal with it at arm's length and their attitude is antagonistic to the association. When asked to extend credit to it, all persons dealing with the corporation know that if it is, or thereafter becomes, insolvent, the whole of its property may be applied to pay or secure debts due to favored creditors, including officers and directors, and that the claims of all other creditors may be excluded and consequently lost. If, with this knowledge, credit is given, it cannot be said that preferences subsequently conferred upon other creditors have violated any right which the law gave to the creditor whose claim was left unpaid and unsecured. No statute gives to a creditor the right to demand an equal distribution of the assets of an insolvent private manufacturing corporation among its creditors. The maxim that in case of insolvency equality is equity has not the force of a statute requiring such a distribution. It is applicable only when the principles of equity are brought to bear upon the distribution of property lawfully in the custody of a court, where such court possesses the authority to make distribution upon that basis. The directors of a manufacturing corporation are not the agents or trustees of the creditors, but are simply and solely the representatives of the stockholders and of the corporation. There is no sufficient legal reason why they should be denied the right of preference in the event that the corporation becomes insolvent. And even if the vote of the director himself is necessary to authorize the execution of the instrument creating the preference, no legal wrong is done to the other creditors where such preference is

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given. The association is a legal entity distinct from the stockholders and from the directors. The action of the directors is their action, and not their individual act. The vote of a majority is required to pass any resolution or order, but the action of such majority is not necessarily vitiated by the fact that one or more of the persons composing it is interested in the passage of the resolution. The duty of the directors is to the corporation and its stockholders, not to the creditors. If the corporation or its stockholders acquiesce in the disposition of the corporate assets made by the directors, and if such disposition is the payment of a just debt owing by the corporation, no matter to whom, it is difficult to perceive upon what legal ground a creditor can call such act in question. When it is understood that no trust exists in favor of creditors, that the directors are the agents of the stockholders and of the corporation only, and that they owe no special duty to the creditors of the company, it seems plain that, where the right to give preferences is recognized, the directors of an insolvent corporation may secure a bona fide debt owing to one of their own number. As we have stated, it is established law in this state that an insolvent corporation may give preferences to the same extent and in like manner as an individual. In such transactions the corporation and its stockholders are the principal; the directors are their agents. If the vote of the director whose debt is secured is necessary to pass the resolution creating the preference, the only persons sustaining such relations to him as authorize them to object to his act are the stockholders and the corporation itself. The general rules governing the rights and duties of principal and agent apply in cases of this kind. The agent of a private person authorized to sell property may sell and convey to himself. Such sale is voidable, but not void. If his principal does not object within a reasonable time, or with full knowledge ratifies the sale, it will stand. We have been referred to no case in which it has been held that where such sale is made in good faith, and for a fair and sufficient consideration, the creditors of the principal can avoid it on the ground of a violation of duty by the agent. *Fountain Coal Co.* v. *Phelps*, 95 Ind. 271; *Marsh* v. *Whitmore*, 21 Wall. 178, 22 L. ed. 482; *Eastern Bank* v. *Taylor*, 41 Ala. 100. The rule is that where the principal affirms the acts of an agent a stranger will not be permitted to controvert it. *Scott* v. *Detroit, Young Men's Society*, 1 Dougl. (Mich.) 119. "As the principal . . . may confirm the sale, a mere stranger cannot make the objection that the trustee was the purchaser, or that the sale was irregular." Dillon, J., in *Buell* v. *Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516.

Two of the special findings of fact are in these words: "That the said directors were sureties or otherwise legally bound on all the indebtedness of the said canning company, and, desiring to secure themselves from such liability, they caused said canning company, at a meeting called for that purpose, to execute the following instrument in writing, to wit: [Here follows the mortgage or deed of trust to Mosiman.]" "That the claims mentioned in said trust deed were just and bona fide debts of said canning company, and said trust deed was executed by authority of the entire board of directors of the said canning company." Did the fact that the directors were sureties or otherwise legally bound for their payment put it out of the power of the board of directors to secure the payment of these debts? The later and better authorities require us to answer this question in the negative. It was said in *Levering* v. *Bimel*, 146 Ind. 545, 15 N. E. 775, that the effect of the decisions referred to in the opinion was that an insolvent corporation is not to be denied the right to prefer a creditor or creditors, even where such preference inures to the benefit of its officers who are sureties upon the claims of the creditors preferred. And the court further declared that the broad doctrine that the officers of a corporation cannot contract with it in their own names is unreasonable, and that the fact that the officer of the corporation would be enabled by reason of his position to outstrip the other creditors in the race of diligence in collecting or securing the claims upon which they were liable was not sufficient to deprive the corporation of the right to prefer such claims. The courts holding that an interested director cannot vote, or even be counted for the purpose of making a quorum, seemed to have proceeded entirely upon the theory that the director was a trustee for or an agent of the creditors, and therefore could not be permitted to advance his own interests at the expense of his principal or the *cestui que trust*. The directors are the agents and trustees of the corporation and its stockholders. As a director of an insolvent corporation is not a trustee for its creditors, and owes them no duty, where the debt to which preference is given is an honest and just debt of the corporation, the circumstance that the director is incidentally benefited by such preference does not, in our opinion, absolutely disqualify him to take part in the proceedings of the directors, or to vote upon the proposition to secure such debt. If the corporation and the stockholders acquiesce in the action of the director creditors, outside creditors, who are strangers to the corporation, and have no lien or claim upon its property, cannot impeach the transaction. In *Schufeldt* v. *Smith*, 131 Mo. 280, 29 L. R. A. 830, 31 S. W. 1039, creditors of a corporation brought suit to set aside a deed of trust securing certain debts for which the directors were personally liable, two of which, amounting to $14,000, were evidenced by the notes of James Walsh, the president of the corporation, which the corporation had assumed and agreed to pay. The resolution authorizing the execution of the deed of trust was passed by three directors, of whom Walsh was one. The trial court held the deed of trust void, but its decision was reversed on appeal; the supreme court of

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Missouri holding that, as the debts were just, the preference was valid. The facts upon which *Butler* v. *Harrison Land & Min. Co.* 139 Mo. 467, 41 S. W. 234, was decided, were as follows: The corporation had but three stockholders, who were also its sole directors. The company owed them $100,000, and four years after it ceased to be a going concern they caused all the property belonging to it to be transferred to themselves in payment of their debt. Suit was brought by a creditor to set aside the transfer, and the lower court held the deed void. But, on appeal, the supreme court said: "Can an insolvent corporation prefer its director creditors in the disposition of its property to the exclusion of its general nondirector creditors, so long as the property of the corporation remains in its custody and possession, and the preference is made in good faith to pay off and discharge honest obligations?" The court answered its question in the affirmative, and sustained the deed. In *Garrett* v. *Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461, 29 N. W. 395, the court said that counsel "insist that the directors of an insolvent corporation cannot take from it security, by mortgage or other conveyance, creating a lien upon its property, even though given in good faith, and without fraud in the transaction. We are not prepared to admit this proposition. A creditor may accept payment or security from an insolvent debtor, free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefore, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in a good-faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way take its property in security." In *Planters' Bank* v. *Whittle*, 78 Va. 737, an insolvent corporation against which suits were pending for the appointment of a receiver, for the purpose of securing certain notes on which the directors were accommodation indorsers, assigned as collateral security sundry bonds, constituting a valuable part of its assets. It was held that the assignment was valid, if made in good faith. The supreme court of Missouri, in *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79, 4 S. W. 260, sustained the validity of a deed of trust given to secure debts owing to four of the directors, who voted for the resolution of the board authorizing the execution of the deed. The right of a corporation in embarrassed or failing circumstances to prefer debts due to its directors, or for which they are liable as indorsers, sureties, or otherwise, has been upheld in many other cases, among which the following may be cited: *Warfield* v. *Marshall County Canning Co.* 72 Iowa, 666, 34 N. W. 467; *Bank of Montreal* v. *J. E. Potts Salt & Lumber Co.* 90 Mich. 345, 51 N. W. 512; *Farmers' & M. Bank* v. *Wasson*, 48 Iowa, 336, 30 Am. Rep. 398; *Central R. & Bkg. Co.* v. *Clagborn*, Speers, Eq. 545; *Garrett* v. *Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461, 29 N. W. 395; *Reichwald* v. *Commercial Hotel Co.* 106 Ill. 439; *Sargent* v. *Webster*, 13 Met. 497, 36 Am. Dec. 743. In the latter case it was said by Shaw, Ch. J.: "In the first place, it is very clear that the plaintiff, Sargent, though a member of the corporation, had a right to deal with them as with a person and body politic. He could take security or attach property, or take any other measure that another creditor could; and though he might be liable, in a qualified way, for the debts of the corporation, it was a special liability created by statute, and one which can be enforced in the mode provided by statute." Our conclusion, therefore, upon the reasons and authorities herein set out, is that the deed of trust executed by the Nappanee Canning Company to Mosiman, as trustee, to secure among others, debts for which the directors of that company were liable, was valid, and enforceable against the property described in it.

The findings of the court to the effect that the execution of the trust deed rendered it impossible for the appellee, Reid, Murdock, & Co., to recover and collect damages for the breach of its contract with the canning company; that the directors intended to shield themselves from further liability, to indemnify themselves against loss, and to obtain the benefit of the advance in the price of the goods sold to the appellee; and that the trust deed is fraudulent as to each of the directors beneficially interested therein,—are wholly unimportant. The directors had a right to cause the deed of trust to be made to secure themselves against loss. As it included all the property of the company, its necessary effect was to render it impossible for the appellee to collect any claim held by it out of the property of the corporation. And no facts are found which establish fraud. *Griffin* v. *Peters*, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354. It was not a fraud for the directors to do what they had a legal right to do, nor was the deed rendered fraudulent by the consequences of loss to the appellee, Reid, Murdock, & Co., which may have resulted from it. The facts found sustain the conclusion of the court that the appellee, Reid, Murdock, & Co., was entitled to recover from the Nappanee Canning Company $1,100 as damages, and there was evidence to support the finding.

The judgment that the appellee, Reid, Murdock, & Co., recover from the Nappanee Canning Company $1,100, and costs in that behalf only, is affirmed. The judgment that the mortgage or deed of trust executed by the Nappanee Canning Company to Mosiman, as trustee, is void as to Francis E. Berlin, Barney Uline, Frank Coppes, Tobias Hartman, Henry Wysong, Jacob H. Whisler, Joseph S. Armey, John W. Albin, Ephraim Emmert, Coppes Bros. & Co., and the Farmers' & Traders' Bank, is reversed, with directions to the court to restate its second conclusion of law in accordance with this opinion, and to render judgment in

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favor of the said appellants, sustaining said mortgage or deed of trust; and the judgment in favor of the said City National Bank of Goshen, Isaac Blumberg, George Searer, George Barber, M. H. Mittenthal, as guardian, sustaining said mortgage or deed of trust, is hereby affirmed.

Hadley, J., dissenting (filed October 8, 1902):

It is conceded that this court has adopted the rule that a corporation, while prosecuting its corporate business, though with liabilities greater than assets, may prefer its creditors, as may a natural person, and that such preference may extend to an officer or director of the corporation, when conferred by the vote of a disinterested majority of the board of directors. I am impressed, however, after a thoughtful consideration of the subject, that the rule has been already carried in this state as far as reason and judicial precedent will warrant, and, in so far as it is held in the majority opinion in the case at bar that the directors of an insolvent corporation, in contemplation of its early dissolution, may appropriate the entire assets of the corporation to the exclusive security of their own pre-existing personal liabilities, I am unable to agree with my brethren, and am constrained to enter my earnest protest. The holding is a step in advance of any previous ruling of this court, is forbidden by the decided weight of authority, as I shall endeavor to show, and invests corporate directors with such temptations and powers for mischief and moral wrong that, if no other existed, it should be denied on the ground of public policy. In support of this view, I am not driven to what is commonly called the "trust-fund doctrine,"—that is, to a line of decision to the effect that upon insolvency equity seizes the assets of a corporation for equal distribution to the creditors,—and no preference can be given to anyone. This latter doctrine has been repudiated in this and in most other states of the Union to the extent of recognizing the right of insolvent corporations to prefer their common, unofficial creditors to the same extent, and by the same modes, that an insolvent individual may prefer his. But as to official or director creditors, it is quite as generally held that their position as managing agents gives them such an unequal and unfair advantage over other creditors that they will not be permitted by courts of chancery to profit by their superior knowledge and position in a race of diligence. The position occupied by directors is one of trust, call it what you may. They receive the property of others, act for others, and are accountable to others. They are bound to devote the property intrusted to them exclusively to the purposes of the corporation. Any departure in this is a misappropriation, for which they are answerable to the stockholders or the creditors. The assets not being their own, they hold and administer them primarily for the benefit of the stockholders, secondarily for the use of those who may by contract or operation of law succeed to the interests of the stockholders. While the corporation is solvent, the active fiduciary relation is between the directors and the stockholders, who are the real parties in interest. When insolvency occurs, the stockholders, while retaining the legal title, by force of law part with all beneficial interest in the assets, and the same is transferred to the creditors. The possession and control of the directors being unchanged by the advent of insolvency, they thereafter necessarily hold the property, not for themselves, but in trust for the creditors, who now have the exclusive interest. It at once becomes their duty to apply the assets to the payment of the debts, not necessarily *pro rata*, because the creditors have no mutual relation among themselves; but they hold the assets in trust for application to the debts, either *pro rata* or preferentially, as they themselves deem the merits of the creditors to be. The directors, being the corporation for the purpose of judging among the creditors, cannot select themselves from among the creditors for preference, because they cannot be both judges and creditors at the same time. It seems absurd to say that the same persons may constitute different identities of themselves, so that, as directors of a corporation, they may convey, or mortgage, or contract with themselves as private persons. The relation of debtor and creditor implies antagonism, a countervailing interest of distinct and independent parties. The interests of self-preferring creditors are co-operative and the same. The more anxious as a creditor to obtain the preference, the more willing and ready as a debtor to grant it. This puts the director in a situation wholly incompatible with his duty to serve all stockholders and creditors fairly and alike. While not a trustee in a technical sense, there can be no doubt that he occupies such a fiduciary position towards the stockholders and directors as calls for a faithful performance of duty, and conduct entirely free from any use of his position to advance his personal interests beyond those of others of equal merit. We have many American decisions in support of this view, from the more recent of which in the several states, though often not the best considered, I briefly quote: "It seems to be well settled that directors of an insolvent corporation, who are creditors of the company, cannot secure to themselves any preference or advantage over other creditors in the payment of their claims." *Bonney* v. *Tilley*, 109 Cal. 346, 42 Pac. 439, quoted approvingly in *Merced Bank* v. *Ivett*, 127 Cal. 134, 59 Pac. 393, decided December 11, 1899. "It is not good morals, or good law." *Fishel* v. *Goddard* (Colo.; July 5, 1902) 69 Pac. 607, 612. "We think it very clear, therefore, that when the validity of these mortgages, to secure debts upon which the directors were indorsers, was questioned by other creditors of the corporation, they should have been classed as instruments rendered void by the legal principle which prevents directors of an insolvent corporation from giving themselves a preference

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over outside creditors." *Atlas Tack Co.* v. *Exchange Bank* (Aug. 7, 1900) 111 Ga. 703, 710, 36 S. E. 939. "The law is, however, that an insolvent corporation cannot prefer a creditor who at the time is a director therein." *Rockford Wholesale Grocery Co.* v. *Standard Grocery & Meat Co.* (Oct. 24, 1898) 175 Ill. 89, 51 N. E. 642. "In *Hays* v. *Citizens' Bank*, 51 Kan. 535, 33 Pac. 318, it was held that the directors and managers of a corporation, who were creditors of the same, could not prefer themselves, leaving the question undecided as to whether other creditors might be preferred. The ground of that decision is that the directors are agents of the stockholders and creditors, and that their interests as creditors would be inimical to their duties as agents. They occupy a fiduciary relation to the creditors and stockholders, and may not take advantage of their superior information and opportunity to gain an advantage over those whose interests they are guarding; nor are they permitted to contract with themselves as they may with third parties." *Grand De Tour Plow Co.* v. *Rude Bros. Mfg. Co.* 60 Kan. 145, 150, 55 Pac. 848. "Officers of a corporation, who are also its creditors, cannot lawfully pay their own claims in preference to other creditors when the corporation is insolvent." Headnote 1 *James Clark Co.* v. *Colton* (1900) 91 Md. 195, 49 L. R. A. 698, 46 Atl. 386. "The directors of an insolvent corporation, being its creditors, cannot take advantage of their fiduciary relation, and deal directly with themselves, to the injury of others in equal right. If they do, equity will set aside the transaction at the suit of creditors of the corporation or their representatives, without reference to the question of any actual fraudulent intent on the part of the directors; for the right of the creditors does not depend upon fraud in fact, but upon the violation of the fiduciary relation of the directors." *Taylor* v. *Fanning* (Minn.; July 3, 1902) 91 N. W. 269. "At common law a debtor may prefer a creditor to the exclusion of others, but a different rule prevails when the creditor is a director of an insolvent corporation debtor. The directors in such case are not strictly trustees for the general creditors, though sometimes so called, but they owe them a duty which is inconsistent with the taking of a security for prior indebtedness, to their detriment." *Symonds* v. *Lewis* (1901) 94 Me. 501, 48 Atl. 121. "The corporation was plainly insolvent, not a going concern, nor one with any prospect of going on at any time in the future. It could not, in such condition, prefer its directors, secretary, and treasurer." *King* v. *Woolbridge* (Oct. 29, 1900) 78 Miss. 179, 28 So. 824. "The proposition that an insolvent corporation cannot prefer a debt on which its officers and directors are bound as sureties is now thoroughly established in this state." *Williams* v. *Turner* (Neb.; Jan. 8, 1902) 88 N. W. 668. "The law will not allow the stockholders and officers of the corporation to take advantage of their knowledge of the insolvent condition of the concern, and their power to use and control the assets to repay their own debts, or to relieve them from special liabilities to the injury of other creditors." *Graham* v. *Carr* (May 6, 1902) 130 N. C. 271, 41 S. E. 379. "The law applicable to these cases is extremely clear. While directors of corporations are not trustees in a technical sense, there is yet no doubt that they occupy a fiduciary position towards stockholders and creditors of the corporation, and that they come within the designation of persons filling a fiduciary relationship. In fact, they hold a position of the highest trust, and will, therefore, be required to execute it with the utmost fidelity. This being so, it is plain that the defendants could not use their official position to advance their individual interests. But this is precisely what they did, with actual knowledge that the corporation was insolvent." *Smith* v. *Putnam* (1882) 61 N. H. 632. "The receiver of an insolvent corporation may recover its assets, withdrawn, after it has become insolvent, in order to secure some of its directors against a liability incurred for the corporation. A preference of that character cannot stand, although at the time it is given there is no statutory prohibition against it." Headnote, *Taylor* v. *Gray* (Nov. 22, 1899) 59 N. J. Eq. 621, 44 Atl. 668. "It is the settled law of this commonwealth that an insolvent debtor, whether corporation or individual, may prefer bona fide creditors. But if the creditor benefited be a director, or other officer possessed of corporate power and corporate knowledge of the insolvency of his corporation, then he has an advantage over other creditors whose claims may be of equal merit. He has knowledge that his debt is in peril, and has the power to prefer himself. As he is, in a sense, trustee for all the stockholders and creditors, equity forbids that he should act solely for himself, regardless of the interests of those for whom he is trustee." *Mueller* v. *Monongahela Fire Clay Co.* (1898) 183 Pa. 450, 458, 38 Atl. 1009. "The directors of an insolvent corporation are, by virtue of their position, debarred from preferring debts of the corporation due to themselves." *Olney* v. *Conanicut Land Co.* (Aug. 10, 1889) 16 R. I. 597, 5 L. R. A. 361, 18 Atl. 181. "When a corporation is insolvent, and has ceased to be a going concern, and its officers know or ought to know that suspension is impending, then such officers are so far trustees that they may not transfer corporate property to themselves in payment of debts due them, and that such a transfer constitutes a fraud in law." *Slack* v. *Northwestern Nat. Bank* (April 25, 1899) 103 Wis. 57, 64, 79 N. W. 51. Of same import, see *Burnham, H. M. & Co.* v. *McCornick* (Oct. 22, 1898) 18 Utah, 42, 55 Pac. 77. To the same effect, see *Harding* v. *Hart* (Jan. 7, 1902) 51 C. C. A. 264, 113 Fed. 304, 342; *Kittel* v. *Augusta, T. & G. R. Co.* (Feb. 22, 1897) 78 Fed. 855; *Northwestern Mut. L. Ins. Co.* v. *Cotton Exch. Real Estate Co.* (Oct. 21, 1895) 70 Fed. 155; *Bosworth* v. *Jacksonville Nat. Bank* (Nov. 27, 1894) 12 C. C. A. 331, 24 U. S. App. 413, 64 Fed. 615; *Sutton Mfg. Co.* v. *Hutchin-*

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son (Oct. 1, 1894) 11 C. C. A. 320, 24 U. S. App. 145, 63 Fed. 496; *Consolidated Tank-Line Co.* v. *Kansas City Varnish Co.* (Sept. 5, 1890) 43 Fed. 204.

It is not clear how *Sanford Fork & Tool Co.* v. *Howe, B. & Co.* 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621, lends any support to the proposition that directors, or a majority of the board of directors, may prefer themselves by appropriating all the corporate assets on pre-existing liabilities, after they have determined that the corporation is hopelessly insolvent, and will in a few days abandon its corporate business. In that case Justice Brewer rests the court's ruling upon the fact that the stockholders expressly, by vote, authorized the mortgage, and that at the time it was executed the corporation was a going concern, and intended to continue in business, and in fact did continue, and paid out $30,000 on its obligations, other than those secured, in the usual course of business; and it was also at the time believed by all parties to be solvent, and was in fact solvent, if the assets were worth as much as they cost. The trend of the decision is indicated by the following sentence: "It is often said that the directors may not take advantage of their position and power to secure personal advantage to themselves, but that proposition has no application here, for the corporation itself directed this mortgage." P. 317, 157 U. S., p. 713, 39 L. ed., and p. 623, 15 Sup. Ct. Rep. To the same effect, see also the following text-writers: 2 Cook, Corp. § 692; Elliott, Corp. § 189; Field, Corp. § 174; Reese, Ultra Vires, § 155; 2 Spelling, Priv. Corp. § 713; Taylor, Priv. Corp. § 759; 5 Thomp. Corp. § 6503; 7 Thomp. Corp. § 8496; Morawetz, Priv. Corp. § 787; 3 Clark & M. Priv. Corp. p. 2414. Arkansas, Ohio, Massachusetts, New York, and a number of other states have statutes restricting the right of insolvents to prefer any creditor. Tennessee, Texas, Washington, South Dakota, and perhaps some other states, seem to adhere to the trust-fund doctrine. It has always been the rule that the holder of a secret equity shall not assert it to the injury of one who has been innocently misled thereby, and in what way is the principle different when the directing agents of an insolvent corporation, with that full knowledge of the financial condition of the concern the law requires them to have, continue to conduct the business, keep the public records fair, invite public confidence, solicit the people to deal with them, and thus go on under cover, speculating on the capital fund of the association, until it has been wasted to a point that will only secure their personal liabilities, and then, under claim of acting for the corporation, deliver to themselves, as creditors, all that is left of the assets? I am mistaken if the deception of the one is not as culpable as the other, and if the conduct of the latter does not violate the principles of common honesty.

RHODE ISLAND SUPREME COURT.

Angela S. HUNT
v.
James REILLY *et al.*

(.....R. I.....)

A woman whose name is forged to a deed of her husband's property is not estopped to assert her dower rights in the property, even as against bona fide purchasers, by the fact that, after learning of the forgery, she failed to notify them of her rights, if the purchase was made without her knowledge.

(March 31, 1902.)

ON PLEA to bill filed to establish dower rights. *Overruled.*

The facts are stated in the opinion.

Messrs. **Edward D. Bassett** and **Frederic Hayes**, for respondents, in support of plea:

Where one of two innocent persons must suffer a loss, he who is the cause or occasion of that confidence by which the loss has been caused or occasioned ought to bear it.

1 Story, Eq. Jur. § 384; 2 Pom. Eq. Jur. § 814; *Galbraith* v. *Lunsford*, 87 Tenn. 89, 1 L. R. A. 524, 9 S. W. 365.

The complainant could legally have released her right of dower. She says she did not; but in her silence of over thirty years she has been guilty of gross laches.

Marshall v. *Smith*, 34 L. J. Ch. N. S. 189; *Bausman* v. *Kelley*, 38 Minn. 197, 36 N. W. 333; *Havens* v. *Patterson*, 43 N. Y. 218; *Hayes* v. *Nourse*, 114 N. Y. 595, 22 N. E. 40.

Had her inchoate right of dower been consummate, and had she failed to take any proceedings for thirty years, either at law or in equity, to have it assigned to her, her dower would have been barred.

Marshall v. *Smith*, 34 L. J. Ch. N. S. 189, 10 Jur. N. S. 1174.

Parties under disabilities are estopped if their conduct has been intentional and fraudulent.

Bigelow, Estoppel, 580, note 1; *Schnell* v. *Chicago*, 38 Ill. 382, 87 Am. Dec. 304; *McMorris* v. *Webb*, 17 S. C. 558, 43 Am. Rep. 629.

No married woman shall avail herself of fraud.

NOTE.—As to estoppel of married women generally, see *notes* to Galbraith v. Lunsford (Tenn.) 1 L. R. A. 522; Speier v. Opfer (Mich.) 2 L. R. A. 347; Cook v. Walling (Ind.) 2 L. R. A. 769; Long v. Crossan (Ind.) 4 L. R. A. 783; and Miller v. Shields (Ind.) 8 L. R. A. 406; also, in this series, Vansandt v. Wier (Ala.) 32 L. R. A. 201; Williamson v. Jones (W. Va.) 38 L. R. A. 694; and National Granite Bank v. Tyndale (Mass.) 51 L. R. A. 447.

As to estoppel of married women by deed or covenant, see *note* to Wadkins v. Watson (Tex.) 22 L. R. A. 779.

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Barrow v. *Barrow*, 4 Kay & J. 409, 4 Jur. N. S. 1049.

The fact that the several parcels of real estate conveyed by the deed of 1866 have been improved and greatly enhanced in value must be considered in connection with the laches of complainant.

Harter v. *Twohig*, 158 U. S. 448, 39 L. ed. 1049, 15 Sup. Ct. Rep. 883; *Johnston* v. *Standard Min. Co.* 39 Fed. 304; *Williamson* v. *Jones*, 43 W. Va. 562, 38 L. R. A. 694, 27 S. E. 410.

It would have been proper for the complainant to have given a notice upon the record.

Viele v. *Judson*, 82 N. Y. 37; *Costello* v. *Mead*, 55 How. Pr. 356; *Cornish* v. *Abington*, 4 Hurlst. & N. 550.

The principles of estoppel in matters of personal estate appear to apply equally to real estate.

Thompson v. *Blanchard*, 4 N. Y. 303; *New York Rubber Co.* v. *Rothery*, 107 N. Y. 310, 14 N. E. 269; *Carpenter* v. *Carpenter*, 25 N. J. Eq. 194; Scribner, Dower, § 37, p. 268; *Cory* v. *Gertcken*, 2 Madd. 40; *Savage* v. *Foster*, 9 Mod. 35.

The people may be estopped by a person's negligence when his name has been forged, and for an unreasonable time he neglects, not to discover the forgery, but to give notice thereof after discovery to the party imposed on.

People v. *Bank of N. A.* 75 N. Y. 548; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; Bigelow, Estoppel, 5th ed. p. 632; *Leather Mfrs. Nat. Bank* v. *Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657.

Silence will create an estoppel.

Chapman v. *Chapman*, 59 Pa. 214; *Crest* v. *Jack*, 3 Watts, 239, 27 Am. Dec. 353; *Keeler* v. *Vantuyle*, 6 Pa. 253; *Com.* v. *Moltz*, 10 Pa. 531; *Woods* v. *Wilson*, 37 Pa. 383; *Miranville* v. *Silverthorn*, 48 Pa. 149; *Stevens* v. *Dennett*, 51 N. H. 324.

The doctrine of equitable estoppel applies to married women.

Bigelow, Estoppel, 2d ed. 1876, p. 448; 2 Pom. Eq. Jur. 2d ed. §§ 814, 815; 2 Herman, Estoppel, §§ 1120, 1121; *Gibson* v. *Herriott*, 55 Ark. 85, 17 S. W. 589; 6 Wait, Act. & Def. p. 687.

Under certain circumstances, a married woman may become subject to estoppel *in pais*, if she knowingly permits another person to sell and convey her property as his own.

Carpenter v. *Carpenter*, 25 N. J. Eq. 194; *Galbraith* v. *Lunsford*, 87 Tenn. 89, 1 L. R. A. 524, 9 S. W. 365.

Estoppel by fraud applies to dower.

2 Scribner, Dower, 2d ed. p. 266, § 34; *Deshler* v. *Beery*, 4 Dall. 300, 1 L. ed. 842; *Cory* v. *Gertcken*, 2 Madd. 40; *Savage* v. *Foster*, 9 Mod. 35; *Hill* v. *Mitchell*, 5 Ark. 608; *Gilbert* v. *Reynolds*, 51 Ill. 513.

Mr. **Warren R. Perce** also for respondents.

Mr. **Irving Champlin** for complainant, *contra*.

Stiness, Ch. J., delivered the opinion of the court:

This case has been before us on demurrer to the bill. 23 R. I. 471, 50 Atl. 833. The respondents now set up, by way of plea, that they "were all bona fide purchasers for a valuable consideration, and that said complainant knew of the fact that said deed mentioned in said bill of complaint purported to be signed by her, within the space of three years after the execution of said deed; but said complainant did not notify the grantee in her supposed deed, nor any of the grantees who hold by mesne conveyances from her said supposed grantee, that she had not signed said deed, as appears of record, but permitted them to suppose that said signature was genuine, wherefore these respondents insist that said complainant is estopped to set up the claim of fraud, as alleged in her bill of complaint." The case is now heard on the sufficiency of the plea.

The only difference between the question now presented and the one which was before us on demurrer is in the averments that the complainant knew of the forgery of her name within three years from the execution of the deed, that she did not notify the grantee of the fact of the forgery, and that the respondents are purchasers for value, whom she has permitted to suppose that said signature was genuine, whereby she is estopped. We are unable to see that any of the facts thus alleged have changed the legal aspect of the case. The vital question still remains,—By what fact is she estopped? The respondents say by silence when she should have given some notice; by silence which has led them to believe that her release of dower was genuine. The same claim was made in *Viele* v. *Judson*, 82 N. Y. 32, where, after a mortgage had been assigned, the mortgagee executed a discharge of the mortgage, which was recorded. The assignee knew of the discharge and of the record, but took no steps to reinstate the mortgage. The transfer was recorded, but no note of it was made, as was customary, on the record of the mortgage; and so it was likely to be overlooked on an examination of title, and it so happened. Another mortgage was subsequently given on the same property, both mortgagor and mortgagee knowing that the first mortgage was not paid, and that the pretended discharge was invalid; and this was transferred to an innocent purchaser for value. It was held that the assignee was not estopped from enforcing his mortgage against the innocent purchaser, and this, very plainly, must have been so, from the fact that the record showed that the mortgagee had no power to discharge after an assignment. The defendant, however, having set up estoppel against the plaintiff's enforcing his mortgage, the court passed upon the question of estoppel, and thereby overruled *Costello* v. *Meade*, 55 How. Pr. 356, which held exactly what the respondents claim here. A discharge of a mortgage had been recorded, which the mortgagee said was a forgery. He assigned the mortgage to a bona fide pur-

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chaser for value, and subsequently a second mortgage was given on the property. It was held that the assignee was estopped because he took no steps to correct the record. The reason for overruling *Costello* v. *Meade*, as stated in *Viele* v. *Judson*, was that to sustain an estoppel, because of an omission to speak, there must be both the specific opportunity and the apparent duty to speak: the party maintaining silence must have known that someone was relying thereon, and was either acting or about to act as he would not have done had the truth been told. These are the principal grounds of an equitable estoppel, but they do not exist in this case. The complainant had no opportunity to warn the grantee, because she knew nothing about the transaction until after it was completed. She was not present with him or with any subsequent grantee, so far as alleged, so as to have either the opportunity or duty to speak. No one has relied on anything said or done by her, or that was being done with her knowledge while she stood by in acquiescent silence. So far as appears, she did not know of a single sale before it was made, or that any one of these respondents was about to act as he would not have done had he known the truth. It is by no means an unprecedented thing for men to buy land subject to a dower right. Warranties in deeds are given to cover just such known and unknown defects in title. The complainant is not chargeable in law with notice that any one of these respondents would not have made his purchase had he known that she had not released her dower, and it is not averred that she was so notified in fact. The respondents' argument comes to this: It is to be presumed that no one would buy land laid out as city lots, subject to dower; that this land was liable to be sold to somebody; and that failure to give notice of some sort was equivalent to standing by in fraudulent silence. We have already said that there is no such presumption in law, and that it is not alleged that the complainant knew of any one of these transactions.

The only remaining point is, Does the possibility of sale make it fraudulent not to give some sort of notice? As we stated in the former opinion, we know of no notice that she was bound to give, or that she could legally and effectively give, and we repeat what we said before,—that the respondents do not show what she should have done. They say it is not for them to show this. If they plead an estoppel, they must set up facts which constitute an estoppel. They have pleaded simply that she did not notify the original or subsequent grantees. Notice to the original grantee before he took the deed was impossible. Failure to notify him afterwards could work no estoppel, for in such a case an estoppel does not arise after the fact. Was it fraud not to give some sort of notice, if any effective notice could have been given? We cannot say that it was. She had no present interest in the property. There was no certainty that she would outlive her husband, so as ever to have any interest. She had no knowledge that it was to be sold, as it has been, and to have acted with reference to it would have been action based upon conjecture. The elements of damage to others are too uncertain and remote to enable us to say that silence under such circumstances was fraud in law. As Judge Finch said in *Viele* v. *Judson*: "Are we not in danger of going so far as to say that, if a man patiently and silently bears a wrong, he shall be estopped from saying that it is a wrong? Suppose one's name is forged to a note, and he learns the fact that such paper is afloat. Of course, he understands that somebody may be deceived and injured by it. Must he bring an action against the forger or prosecute him criminally within a reasonable time, at the peril of being estopped from proving the note a forgery when collection is sought to be enforced?" In *Williamson* v. *Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, another illustration is put: "If one man chooses to go upon another's land and clear and improve it, the mere failure of the owner to go to him and warn him not to do so will not take away the true owner's title." The inducement of another to act, and the omission to speak only when there is a duty to speak, with knowledge of the circumstances, are the recognized elements of an estoppel. *Owen* v. *Slatter*, 26 Ala. 547, 62 Am. Dec. 745; *Lawrence* v. *Brown*, 5 N. Y. 394; 11 Am. & Eng. Enc. Law, 2d ed. pp. 427, 428, and notes. The cases cited by the respondents are not opposed to this principle. They are cases which in fact involve the elements above stated, and so do not rest upon mere silence, as this case does. We think that the essential elements of an estoppel are lacking. The plea sets up nothing that the complainant omitted to do which it was her duty to do, and hence it is no answer to the bill.

Plea overruled.

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IDAHO SUPREME COURT.

W. H. KING, *Respt.*,
v.
OREGON SHORT LINE RAILROAD COMPANY, *Appt.*

(.....Idaho.....)

*Under subdiv. 2, § 4168, Rev. Stat., which requires the complaint to contain a statement of the facts constituting the cause of action, in ordinary and concise language, a general allegation of negligence, while good against a general demurrer, is not good against a demurrer on the ground of uncertainty.

(December 10, 1898.)

*Headnote by SULLIVAN, CH. J.

APPEAL by defendant from a judgment of the District Court for Bannock County in favor of plaintiff in an action brought to recover the value of certain stock alleged to have been killed by defendant's negligence. *Reversed.*

Statement by **Sullivan**, Ch. J.:

This action was brought by the respondent to recover the value of four head of cattle alleged to have been killed by appellant's locomotives and cars,—one alleged to have been killed on May 7, 1897; one on May 10, 1897; one on August 5, 1897; and one on November 5, 1897. The killing of each animal is set up as a separate cause of action. The third paragraph of each cause of action, which contains the allegations of the

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careless and negligent killing of said stock, is couched substantially in the same language, and in the first is as follows, to wit: "That the defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its locomotives and cars that the same ran against, upon, and over said steer, and killed and destroyed the same, to the damage of the plaintiff in the sum of $18, no part of which has been paid." The total value of the four head is alleged to have been $78. To each of said causes of action the defendant, who is appellant here, interposed a demurrer on the ground of uncertainty, and distinctly specifies that each of said causes of action is uncertain in several particulars, and among them the following: (1) It does not state any facts constituting negligence or carelessness on the part of any agent or servant of the defendant, or of the defendant; (2) it does not state any act or omission on the part of any agent or servant of the defendant, or of the defendant, or of anyone, constituting negligence or carelessness. The demurrer was overruled, and appellant declined to answer or further plead, whereupon judgment was given and entered in favor of the plaintiff. This appeal is from the judgment.

Mr. **Joseph H. Blair,** for appellant:

The question is, Does the complaint state a cause of action so imperfectly that it is open to special demurrer on the ground of uncertainty? Assailed on the ground of uncertainty, with the grounds wherein it is uncertain set out in the demurrer, it is insufficient to require the defendant to answer.

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I. *Scope.*

This note is intended to be confined to general statements of negligence in pleading, or to statements that an alleged act was negligently done. The question as to the proper method of making any other class of allegations is considered only, in view of the fact that under some circumstances and in some classes of cases general allegations are not regarded as sufficiently specific, to the extent of showing what would be sufficiently specific in those cases and under those circumstances. Questions as to the proof admissible under a general allegation of negligence are shut out as questions of variance, and not of sufficiency of such allegations, except, perhaps, in a few cases in which the attack seemed to be upon the sufficiency of the pleading rather than upon the admissibility of the evidence.

II. *The rule as generally stated.*

The broad general rule that a pleader may allege negligence in an action therefor in general terms, or that a general allegation of negligence is sufficient, is laid down and thus stated in the following cases: Mary Lee Coal & R. Co. v. Chambliss, 97 Ala. 171, 11 So. 897; Laughran v. Brewer, 113 Ala. 509, 21 So. 415; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Stephenson v. Southern P. Co. 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; Cunningham v. Los Angeles R. Co. 115 Cal. 561, 47 Pac. 452; McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367; Chicago, B. & Q. R. Co. v. Blank, 24 Ill. App. 438; Pennsylvania Co. v. Krick, 47 Ind. 368; Pittsburgh, C. & St. L. R. Co. v. Nelson, 51 Ind. 150; Wabash, St. L. & P. R. Co. v. Johnson, 96 Ind. 44; Ohio & M. R. Co. v. Walker, 113 Ind. 196, 15 N. E. 234; Medsker v. Pogue, 1 Ind. App. 197, 27 N. E. 432; Evansville & T. H. R. Co. v. Taft, 2 Ind. App. 237, 28 N. E. 443; Lake Shore & M. S. R. Co. v. Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303; Louisville, E. & St. L. Consol. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; Citizens' Street R. Co. v. Abright, 14 Ind. App. 433, 42 N. E. 238, 1028; Island Coal Co. v. Clemmitt, 19 Ind. App. 21, 49 N. E. 38; Green v. Eden, 24 Ind. App. 583, 56 N. E. 240; Chicago, St. L. & P. R. Co. v. Nash (Ind.) 24 N. E. 884; Allender v. Chicago, R. I. & P. R. Co. 37 Iowa, 264; Louisville & N. R. Co. v. Rains, 15 Ky. L. Rep. 423, 23 S. W. 505; Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 406; Louisville R. Co. v. Will, 23 Ky. L. Rep. 1961, 66 S. W. 628; Lucas v. Wattles, 49 Mich. 380, 13 N. W. 782; McCauley v. Davidson, 10 Minn. 418, Gil. 335; Dolan v. Moberly, 17 Mo. App. 436; Union P. R. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457; Preston v. St. Johnsbury & L. C. R. Co. 64 Vt. 280, 25 Atl. 486; Birckhead v. Chesapeake & O. R. Co. 95 Va. 648, 29 S. E. 678.

He need not set out the facts evidencing the negligence. Connell v. Chesapeake & O. R. Co. 22 Ky. L. Rep. 501, 58 S. W. 374; Rogers v. Hughes, 87 Ky. 185, 8 S. W. 16; McCauley v. Davidson, 10 Minn. 418, Gil. 335; Laughran v. Brewer, 113 Ala. 509, 21 So. 415; Chicago, B. & Q. R. Co. v. Blank, 24 Ill. App. 438; Evansville & T. H. R. Co. v. Taft, 2 Ind. App. 237, 28 N. E. 443; Island Coal Co. v. Clemmitt, 19 Ind. App. 21, 49 N. E. 38; Lucas v. Wattles, 49 Mich. 380, 13 N. W. 782; Union P. R. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457; Birckhead v. Chesapeake & O. R. Co. 95 Va. 648, 29 S. E. 678.

The particular act of negligence is a matter of proof. Allender v. Chicago, R. I. & P. R. Co. 37 Iowa, 264; Pennsylvania Co. v. Krick, 47 Ind. 368.

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Stephenson v. *Southern P. Co.* 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Steffe* v. *Old Colony R. Co.* 156 Mass. 262, 30 N. E. 1137; *Batterson* v. *Chicago & G. T. R. Co.* 49 Mich. 184, 13 N. W. 508; *Pullman Palace Car Co.* v. *Martin*, 92 Ga. 161, 18 S. E. 364; *Woodward* v. *Oregon R. & Nav. Co.* 18 Or. 289, 22 Pac. 1076; *McPherson* v. *Pacific Bridge Co.* 20 Or. 486, 26 Pac. 560; *Smith* v. *Buttner*, 90 Cal. 95, 27 Pac. 29; *Conley* v. *Richmond & D. R. Co.* 109 N. C. 692, 14 S. E. 303; *Price* v. *Atchison Water Co.* 58 Kan. 551, 50 Pac. 450; *Atchison, T. & S. F. R. Co.* v. *O'Neill*, 49 Kan. 367, 30 Pac. 470.

In negligence cases—stock-killing cases, as well as all others—the burden of proof is upon the plaintiff to establish negligence on the part of the defendant. The mere killing of stock by a railroad company by running its engines and cars over it does not establish a prima facie case of negligence, so as to shift and throw the burden of excusing upon the defendant.

Cateril v. *Union P. R. Co.* 2 Idaho, 540, 21 Pac. 416; *Atchison, T. & S. F. R. Co.* v. *Walton*, 3 N. M. 530, 9 Pac. 351; *Kansas City, L. & S. K. R. Co.* v. *Bolson*, 36 Kan. 534, 14 Pac. 5; *Union P. R. Co.* v. *Bullis*, 6 Colo. App. 64, 39 Pac. 897; *Schenck* v. *Union P. R. Co.* 5 Wyo. 430, 40 Pac. 840; *Atchison, T. & S. F. R. Co.* v. *McFarland*, 2 Kan. App. 662, 43 Pac. 788; 1 Rapalje & Mack's Digest of Railway Law, p. 311, ¶ 495; 2 Thomp. Neg. p. 1243.

Mr. **W. T. Reeves,** for respondent:

It is unnecessary to specify the particular act or omissions that constitute the negligence.

2 Estee, Pl. p. 35, § 2005; Bliss, Code Pl. 3d ed. § 211*a*; *Cunningham* v. *Los Angeles*

And under a general allegation of negligence the facts showing negligence may be proved. Wabash, St. L. & P. R. Co. v. Johnson, 96 Ind. 44; Pittsburgh, C. & St. L. R. Co. v. Nelson, 51 Ind. 150; Cleveland, C. C. & I. R. Co. v. Wynant, 100 Ind. 160; Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 566, 45 N. E. 108; Chicago City R. Co. v. Jennings, 57 Ill. App. 376; Braxton v. Hannibal & St. J. R. Co. 77 Mo. 455; Omaha & R. Valley R. Co. v. Wright, 47 Neb. 886, 66 N. W. 842; Young v. Lynch, 66 Wis. 514, 29 N. W. 224.

Nor need either the motives, intents, or circumstances of the injury be stated. Louisville, C. & L. R. Co. v. Case, 9 Bush, 728.

The essential elements of a petition charging actionable negligence are, that the plaintiff, without fault on his part, has sustained an injury as the proximate consequence of a specific negligent act or omission of the defendant. Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462.

And a court cannot, as a matter of law, say that a complaint alleging negligence generally does not sufficiently allege negligence unless the particular acts or omissions complained of are such that they could not be negligent under any possible state of facts or circumstances provable under the allegations of the complaint. Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565.

The facts required to be alleged in an action for damages for negligence are little, if any, more than the mere conclusions of the pleader, leaving the facts which enter into and support the conclusions to be adduced in the evidence. Louisville & N. R. Co. v. Hawkins, 92 Ala. 241, 9 So. 271.

And an averment of negligence in a complaint therefor is sufficient which shows that the negligence of the defendant either caused or reasonably contributed to the injury complained of, or that the injury resulted from such negligence. Western R. Co. v. Lazarus, 88 Ala. 453, 6 So. 877.

At common law it was not necessary, in a declaration for negligence, to set out the facts and details constituting the basis of the action. Stephenson v. Southern P. Co. 102 Cal. 143, 34 Pac. 618, 36 Pac. 407.

And in adopting what is known as the Code system of pleading courts in most of the states have excepted from the general rule requiring a complaint to state the facts constituting the cause of action in ordinary and concise language cases founded upon negligence; or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in

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general terms without stating the facts constituting such negligence. *Ibid.*

III. *More particular statement of the rule.*

The rule given in the foregoing subdivision of this note is very generally stated, and while in some simple cases and in some jurisdictions it has been acted upon literally to the extent of permitting the mere statement of the injury and that it was negligently inflicted, in most jurisdictions and under usual circumstances it must be taken as referring to the manner in which the acts in question were performed, and not as excusing a statement that such acts were done.

Thus, while, in actions for tort, it is frequently sufficient to describe the injury generally without setting out the particulars of the defendant's misconduct, and great latitude of statement is allowed, this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof. Baltimore & O. R. Co. v. Whittington, 30 Gratt. 805; King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975; Coal Bluff Min. Co. v. Watts, 6 Ind. App. 347, 33 N. E. 662; Lake Shore & M. S. R. Co. v. Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303; Louisville, E. & St. L. Consol. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767.

When negligence is the gist of an action, the rules of good pleading require that the pleader shall state with clearness and precision the particular act of omission or commission on which negligence is predicated. Coal Bluff Min. Co. v. Watts, 6 Ind. App. 347, 33 N. E. 662; Jeffersonville, M. & I. R. Co. v. Dunlap, 29 Ind. 426; Ohio & M. R. Co. v. Engrer, 4 Ind. App. 261, 30 N. E. 924; Griggs v. St. Paul, 9 Minn. 246, Gil. 231; Woodward v. Oregon R. & Nav. Co. 18 Or. 289, 22 Pac. 1076.

The act done or omitted constituting the negligence must be averred and proved; and an act done or omitted, which is relied on to establish negligence, must be one which was alleged. Missouri P. R. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608; Woodward v. Oregon R. & Nav. Co. 18 Or. 289, 22 Pac. 1076.

And it is not sufficient to state the result or conclusion from facts arising from circumstances of the case not set forth in the declaration. King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975; Ohio & M. R. Co. v. Engrer, 4 Ind. App. 261, 30 N. E. 924.

A mere abstract proposition that the defendant was guilty of negligence which resulted in

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R. Co. 115 Cal. 561, 47 Pac. 452; *Davies* v. *Occanic S. S. Co.* 89 Cal. 283, 26 Pac. 827; *Stephenson* v. *Southern P. Co.* 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Louisville & N. R. Co.* v. *Wolfe*, 80 Ky. 84; *Wright* v. *Omaha & R. Valley R. Co.* 49 Neb. 456, 68 N. W. 618, 47 Neb. 886, 66 N. W. 842; *House* v. *Meyer*, 100 Cal. 592, 35 Pac. 308; *Scott* v. *Hogan*, 72 Iowa, 614, 34 N. W. 444; *Rogers* v. *Truesdale*, 57 Minn. 126, 58 N. W. 688; *Jones* v. *Darden*, 90 Ala. 372, 7 So. 923; *Texas & P. R. Co.* v. *Easton*, 2 Tex. Civ. App. 378, 21 S. W. 575; *Evansville & T. H. R. Co.* v. *Krapf*, 143 Ind. 647, 36 N. E. 901; *Louisville, E. & St. L. Consol. R. Co.* v. *Hicks*, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; *Benjamin* v. *Holyoke Street R. Co.* 160 Mass. 3, 35 N. E. 95; *Louisville, N. A. & C. R. Co.* v. *Berkey*, 136 Ind. 181, 35 N. E. 3; *Schneider* v. *Missouri P. R. Co.* 75 Mo. 295; *Palmer* v. *Missouri P. R. Co.* 76 Mo. 217; *Mack* v. *St. Louis, K. C. & N. R. Co.* 77 Mo. 232.

Sullivan, Ch. J., delivered the opinion of the court:

There is but one question presented by the record, and that is: In actions based on negligence, is it sufficient to plead negligence generally, or must the specific acts of commission or omission be specifically set out in the complaint? It is conceded by counsel for appellant that the complaint in this action would be good as against a general demurrer, to wit, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that it is sufficient to sustain a verdict or judgment, unless attacked by a demurrer on the ground of uncertainty,

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injury to or the death of the plaintiff is not sufficient in an action for damages therefor. Louisville & P. Canal Co. v. Murphy, 9 Bush, 522; Schindler v. Milwaukee, L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911; Leduke v. St. Louis & I. M. R. Co. 4 Mo. App. 485; McPherson v. Pacific Bridge Co. 20 Or. 486, 26 Pac. 560; Woodward v. Oregon R. & Nav. Co. 18 Or. 289, 22 Pac. 1076; Missouri P. R. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608.

And a petition or declaration stating generally only that plaintiff was injured by the carelessness and negligence of the defendant's servants and agents is worthless. Gurley v. Missouri P. R. Co. 93 Mo. 445, 6 S. W. 218; San Antonio & A. P. R. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

And it is bad where it does not state in what particular respect the defendant was negligent, or wherein the negligence consisted. Laporte v. Cook, 20 R. I. 261, 38 Atl. 700; Ensley R. Co. v. Chewning, 93 Ala. 24, 9 So. 458; King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975.

In a complaint founded upon failure to perform a legal duty, the act done, or omitted to be done, should be characterized as having been negligently done or negligently omitted to be done. Louisville, E. & St. L. Consol. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; Consumers' Electric Light & Street R. Co. v. Pryor (Fla.) 32 So. 797.

And the rule best supported by authority and most consonant with reason is that it is sufficient, in an action for damages for alleged negligence, to aver that the defendant negligently performed, or negligently omitted to perform, some act the performance or nonperformance of which caused the injury complained of. The pleading need not show all the various facts from which the negligence may be deduced.

This rule was squarely stated as above, or in substantially similar terms, in the following cases: Leach v. Bush, 57 Ala. 145; Mobile & M. R. Co. v. Crenshaw, 65 Ala. 566; Ensley R. Co. v. Chewning, 93 Ala. 24, 9 So. 458; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145; Laughran v. Brewer, 113 Ala. 509, 21 So. 415; Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Hill v. Fairhaven & W. R. Co. (Conn.) 52 Atl. 725; Walsh v. Western R. Co. 34 Fla. 1, 15 So. 686; Jacksonville, T. & K. W. R. Co. v. Jones, 34 Fla. 286, 15 So. 924; Consumers' Electric Light & Street R. Co. v. Pryor (Fla.) 32 So. 797; Illinois C. R. Co. v. Larson, 42 Ill. App. 264; Andrew v. Chicago & N. W. R. Co. 45 Ill. App. 269; Lavis v. Wisconsin, C. R. Co. 54 Ill. App. 636; Alton R. & Illuminating Co. v. 59 L. R. A.

Foulds, 81 Ill. App. 322; Ft. Wayne v. De Witt, 47 Ind. 391; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Boyce v. Fitzpatrick, 80 Ind. 526; Huntington County v. Huffman, 134 Ind. 1, 31 N. E. 570; Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Evansville & T. H. R. Co. v. Krapf, 143 Ind. 647, 36 N. E. 901; Rodgers v. Baltimore & O. S. W. R. Co. 150 Ind. 397, 49 N. E. 453; Chicago, St. L. & P. R. Co. v. Barnes, 2 Ind. App. 213, 28 N. E. 328; Ohio & M. R. Co. v. Engrer, 4 Ind. App. 261, 30 N. E. 924; Ohio & M. R. Co. v. Craycraft, 5 Ind. App. 335, 32 N. E. 297; Hindman v. Timme, 8 Ind. App. 416, 35 N. E. 1046; Louisville, E. & St. L. Consol. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; Citizens' Street R. Co. v. Lowe, 12 Ind. App. 47, 39 N. E. 165; Chicago & E. R. Co. v. Cummings, 24 Ind. App. 192, 53 N. E. 1026; Mack v. St. Louis, K. C. & N. R. Co. 77 Mo. 232; Chubbuck v. Hannibal & St. J. R. Co. 77 Mo. 591; Otto v. St. Louis, I. M. & S. R. Co. 12 Mo. App. 168; Ravenscraft v. Missouri P. R. Co. 27 Mo. App. 617; Hill v. Missouri P. R. Co. 49 Mo. App. 520; Senate v. Chicago, M. & St. P. R. Co. 57 Mo. App. 223; Lachner Bros. v. Adams Exp. Co. 72 Mo. App. 13; Campbell v. United States Foundry Co. 73 Hun, 576, 26 N. Y. Supp. 165; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350; Lake Erie & W. R. Co. v. Mackey, 53 Ohio St. 370, 29 L. R. A. 757, 41 N. E. 980; New York, C. & St. L. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130; Cederson v. Oregon Nav. Co. 38 Or. 343, 62 Pac. 637, 63 Pac. 763; International & G. N. R. Co. v. Downing, 16 Tex. Civ. App. 643, 41 S. W. 190; Snyder v. Wheeler Electrical Co. 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733.

Within this rule, facts from which the ultimate and conclusive facts may be inferred are evidence in an action for negligence, and need not be stated. But the facts from which a legal conclusion is to be drawn, upon which depends the plaintiff's right of action, must be stated in order to show a cause of action. Mitchell v. Clinton, 99 Mo. 153, 12 S. W. 793.

There is a distinction, in alleging negligence, between the acts and the facts constituting the negligence, it being necessary to set out the acts, but not the facts. Carpenter v. McDavitt, 53 Mo. App. 393.

And the declaration need not state with particularity the acts of omission or commission which constitute the negligence or wrong. Berns v. Gaston Gas Coal Co. 27 W. Va. 285, 55 Am. Rep. 304; Hawker v. Baltimore & O. R. Co. 15 W. Va. 628, 36 Am. Rep. 825.

If enough be alleged in an action for negli-

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specifically setting forth wherein it is uncertain. While counsel for respondent concede that, if the facts are sufficiently within the knowledge of the pleader, it would be better pleading to plead them, they also contend that the rule of pleading negligence is so thoroughly settled in this country that it is no longer an open question, and the rule is to the effect that it is unnecessary to plead the particular acts or omissions that constitute the negligence, and cite Bliss, Code Pl. 3d ed. § 211*a*; *Cunningham* v. *Los Angeles R. Co.* 115 Cal. 561, 47 Pac. 452; *Stephenson* v. *Southern P. Co.* 102 Cal. 143, 34 Pac. 618, 36 Pac. 407, and numerous other cases. It is said in Bliss, Code Pl. 3d ed. § 211 *a*, that a general allegation of negligence is allowed; that negligence is the ultimate fact to be pleaded, and is not a conclusion. Referring to negligence and fraud, it is said: "The law draws the conclusion in both cases, yet we can see that the negligence possesses more of the element of fact than does fraud. . . . We do not infer it as a legal conclusion from certain facts, but it is a fact itself inferable from certain evidence. . . . Fraud will never be presumed. The facts from which it is inferred must be shown." And, after giving some examples and citing authorities, the author concludes said section as follows: "Some negligence is presumed, and it must, of necessity, be alleged generally." Simply because "some negligence will be presumed," certain facts being shown, we are unable to comprehend that for that reason "negligence must, of necessity, be alleged generally." If certain facts must be shown before negligence will be presumed, the plaintiff must know these

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gence to show the existence of a legal duty and its breach, a very slight designation that the act done, or omitted to be done, was committed or omitted in the absence of due care, is sufficient to support a charge of negligence. Lake Shore & M. S. R. Co. v. Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 308; Louisville, E. & St. L. Consol. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767.

Such an allegation furnishes the predicate for proof of such incidental facts and circumstances as fairly tend to establish the negligence of the primary fact complained of. Chicago, St. L. & P. R. Co. v. Barnes, 2 Ind. App. 213, 28 N. E. 328; Evansville & T. H. R. Co. v. Krapf, 143 Ind. 647, 36 N. E. 901; Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899; Snyder v. Wheeler Electrical Co. 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733.

And under it proof of any and every degree of negligence is admissible. Ft. Wayne v. De Witt, 47 Ind. 391; Evansville & T. H. R. Co. v. Krapf, 143 Ind. 647, 36 N. E. 901; Morris v. Louisville & N. R. Co. 11 Ky. L. Rep. 698, 12 S. W. 940; McPheeters v. Hannibal & St. J. R. Co. 45 Mo. 22; Shumacher v. St. Louis & S. F. R. Co. 39 Fed. 174.

The acts which it is intended to be shown were negligently done in an action for negligent injury should be set out with a reasonable degree of particularity and in some appropriate form of expression charged to have been negligently done. Jacquin v. Grand Ave. Cable Co. 57 Mo. App. 320; Gurley v. Missouri P. R. Co. 93 Mo. 445, 6 S. W. 218; Woodward v. Oregon R. & Nav. Co. 18 Or. 289, 22 Pac. 1076.

But when a petition states the acts or omissions complained of, and avers that they were negligent, or that they were negligently done, it is sufficient, unless such acts or omissions can be declared, as a matter of law, not to constitute negligence. International & G. N. R. Co. v. Downing, 16 Tex. Civ. App. 643, 41 S. W. 190; Citizens' Street R. Co. v. Abright, 14 Ind. App. 433, 42 N. E. 238, 1028; Cederson v. Oregon Nav. Co. 38 Or. 343, 62 Pac. 637, 63 Pac. 763.

And an allegation in an action for negligence specifying the act, the doing of which caused the injury, and averring generally that it was negligently done, states a cause of action, although it be not apparent from the compiaint how the injury resulted from the negligence alleged. Lake Erie & W. R. Co. v. Mackey, 53 Ohio St. 370, 29 L. R. A. 757, 41 N. E. 980; Louisville, C. & L. R. Co. v. Case, 9 Bush, 728; Rogers v. Hughes, 87 Ky. 185, 8 S. W. 16; 59 L. R. A. Johnson v. St. Paul & D. R. Co. 31 Minn. 283, 17 N. W. 622.

Some of the cases, however, have treated the two rules as meaning the same, the latter being regarded merely as a more particularized statement of the same matter.

Thus, in Smith v. Buttner, 90 Cal. 95, 27 Pac. 29, it was held that negligence may be charged in an action therefor in general terms, —that is, what was done being stated, it is sufficient to say that it was negligently done, without stating the particular omission which rendered the act negligent; but it must appear from the facts averred that the negligence caused or contributed to the injury.

And Senate v. Chicago, M. & St. P. R. Co. 57 Mo. App. 223, holds that a general averment of negligence is sufficient in an allegation specifying the act, the doing of which caused the injury; and averring generally that it was negligently or carelessly done will suffice.

So, in Lachner Bros. v. Adams Exp. Co. 72 Mo. App. 13, it was held that the plaintiff in a common-law action for negligence is not required to allege more than general negligence, and allegations specifying the act, the doing of which caused the injury, and that it was negligently or carelessly done, will suffice.

And in Snyder v. Wheeler Electrical Co. 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733, it was held that a declaration for negligence may allege the negligence generally without stating the particular facts going to prove negligence, but must specify with reasonable certainty the main or primary act of omission or commission doing the damage.

But if a negligent act is claimed to have been done by an agent, in order to hold the alleged principal the agent's authority to act must be set forth; and a statement that he was acting in the due course of his employment is a mere conclusion, and not the statement of any fact going to show authority, and is not a fact which would be admitted by demurrer. Davis v. Houghtelilin, 33 Neb. 582, 14 L. R. A. 737, 50 N. W. 765.

An allegation in an action for negligence that the defendant by its agents or servants was guilty of a negligent act, however, implies that the act was done about the master's business and within the scope of the servant's employment. Voegeli v. Pickel Marble & Granite Co. 49 Mo. App. 643; Todd v. Havlin, 72 Mo. App. 565.

And an averment in a complaint for a personal injury that the defendant, acting through its agents and servants, injured the plaintiff, is equivalent to an averment that the injury

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facts before he can show them; and, if he knows them, he certainly can allege them, and thus inform the defendant of the specific facts from which the conclusion of negligence is drawn. If, under the laws of this state, the killing of a steer by a locomotive engine or train of cars were made prima facie evidence of negligence, then, such killing being alleged in the complaint, a cause of action would be stated. But, under the statutes of this state, something more than the killing must be shown, in order to entitle a plaintiff to recover. He must not only show the killing, but he must show the certain other fact or facts from which the conclusion of negligence will be inferred or drawn. And, if a plaintiff must show acts or omissions from which negligence will be inferred before he can recover, it certainly is no hardship on him, nor unreasonable, to require him to allege them. Subdivision 2, § 4168, Rev. Stat., provides that the complaint must contain "a statement of the facts constituting the cause of action in ordinary and concise language." The causes of action in this case are based on the negligent killing of certain animals. Under such provision of the statute, the complaint must contain a statement of the facts constituting the negligent killing, in "ordinary and concise language." In *Stephenson* v. *Southern P. Co.* 102 Cal. 143, 34 Pac. 618, 36 Pac. 407, the facts constituting the negligence were stated in the complaint in ordinary and concise language. The court, after stating that at common law it was necessary, in a declaration for negligence, to set out the facts in detail, constituting the basis of the action, says: "In adopting what is known as the Code

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was inflicted by the defendant acting through its duly authorized agents and servants, and is not defective in failing to aver that the agents and servants were acting within the line of their duty when they committed the grievance complained of. Wabash R. Co. v. Savage, 110 Ind. 156, 9 N. E. 85.

IV. *Reasons for rule.*

It is a rule of pleading that while it is not allowable to allege a mere conclusion of law containing no element of fact, it is proper, not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which, according to the common and ordinary use of language, amounts to a mixed statement of fact and a legal conclusion. And the question of negligence in a particular case is generally held to be one of mingled law and fact. Clark v. Chicago, M. & St. P. R. Co. 28 Minn. 69, 9 N. W. 75; Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899; McCauley v. Davidson, 10 Minn. 418, Gil. 335; Louisville & P. Canal Co. v. Murphy, 9 Bush, 522.

It does not follow that, because negligence is a mixed question of law and fact, a general allegation of negligence in an action therefor constitutes pleading a legal conclusion only. Grinde v. M. & St. P. R. Co. 42 Iowa, 376.

While an allegation in a petition that the act complained of was negligence is perhaps a conclusion, it is not wholly a conclusion of law. It amounts to a charge that the act was done under circumstances to make it negligent, and that as done it was a violation of the duty which the defendant owed to the plaintiff in the use of proper care. International & G. N. R. Co. v. Downing, 16 Tex. Civ. App. 643, 41 S. W. 190.

Negligence and care are the sum and conclusion of a variety of attending circumstances characterizing the main acts bearing on or tending to prove the ultimate facts, and the rule of pleading is to charge them in this way, and to depend upon the evidence to establish the allegation. Andrew v. Chicago & N. W. R. Co. 45 Ill. App. 269.

Negligence is the ultimate fact to be pleaded and it forms part of the act from which an injury arises, or by which contributory negligence is made up. It is not merely the result of the absence of care in the performance of an act, but the absence itself, and, is not, therefore, a mere conclusion of law, and may be pleaded generally. Louisville & N. R. Co. v. Wolfe, 80 Ky. 82; Andrew v. Chicago & N. W. R. Co. 45 Ill. App. 269; Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899; McPheeters v. Hannibal & St. J. R. Co. 45 Mo. 22; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Stephenson v. Southern P. Co. 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367; Hill v. Fairhaven & W. R. Co. (Conn.) 52 Atl. 725.

And it is treated as a qualifying term indicating the manner in which an action is done, and not a mere conclusion. Cederson v. Oregon Nav. Co. 38 Or. 343, 62 Pac. 637, 63 Pac. 763.

Where the only averment directly affecting the question of negligence in an action for damages therefor is that a person did an act negligently or the opposite, the averment must be regarded as one of fact, and effect be given it accordingly. Washburn v. Chicago & N. W. R. Co. 68 Wis. 474, 32 N. W. 234.

V. *Averment of duty as an element of negligence.*

In every case involving actionable negligence there are necessarily three essential elements: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure; and the absence of any one of these elements renders a complaint bad. Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028; Maenner v. Carroll, 46 Md. 193.

And a complaint for personal injuries through negligence must show a legal duty or obligation of the defendant toward the person injured, existing at the time and place of the injury, which the defendant failed to perform or fulfill, and that the injury was occasioned by such failure. Thiele v. McManus, 3 Ind. App. 132, 28 N. E. 327; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Thompson v. Flint & P. M. R. Co. 57 Mich. 300, 23 N. W. 820.

There can be no fault or negligence or breach of duty where there is no act, or duty, or contract, or service which a party is bound to perform or fulfil. Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644.

And it is not enough to show that the defendant had been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others. Gautret v. Egerton, L. R. 2 C. P. 371, 36 L. J. C. P. N. S. 191, 16 L. T. N. S. 17, 15 Week. Rep. 638.

A declaration in an action for damages for

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system of pleading, courts in most of the states have excepted from the general rule requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence, or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence." If it be true that the courts of most of the states have excepted from the general rule, which requires a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded on negligence, or, rather, have so far modified that provision of the statute as to permit the plaintiff to state negligence in general terms, without stating the facts constituting the negligence, this court is not inclined to follow them. No doubt, we have much good court-made law; but, when we have a plain provision of the statute,—too plain for construction,—if it requires modification the legislative department of the state may do that. This court will not undertake it. The legislature has furnished the basis of decision as to the facts a complaint must contain, and courts are bound by it. In the case last cited the court further said: "The statement of other facts auxiliary to this main fact [negligence] might have tended to a clearer conception of the principal act, but the most there can be said against the pleading is that it states a cause of action, but states it imperfectly, which is the equivalent of saying that it is good except as against a special demurrer." So we think in the case at bar the complaint sufficiently states a cause of action, except as against a special demurrer on the ground

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alleged negligence must charge the defendant with the neglect of a legal duty, as distinguished from the mere doing of some positive act. Laporte v. Cook, 20 R. I. 261, 38 Atl. 700.

An allegation, however, that it was one's duty either to do or not to do a particular thing is a mere statement of a conclusion of law, and not traversable. Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680, Affirming 70 Ill. App. 550; Ward v. Chicago & N. W. R. Co. 61 Ill. App. 530; Jensen v. Wetherell, 79 Ill. App. 33; Marvin Safe Co. v. Ward, 46 N. J. L. 19; Brennan v. Lachat, 5 N. Y. S. R. 882; Hayden v. Smithville Mfg. Co. 29 Conn. 548; Kennedy v. Morgan, 57 Vt. 46; Brown v. Mallett, 5 C. B. 599, 17 L. J. C. P. N. S. 227, 12 Jur. 204.

And a declaration in an action for a negligent breach of duty should state the facts upon which the supposed duty is founded with the breach of which the defendant is charged. Gautret v. Egerton, L. R. 2 C. P. 371, 36 L. J. C. P. N. S. 191, 16 L. T. N. S. 17, 15 Week. Rep. 638; Angus v. Lee, 40 Ill. App. 304; West Chicago Street R. Co. v. James, 69 Ill. App. 609; Wilson v. New York, N. H. & H. R. Co. 18 R. I. 491, 29 Atl. 258; Race v. Easton & A. R. Co. 62 N. J. L. 536, 41 Atl. 710; Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767; State *ex rel.* Rader v. Union Twp. 43 N. J. L. 518; Kennedy v. Morgan, 57 Vt. 46; Seymour v. Maddox, 16 Q. B. 326, 5 Eng. L. & Eq. 265, 15 Jur. 723, 20 L. J. Q. B. N. S. 327.

Averments that specified acts were duties of defendant, in an action for negligence, are of no avail where facts are not stated from which the law will create the duty. Ward v. Chicago & N. W. R. Co. 61 Ill. App. 530; Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680, Affirming 70 Ill App. 550; Jensen v. Wetherell, 79 Ill. App. 33; Angus v. Lee, 40 Ill. App. 304; Consumers' Electric Light & Street R. Co. v. Pryor (Fla.) 32 So. 797; Hayden v. Smithville Mfg. Co. 29 Conn. 548; Hewison v. New Haven, 34 Conn. 136, 91 Am. Dec. 718; McCune v. Norwich City Gas Co. 30 Conn. 521, 79 Am. Dec. 278; Brennan v. Lachat, 5 N. Y. S. R. 882; Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767; State *ex rel.* Rader v. Union Twp. 43 N. J. L. 518; Marvin Safe Co. v. Ward, 46 N. J. L. 19; Breese v. Trenton Horse R. Co. 52 N. J. L. 250, 19 Atl. 204; Baltimore & O. R. Co. v. Wilson, 31 Ohio St. 555; Seymour v. Maddox, 16 Q. B. 326, 5 Eng. L. & Eq. 265, 15 Jur. 723, 20 L. J. Q. B. N. S. 327.

And the sufficiency of the pleading must be determined from the facts from which the duty is deduced. Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767; Marvin Safe Co. v. Ward, 46 N. J. L. 19; Brown v. Mallett, 5 C. B. 599, 17 L. J. C. P. N. S. 227, 12 Jur. 204.

And the pleading is bad in substance if the duty does not in all cases result from the facts stated in it. State *ex rel.* Rader v. Union Twp. 43 N. J. L. 518; Angus v. Lee, 40 Ill. App. 304.

An allegation of duty in words in an action for negligence is always surplusage, since, if the facts stated raise the duty, the allegation is unnecessary; if they do not, it is unavailing Gibson v. Leonard, 37 Ill. App. 344; Thamm v. Lahey, 59 Ill. App. 73; West Chicago Street R. Co. v. Colt, 50 Ill. App. 640; Jensen v. Wetherell, 79 Ill. App. 33; West Chicago Street R. Co. v. James, 69 Ill. App. 609; Hewison v. New Haven, 34 Conn. 136, 91 Am. Dec. 718; McCune v. Norwich City Gas Co. 30 Conn. 521, 79 Am. Dec. 278; Breese v. Trenton Horse R. Co. 52 N. J. L. 250, 19 Atl. 204; Brown v. Mallett, 5 C. B. 599, 17 L. J. C. P. N. S. 227, 12 Jur. 204.

And such a statement is not even obnoxious to special demurrer. Jensen v. Wetherell, 79 Ill. App. 33.

An an allegation in an action for alleged negligence, showing a relation from which a particular duty might arise and stating the duty, does not warrant showing in evidence that in fact such duty did arise. Seymour v. Maddox, 16 Q. B. 326, 5 Eng. L. & Eq. 265, 15 Jur. 723, 20 L. J. Q. B. N. S. 327.

Nor is a declaration which is defective in charg'ng a duty without stating the facts from which the duty arises helped by an allegation that the acts of the defendant were done maliciously. McCune v. Norwich City Gas Co. 30 Conn. 521, 79 Am. Dec. 278.

And in an action for neglect of duty it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute, and that he would not have been injured if the duty had been performed. He must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his security from the injury. Smith v. Tripp, 13 R. I. 152.

A complaint in an action for a negligent injury, however, which sets forth the facts out of which the duty of the defendant to the plaintiff arose, is sufficient. Brennan v. Lachat, 5 N. Y. S. R. 882.

And when the gravamen of an action is the alleged nonfeasance or misfeasance of another, as a general rule it is sufficient if the complaint avers facts out of which the duty to act springs, and that the defendant negligently failed to do and perform. It is not necessary to specify the

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of uncertainty. The demurrer should have been sustained, and the plaintiff permitted to amend his complaint by setting forth the facts constituting the negligence. In *Woodward* v. *Oregon R. & Nav. Co.* 18 Or. 289, 22 Pac. 1076, which was a case founded on negligence, the court says: "Our Code, § 66, requires the complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action, and one of the great objects to be attained by this enactment was to compel the plaintiff to place upon the record the specific and particular facts which he claims entitle him to recover," and holds that the plaintiff must allege in the complaint the acts or omissions of the defendant causing the injury, and show that they occurred through or by the negligence of the defendant. That decision recognizes the fact that in some jurisdictions it is sufficient to allege generally that the injury complained of was negligently done, but declares that that method of pleading has not been approved in that state. In *McPherson* v. *Pacific Bridge Co.* 20 Or. 486, 26 Pac. 560, the supreme court of Oregon holds that in actions for negligence a general allegation of negligence does not charge a fact. In *Batterson* v. *Chicago & G. T. R. Co.* 49 Mich. 184, 13 N. W. 508 (a case from Michigan), the court held that the plaintiff, in negli-

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particular acts of diligence he should have employed in the performance of such duty, since what the defendant did, and how he did it, and what he failed to do are generally better known to the defendant than to the plaintiff. Leach v. Bush, 57 Ala. 145; Mobile & M. R. Co. v. Crenshaw, 65 Ala. 566.

And the effect of a charge in a petition of the failure of the defendant to perform certain duty required by law, and of injuries and damages as the result of such failure, is to charge negligence; and such petition is good, though it does not expressly do so. Clark v. Dyer, 81 Tex. 339, 16 S. W. 1061; Taylor v. Felsing, 63 Ill. App. 624.

So, where the law imposes a public duty, it is unnecessary in pleading in an action for negligence for failure to perform such duty to allege it. Louisville & P. Canal Co. v. Murphy, 9 Bush, 522.

And where, in an action for alleged negligence upon the facts stated in the declaration, the duty of the defendant was clearly implied, that is sufficient without an express averment as to such duty. Geveke v. Grand Rapids & I. R. Co. 57 Mich. 589, 24 N. W. 675; Louisville & P. Canal Co. v. Murphy, 9 Bush, 522.

VI. *The rule as affected by necessity of notice of nature of claim.*

The general theory of pleading in actions for negligence, as well as other actions, is that the pleader must set forth the facts of his claim with such certainty as reasonably to inform the other party what is proposed to be proved in the case, so that he may have a fair opportunity to meet such facts and prepare his defense. King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975; Addison v. Lake Shore & M. S. R. Co. 48 Mich. 155, 12 N. W. 42; Wills v. Cape Girardeau S. W. R. Co. 44 Mo. App. 51; Jacquin v. Grand Ave. Cable Co. 57 Mo. App. 320; San Antonio & A. P. R. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; Preston v. St. Johnsbury & L. C. R. Co. 64 Vt. 280, 25 Atl. 486.

A plaintiff in an action for negligence must, by his declaration, inform the defendant and the tribunal in which the action is brought what the complaint is. He must not only show that the defendant has been negligent, but must also show in what respect. Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 433, 2 N. W. 795; Duval v. Hunt, 34 Fla. 85, 15 So. 876.

And he cannot recover under a general allegation of negligence, where this gives the defendant no notice of facts, and is only a conclusion. Leduke v. St. Louis & I. M. R. Co. 4 Mo. App. 485.

But if the pleading is such as to advise the adverse party so that he may know what the charge of negligence is which he is called upon to defend himself against, it is not defective merely because it is stated in general terms. Wills v. Cape Girardeau S. W. R. Co. 44 Mo. App. 51; Preston v. St. Johnsbury & L. C. R. Co. 64 Vt. 280, 25 Atl. 486.

A declaration in an action for negligence is good if it contains the substantial elements of a cause of action, the duty violated, the breach thereof properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the right of the case can be given. Poling v. Ohio River R. Co. 38 W. Va. 645, 24 L. R. A. 215, 18 S. E. 782.

In many simple cases a general allegation of negligence or want of care gives all the information needed, and in such cases the whole taken together makes a good declaration. Schindler v. Milwaukee, L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911.

So, where, from the nature of the case, the plaintiff in an action for damages for negligence could not be expected to know the exact cause of the precise negligent act which became the cause of an injury, and the facts were peculiarly within the knowledge of the defendant, plaintiff is not required to allege the particular cause; and it is sufficient to allege the facts in a general way, which will give the defendant notice of the character of proof that would be offered to support the plaintiff's case. Missouri P. R. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608; San Antonio & A. P. R. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; Cunningham v. Los Angeles R. Co. 155 Cal. 561, 47 Pac. 452; King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975.

And an averment that the injury was inflicted by the want of due care in the defendant, omitting all specification of the mode of the fault, is allowable where the knowledge of the circumstances must in the nature of things be confined to the party inculpated; as where goods are lost by the carelessness of a bailee, in which case it seldom happens that the owners know the fault which occasions the loss. Central R. Co. v. Van Horn, 38 N. J. L. 133.

A pleader is required to set out the particular acts constituting the negligence complained of, in an action therefor, only so far as they appear to be within his knowledge. Chicago City R. Co. v. Jennings, 157 Ill. 274, 41 N. E. 629.

In the above case, Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 425, *infra*, VIII. c, and X. b, 1, was distinguished and explained, the court saying that in that case there were two counts and the general issue was pleaded to the whole declaration, so that the question here involved did not arise upon the demurrer to the declaration, and, as a plea was filed to the declaration, its sufficiency was thereby admitted, and the

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gence cases, is "bound to set out the combination of material facts relied on as his cause of action, and follow up his allegations by evidence pointing out and proving the same combination of circumstances." See also *Pullman Palace Car Co.* v. *Martin*, 92 Ga. 161, 18 S. E. 364; *Steffe* v. *Old Colony R. Co.* 156 Mass. 262, 30 N. E. 1137; *Conley* v. *Richmond & D. R. Co.* 109 N. C. 692, 14 S. E. 303; *Price* v. *Atchison Water Co.* 58 Kan. 551, 50 Pac. 450. We are aware that there is very respectable authority which holds that a general allegation of negligence is sufficient, and that at common law it was not necessary, in a declaration for negligence, to set out the facts constituting the negligence. But our Code of Civil Procedure has greatly changed the common-law rules of pleading, and requires the facts constituting the cause of action to be set forth in ordinary and concise language. And in the case at bar facts sufficient should have been set forth to inform the defendant what act or omission constituted the negligence complained of.

The judgment of the court below is reversed, with instructions to sustain the demurrer, and to give the plaintiff leave to amend his complaint. The costs of this appeal are awarded to the appellant.

Huston and **Quarles**, JJ., concur.

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question whether the declaration would have been sufficient if it had been specially demurred to was not in the case.

But such circumstances as the pleader does know and must have contemplated and relied upon when he framed his declaration, and are reasonably necessary for the defendant's information, should be specified with reasonable certainty. King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975; San Antonio & A. P. R. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

VII. *Effect of the nature of the negligence or wrong.*

A general allegation of damages will suffice to let in proof, and to warrant recovery of all such damages as naturally and necessarily result from the wrongful act complained of, the law implying such damages, and proof only is necessary to show the extent and amount; but when damages actually sustained do not necessarily result from the act complained of, and consequently are not implied by law, the plaintiff must state in his declaration the particular damage which he has sustained for notice thereof to the defendant, otherwise he will not be permitted to give evidence of it on the trial. Texas & P. R. Co. v. Curry, 64 Tex. 85.

And where negligence is a mixed question of law and fact, and the jury must determine whether the defendant was negligent or not in the light of the surrounding circumstances, the acts which it is intended to be shown were negligently done should be set out with a reasonable degree of particularity and in some appropriate form of expression charged to have been negligently done. Gurley v. Missouri P. R. Co. 93 Mo. 445, 6 S. W. 218.

So, for an indirect injury resulting from alleged negligence, the facts showing negligence should be pleaded, or otherwise it cannot be seen that the alleged negligent act or omission was the proximate cause of the injury, though in direct injury to person or property this may be safely assumed. Race v. Easton & A. R. Co. 62 N. J. L. 536, 41 Atl. 710.

Where in actions for negligence it is averred that the injury was inflicted by the want of care in the defendant, omitting all specification of the mode of the fault, in order to be sustained the act concerning the doing of which negligence is predicated must be of a simple character, so that an allegation of an absence of care in its performance is reasonably intelligible. Central R. Co. v. Van Horn, 38 N. J. L. 133.

But while ordinarily the rules of good pleading require that the facts from which the conclusion of negligence is attributable should be averred, and not mere conclusions of law, this rule has been relaxed where the cause of action consists in the nonperformance or misperformance of duty. Where the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a general rule it is sufficient if the complaint avers facts out of which the duty to act springs, and that the defendant negligently failed to do and perform, and it is not necessary to specify the particular acts of negligence he should have employed in the performance of such duty, since what he did, and how he did it, and what he failed to do are generally better known to him than to the plaintiff. Ensley R. Co. v. Chewning, 93 Ala. 24, 9 So. 458; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145; Laughran v. Brewer, 113 Ala. 509, 21 So. 415; Leach v. Bush, 57 Ala. 145; Mobile & M. R. Co. v. Crenshaw, 65 Ala. 566.

And if an injury itself furnishes a presumption of negligence so as to require the defendant in an action therefor to show by evidence that it had been guilty of no negligence that caused it, all that is necessary to be averred in a declaration to entitle the plaintiff to recover for the injury is the duty, a negligent breach of it, and the result, and that the plaintiff had not contributed to the result by any neglect on his part. Alton R. & Illuminating Co. v. Foulds, 81 Ill. App. 322; Blue v. Briggs, 12 Ind. App. 105, 39 N. E. 885; Lake Shore & M. S. R. Co. v. Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303; Cox v. Providence Gas Co. 17 R. I. 199, 21 Atl. 344.

In such case notice of the breach and default is involved in the act itself. Lake Shore & M. S. R. Co. v. Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303.

So, when an act averred to have been done, for which a recovery is sought, is of such a character that, under the circumstances alleged, it is necessarily negligent, it will be so regarded by the court, even though it be not designated as negligently done. Blue v. Briggs, 12 Ind. App. 105, 39 N. E. 885.

But where the default is brought about by the intervening agency of another, the complaint, to be good, must show that the defendant had notice, either by direct averment, or as a necessary implication from the facts alleged, and a general averment is not sufficient. Lake Shore & M. S. R. Co. v. Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303.

And a general allegation of negligence of the defendant, with a statement of the results thereof, is a sufficient allegation only in cases where the plaintiff may prove the negligence by proof of the result of the alleged negligence, as in case of an action by a passenger upon a railroad train who is injured by a collision of two of the defendant's trains, in which case the plaintiff would not be required to state the exact negligence which caused the collision because he is not supposed to have knowledge of

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the exact facts, and when he has proved the collision and his injury the negligence is sufficiently proved, and the burden of proof is on the defendant to excuse himself if he can; but where the allegation as to the result of the alleged negligence of the defendant would not, if proved, make out a case in favor of the plaintiff, or throw the burden of proof on the defendant to show that he was guilty of no negligence or want of care, the plaintiff will have to go further and prove the particular acts of negligence and want of care on the part of the defendant which caused the injury, and should therefore state such facts in his complaint. Young v. Lynch, 66 Wis. 514, 29 N. W. 224.

So, the law has never lost sight of the difference between trespass, where the act is presumptively wrong until justified, and case, where the liability springs from the facts of the case as stated, and where a charge of what is a mere result from facts, and not itself a statement of facts, cannot be held good pleading. Schindler v. Milwaukee, L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911.

But certainty to a common intent is all that is required in a declaration, and this is attained in actions of trespass on the case for negligence when a neglect of duty relied on and the resulting injury are described with accuracy. Merkle v. Bennington Twp. 68 Mich. 133, 35 N. W. 846.

And while ordinarily negligence consists in omitting to do a duty, or in doing it so carelessly as to bring injury to another, and, unless a particular duty and its breach is set forth in a declaration for the injury, no negligence appears, in case of collisions, except where the injury is caused by the carelessness of a servant, an action of trespass may generally be maintained in which the averment of the force alone will be sufficient. And since, in such cases, it is usually impossible to do more than state the fact of the collision, and that fact would raise a presumption of negligence, nothing appearing to the contrary, because such accidents usually do not occur without negligence, the particular fact need not be stated. Parker v. Providence & S. S. B. Co. 17 R. I. 376, 14 L. R. A. 414, 22 Atl. 284, 23 Atl. 102.

Where a statute gives a remedy where none existed at common law, the declaration in an action founded thereon must show from whence the plaintiff derives his right. Austin v. New York & E. R. Co. 25 N. J. L. 381.

VIII. *The rule as affected by method of asserting defect.*

a. *By demurrer.*

A general allegation of negligence without stating the particular acts which constitute the negligence is good against a general demurrer for want of facts. Barnett v. Leonard, 66 Ind. 422; Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297; Pennsylvania Co. v. Sedwick, 59 Ind. 336; Jones v. White, 90 Ind. 255; Evansville v. Worthington, 97 Ind. 282; Cleveland, C. C. & I. R. Co. v. Wynant, 100 Ind. 160; Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; George H. Hammond & Co. v. Schweitzer, 112 Ind. 246, 13 N. E. 869; Ohio & M. R. Co. v. Walker, 113 Ind. 196, 15 N. E. 234; Anderson v. East, 117 Ind. 126, 2 L. R. A. 712, 19 N. E. 726; Ohio & M. R. Co. v. McCartney, 121 Ind. 385, 23 N. E. 258; Mississinewa Min. Co. v. Patton, 129 Ind. 472, 28 N. E. 1113; Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 566, 45 N. E. 108; Lake Erie & W. R. Co. v. Griffin, 8 Ind. App. 47, 35 N. E. 396; Pennsylvania Co. v. Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; Pittsburgh, C. & St. L. R. Co. v. Kitley, 118 Ind. 152, 20 N. E. 727; Louisville, N. A. & C. R. Co. v. Lynch, 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471; Deller v. Hofferberth, 127 Ind. 414, 26 N. E. 889; Pittsburgh, C. & St. L. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285; Rathburn v. Burlington & M. River R. Co. 16 Neb. 441, 20 N. W. 390; Omaha & R. Valley R. Co. v. Wright, 49 Neb. 456, 68 N. W. 618; Union P. R. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457; Golley & F. Iron Works v. Callan, 9 Ohio C. C. 217; Tuchochi v. Cincinnati Street R. Co. 7 Ohio N. P. 276; Gulf, W. T. & P. R. Co. v. Montier, 61 Tex. 122; Young v. Lynch, 66 Wis. 514, 29 N. W. 224; Gulf, C. & S. F. R. Co. v. Washington, 1 C. C. A. 286, 4 U. S. App. 121, 49 Fed. 347.

Unless the facts stated clearly show the absence of negligence. Pennsylvania Co. v. Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 566, 45 N. E. 108.

And the rule is the same with reference to allegations of knowledge of dangerous defects. Pennsylvania Co. v. Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377.

Or, as stated in some of the cases, when a complaint in an action for negligence characterizes the act from which the injury is charged to have resulted as having been done negligently, the complaint is sufficient upon demurrer without alleging the specific facts constituting the negligent act. Ohio & M. R. Co. v. Craycraft, 5 Ind. App. 335, 32 N. E. 297; Citizens' Street R. Co. v. Lowe, 12 Ind. App. 47, 37 N. E. 165; Evansville & T. H. R. Co. v. Krapf, 143 Ind. 647, 36 N. E. 901; Rodgers v. Baltimore & O. S. W. R. Co. 150 Ind. 397, 49 N. E. 453; Huntington County v. Huffman, 134 Ind. 1, 31 N. E. 570; Chicago & E. R. Co. v. Cummings, 24 Ind. App. 192, 53 N. E. 1026; Keating v. Brown, 30 Minn. 9, 13 N. W. 909.

A failure to state in detail the facts constituting negligence does not render a pleading in an action therefor bad on demurrer. Louisville, N. A. & C. R. Co. v. Cauley, 119 Ind. 142, 21 N. E. 546; Chicago & E. R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033.

The proper method of obtaining a fuller statement is by motion to make the petition more definite and certain. Golley & F. Iron Works v. Callan, 9 Ohio C. C. 217; Tuchochi v. Cincinnati Street R. Co. 7 Ohio N. P. 276; Barnett v. Leonard, 66 Ind. 422; Jones v. White, 90 Ind. 255; Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Pennsylvania Co. v. Sedwick, 59 Ind. 336; Evansville v. Worthington, 97 Ind. 282; Cleveland, C. C. & I. R. Co. v. Wynant, 100 Ind. 160; Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Peerless Stone Co. v. Wray, 143 Ind. 574, 42 N. E. 927; Ohio & M. R. Co. v. Walker, 113 Ind. 196, 15 N. E. 234; Pittsburgh, C. & St. L. R. Co. v. Kitley, 118 Ind. 152, 20 N. E. 727; Rathburn v. Burlington & M. River R. Co. 16 Neb. 441, 20 N. W. 390; Union P. R. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457; Gulf, W. T. & P. R. Co. v. Montier, 61 Tex. 122; Young v. Lynch, 66 Wis. 514, 29 N. W. 224; Louisville, N. A. & C. R. Co. v. Lynch, 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471; Deller v. Hofferberth, 127 Ind. 414, 26 N. E. 889; Pittsburgh, C. & St. L. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285.

And where, in an action for negligence, it is expressly alleged that the injury was caused solely by the defendant's negligence and without any fault on the part of the plaintiff, the remedy of the defendant for mere uncertainty

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in statement is by motion, and not by demurrer. Ohio & M. R. Co. v. Walker, 113 Ind. 196, 15 N. E. 234.

A general averment of negligence is sufficient in an action for damages arising from the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant, unless attacked by motion, and an issue framed by a traverse of such averment may be proved by evidence of any act within the general averment. Omaha & R. Valley R. Co. v. Crow, 54 Neb. 747, 74 N. W. 1066.

A declaration charging negligence, however, is demurrable where it does not set forth in particular any act or omission of the defendant constituting negligence. Wilson v. New York, N. H. & H. R. Co. 18 R. I. 491, 29 Atl. 258; Shadock v. Alpine Pl. Road Co. 79 Mich. 7, 44 N. W. 158.

And a declaration alleging merely that the defendant wrongfully and negligently killed plaintiff's intestate is bad on demurrer for failure to state the facts and circumstances. The facts constituting the negligence should be set out. Chattanooga Cotton Oil Co. v. Shamblin, 101 Tenn. 263, 47 N. W. 496.

And a complaint in an action for negligence is demurrable where it does not contain a clear and concise statement of the plaintiff's cause of action from which the defendant sued can with reasonable certainty ascertain when it had been guilty of negligence and prepare to meet the charge, or where no particular duty and breach thereof as causing the injury were specifically counted upon. Addison v. Lake Shore & M. S. R. Co. 48 Mich. 155, 12 N. W. 42.

And where some act of the defendant is characterized as negligent, and the injury complained of is shown to be the result of other acts or omissions which are not so characterized and which are not otherwise so set forth with their circumstances as to raise the presumption of negligence, the pleading is not sufficient on demurrer. Island Coal Co. v. Clemmitt, 19 Ind. App. 21, 49 N. E. 38.

So, under the Alabama system of pleading very general averments of negligence little short of mere conclusions of a want of care and consequent injury, leaving out the facts which constitute and go to prove negligence, meet all requirements of the law. And an allegation of negligence under Ala. Code, § 2590, subdiv. 1, pursuing the words of the statute, or substantially the same words, is sufficient upon demurrer, but this much is required. Laughran v. Brewer, 113 Ala. 509, 21 So. 415.

And under the Code in force in the Indian territory a complaint in an action for negligence is good on demurrer if it contains the substantial elements of a cause of action, however indefinitely or inartificially they may be stated; indefiniteness or uncertainty of statement which, when construed in the most liberal manner, states the substance of a cause of action not being a ground of demurrer, but a defect to be corrected by motion for a more specific statement, the complaint being treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment. Gulf, C. & S. F. R. Co. v. Washington, 1 C. C. A. 286, 4 U. S. App. 121, 49 Fed. 347.

The Codes of some of the states provide for a demurrer on the ground of uncertainty. The cases arising under such provisions are governed by the same principles as those arising on motion to make the pleading more definite and certain, and will be found below under that head.

b. *By motion to make more definite and certain.*

As seen in a former subdivision of this note (*supra*, VIII. a), the proper remedy in case of objection to pleadings in actions for negligence upon the ground of indefiniteness or uncertainty in any of their allegations is by motion for an order requiring the pleader to make his pleading or some specific allegation therein more definite and certain in the particular objected to. This was held in the cases cited to a substantially similar proposition with reference to the proper remedy in case a demurrer will not lie, in the subdivision above referred to, and also in George H. Hammond & Co. v. Schweitzer, 112 Ind. 246, 13 N. E. 869; Peerless Stone Co. v. Wray, 143 Ind. 574, 42 N. E. 927; Medsker v. Pogue, 1 Ind. App. 197, 27 N. E. 432; Spires v. South Bound R. Co. 47 S. C. 28, 24 S. E. 992; Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 534, 50 Pac. 834; Eaton v. Fitchburg R. Co. 129 Mass. 364.

Or it is by special exception on that ground. Gulf, W. T. & P. R. Co. v. Montier, 61 Tex. 122.

Or by requiring a bill of particulars when that is authorized by law. Jackman v. Lord, 56 Hun, 193, 9 N. Y. Supp. 200.

Or such relief should be asked for in the trial court. Medsker v. Pogue, 1 Ind. App. 197, 27 N. E. 432.

The general rule in pleading is that the pleader should state the particular facts which constitute his cause of action or defense, and a general allegation that the opposite party has caused an injury or loss to the pleader by carelessness or negligence or otherwise is not to be tolerated as a sufficient statement of facts, unless the opposite party admits the truth of such general statements by a demurrer, or unless he takes issue upon them. When he is unwilling to assume the responsibility of meeting any facts which may be proved against him on the trial under such general charge, he is entitled to have a more particular statement of the charge made against him before being called upon to answer or to go to trial, unless, from the nature of the case, it is not in the power of the plaintiff to make a more specific charge through lack of knowledge. Young v. Lynch, 66 Wis. 514, 29 N. W. 224; Madden v. Minneapolis & St. L. R. Co. 30 Minn. 453, 16 N. W. 263.

And where general allegations are mingled with specific ones so as to leave the intention of the pleader uncertain and ambiguous as to the nature and extent of the proof which he may offer in addition to the matter specifically alleged, the court may, on a proper application, order the same to be made more definite, or to be stricken out. Madden v. Minneapolis & St. L. R. Co. 30 Minn. 453, 16 N. W. 263.

But while the defendants in an action for negligence are not compelled to go to trial upon a complaint containing general allegations, and are entitled to have the same made specific and certain, this requires a motion to make it so, and, unless such motion has been made and overruled and exceptions properly saved, no question can be presented concerning it on appeal. Peerless Stone Co. v. Wray, 143 Ind. 574, 42 N. E. 927; Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 566, 45 N. E. 108.

Where the language of a pleading will fairly admit of a construction that will sustain it as against a demurrer, it should, in the absence of a motion to make it more definite and certain, be so construed. Golley & F. Iron Works v. Callan, 9 Ohio C. C. 217.

And, when this is not done, the plaintiff has the right to introduce any competent evidence tending to show negligence on the part of the

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defendant. Spires v. South Bound R. Co. 47 S. C. 28, 24 S. E. 992.

The general rule is that the certainty in a statement of the plaintiff's case in an action for negligence must be such that it is intelligible, and that in a reasonable measure it apprises the defendant of the substantial case to be made against him. Central R. Co. v. Van Horn, 38 N. J. L. 133.

To be proof against a motion to make the petition more definite and certain in an action for negligence, the plaintiff should state the facts concisely, and lay the foundation of the action correctly, so that the other party may be advised of the case made against him, and upon which the pleader may rely for a recovery. Tuchochi v. Cincinnati Street R. Co. 7 Ohio N. P. 276.

A defendant in an action for personal injuries resulting from negligence is entitled to have the complaint state the specific acts or omissions of the defendant which constitute the negligence relied upon, as well as all the surrounding and existing conditions, and what occurred at the time of the injury. Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 566, 45 N. E. 108.

And a complaint in an action for personal injuries charging negligence and carelessness of the defendant, though sufficient on demurrer, may be reached upon a motion for an order requiring the plaintiff to make it more specific, definite, and certain in regard to his charge of negligence, where the general charge is not predicated upon any alleged act of the defendant either of commission or omission, and what the defendant did or omitted to do, of which it could be said that it was done or omitted to be done through its fault and carelessness, is not shown. Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297.

This is the rule of KING v. OREGON SHORT LINE R. Co.

But where the plaintiff in an action for negligence only seeks to recover for the damages naturally resulting from the negligent act complained of, the particulars in respect to which the plaintiff had been damaged need not be stated. Dooley v. Missouri P. R. Co. 36 Mo. App. 381.

It is only when the precise nature of the charge in an action for alleged negligence is not apparent that an application is proper to make the complaint more definite and certain. O'Brien v. Ottenberg, 59 N. Y. S. R. 379, 28 N. Y. Supp. 605.

In the above case, Reubens v. Ludgate Hill S. S. Co. 21 Abb. N. C. 464, 2 N. Y. Supp. 30, *infra*, XII. a, was distinguished on the ground that while there negligence was generally averred here charges are stated in general terms, and the complaint continues with a more specific statement of fact, which definitely states the various charges made, including the respect in which the defendants were negligent and wanting in their duty.

And the indefiniteness or uncertainty of an allegation of negligence to be relieved against on motion is only such as appears on the face of the pleading itself, and not one arising from extrinsic facts as to which particular evidence may be produced in support of it. Lee v. Minneapolis & St. L. R. Co. 34 Minn. 225, 25 N. W. 399.

And a complaint in an action for damages for alleged negligence will not be required to be made more definite and certain by stating the particular acts and things constituting the alleged negligence, where it distinctly appears that the plaintiff is without definite knowledge sufficient to enable him to set out more particularly the specific acts of negligence contributing to the injury, and that these are matters particularly within the specific knowledge of the defendant. Cederson v. Oregon Nav. Co. 38 Or. 343, 62 Pac. 637, 63 Pac. 763; Cunningham v. Los Angeles R. Co. 115 Cal. 561, 47 Pac. 452.

In Cederson v. Oregon Nav. Co. 38 Or. 343, 62 Pac. 637, 63 Pac. 763, *supra*, Knahtla v. Oregon Short Line & U. N. R. Co. 21 Or. 136, 27 Pac. 91, *infra*, XII. b, 2, (b), was distinguished upon the ground that it is probable that the language in that case was used with reference to a general statement of negligence without stating an act or omission with the qualification that it was negligently or carelessly done.

Upon a motion to make a pleading in an action for negligence more definite and certain, it is for the court to consider whether the pleader has been as definite and certain as in the nature of the case could reasonably be expected of him, and, to warrant a reversal, on appeal, of an order denying such a motion, it must be made very clear that the court below erred in the exercise of an authority to some extent discretionary. Orth v. St. Paul, M. & M. R. Co. 43 Minn. 208, 45 N. W. 151; Fraker v. St. Paul, M. & M. R. Co. 30 Minn. 103, 14 N. W. 366.

But where the allegations of a pleading in an action for negligence are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, and a motion is made to require such pleading to be made definite and certain, it is not a mere matter of discretion, under Ohio Rev. Stat. § 5088, providing that when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent the court may require the pleading to be made definite and certain by amendment, but is a matter of substantial right. New York, C. & St. L. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130.

Unless a motion to make a complaint in an action for negligence more specific ought to be sustained in the form in which it is made, however, there can be no available error in overruling it. Chicago & E. R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033.

And error cannot be predicated, in an action for negligence, on a refusal to require the pleading of the opposite party to be made more definite and certain where prejudice has not resulted from the ruling. Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359.

And where it is claimed that for the overruling of a motion to make a complaint in an action for negligence more specific, the judgment rendered upon a verdict on the trial of an issue formed on that pleading should be reversed, it should appear to be reasonably probable that the defendant was deprived, to his prejudice, of some material and specific information which he clearly demanded by his motion. Chicago & E. R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033.

Under a statutory provision for a bill of particulars, where a general allegation in a complaint is sufficient to make a good cause of action, the court cannot compel the allegation of specific facts leading to the general conclusions alleged in the complaint. That office is served by a bill of particulars, by which a party, in a proper case, is apprised of the particular facts which the plaintiff will seek to prove. Jackman v. Lord, 56 Hun, 193, 9 N. Y. Supp. 200.

But a statement of the particulars in an action for negligence cannot be required where the declaration gives the grounds of action and particulars of claim with sufficient definiteness to give the defendant notice thereof. It can

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be demanded only when the declaration is so general as not to apprise the defendant of the real cause of action. If the declaration cannot be thus general consistently with law, demurrer is the remedy, and not a statement of particulars, and a statement of particulars should contain the grounds of the action, and not the evidence. Clarke v. Ohio River R. Co. 39 W. Va. 732, 20 S. E. 696.

c. *By objection after issue joined.*

There is a well-recognized difference between objections in an action for negligence made to a petition by motion or demurrer and objections made to it for the first time upon trial; and in the latter case, if the petition states any cause of action, it should be upheld, although it might have been properly adjudged insufficient upon demurrer or motion. Benham v. Taylor, 66 Mo. App. 308.

Generality in a charge of negligence is not a fatal objection after answer. Foster v. Missouri P. R. Co. 115 Mo. 165, 21 S. W. 916.

If a defendant in an action for negligence pleads to the merits, he thereby waives objections to mere formal defects in the petition, such as a failure to allege notice of the obstruction which caused the injury in question, or to allege facts or circumstances from which notice might be inferred, and will not be heard on the trial to object that the petition does not state a cause of action. Such an objection can only be interposed at the trial where the petition fails altogether to state any cause of action, and not where a cause of action is merely defectively stated. Hurst v. Ash Grove, 96 Mo. 168, 9 S. W. 631.

And while a petition in an action for negligence stating no particular act of negligence might be demurrable, it would be good after verdict if not thus objected to. Dougherty v. Missouri P. R. Co. 9 Mo. App. 478.

And if a material matter in an action for negligence, such as notice of an obstruction which caused the injury, be not expressly averred in the petition, but is necessarily implied from what is expressly stated therein, the defect is cured by verdict in favor of the party so pleading, on the presumption that he has proved on the trial the facts insufficiently averred. Hurst v. Ash Grove, 96 Mo. 168, 9 S. W. 631.

And a declaration in an action for alleged negligence, which does not set forth or allege any duty of the defendant toward the plaintiff, but avers certain acts which it charges were negligent, though defective, on special demurrer after verdict will be considered as having averred it to have been the duty of the defendant to observe due care in those respects wherein the acts of the defendant are charged as negligent. Fox v. Spring Lake Iron Co. 89 Mich. 387, 50 N. W. 872.

So, a complaint in an action for negligence which is good as against a demurrer is also good after judgment to withstand a motion in arrest. Ohio & M. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479.

And the objection in an action for damages for negligence that the facts are not stated with that certainty and definiteness which good pleading requires should be taken by special demurrer or motion to make the pleading more definite and certain; and where a proper demurrer is not filed, and no motion is made before trial, and no objection to the introduction of testimony is made on those grounds, the objection is waived, and the defendant cannot be heard to urge it after judgment for the purpose of defeating the action. Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 534, 50 Pac. 834.

Where negligence is alleged in general terms it is sufficient to withstand the objection made after verdict and judgment that the pleading is indefinite, uncertain, imperfect, or ambiguous however inartificially facts may be stated. *Ibid.*

Likewise, an objection that a declaration charges negligence in general terms without stating specific acts or omissions should be taken before trial by demurrer; it is too late to urge it for the first time on appeal or error. Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 425.

A failure in a complaint in an action for personal injury to allege negligence with sufficient particularity cannot be urged as a ground for reversal, where no demurrer was filed, and the insufficiency was such that it might have been cured by amendment. Hobson v. New Mexico & A. R. Co. (Ariz.) 11 Pac. 545.

But if a petition in an action for negligence fails to state the facts essential to the maintenance of the action, or the averments are so uncertain in character that it cannot well be determined whether they are or are not stated, the action may be dismissed, although objection be not taken by demurrer, since in such case no ground for relief is presented. Depp v. Louisville & N. R. Co. 12 Ky. L. Rep. 366, 14 S. W. 363.

And a declaration which is defective in alleging a duty, without stating the facts necessary to raise the duty, is not cured by verdict. McCune v. Norwich City Gas Co. 30 Conn. 521, 79 Am. Dec. 278; Funk v. Piper, 50 Ill. App. 163.

IX. *The rule as affected by accompanying allegation of facts.*

The general rule is that when a petition in an action for damages for alleged negligence alleges that the injury was the result of negligence, and then continues to set up the specific acts of negligence relied upon, it will be confined to those acts, and the general allegation of negligence will be controlled by the specific acts of negligence averred. Gulf, C. & S. F. R. Co. v. Younger, 10 Tex. Civ. App. 141, 29 S. W. 948; McManamee v. Missouri P. R. Co. 135 Mo. 440, 37 S. W. 119; East Tennessee Coal Co. v. Daniel, 100 Tenn. 65, 42 S. W. 1062.

And the pleader will be confined in his proofs within the limits of his specifications of particular acts. Lachner Bros. v. Adams Exp. Co. 72 Mo. App. 13; Ravenscraft v. Missouri P. R. Co. 27 Mo. App. 617; Omaha & R. Valley R. Co. v. Wright, 49 Neb. 456, 68 N. W. 618; Snyder v. Wheeler Electrical Co. 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733.

And where the particular facts stated in a declaration in an action for negligence do not raise a duty from the defendant to the plaintiff, it cannot be established by other facts not stated. The declaration must stand or fall by the facts stated. Breese v. Trenton Horse R. Co. 52 N. J. L. 230, 19 Atl. 204; Kennedy v. Morgan, 57 Vt. 46.

And it is the duty of the court, in instructing in actions for negligence, to confine the jury to the consideration of the specific grounds of negligence alleged in the petition. Jacquin v. Grand Ave. Cable Co. 57 Mo. App. 320.

A plaintiff in an action for damages for negligence cannot allege negligence in one particular, and on the trial prove and recover upon another. Where the complaint specifies the particular act of negligence relied on, the trial

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must be had on that issue. Lieuallen v. Mosgrove, 33 Or. 282, 54 Pac. 200, 664.

But while the above rule is stated to be the general one, and may be supported by a preponderance of authority, it is by no means universal, the opposite doctrine having been asserted by a number of courts of unquestioned authority and weight.

Thus, in Cunningham v. Union P. R. Co. 4 Utah, 206, 7 Pac. 795, it was held that under a general allegation of negligence the circumstances constituting it may be proved, even though other circumstances particularly specified in the complaint are unproved.

And Traver v. Spokane Street R. Co. 25 Wash. 225, 65 Pac. 284, holds that the rule that where there is a special allegation of negligence, followed by an enumeration and averment of specific acts, the plaintiff is confined to the acts so specified, does not apply under the liberal system of pleadings in Washington, unless the complaint clearly indicates that it was the intention of the pleader to limit the negligence to the specific acts.

So, in Edgerton v. New York & H. R. Co. 39 N. Y. 227, it was held that where the complaint in an action for damages for negligence contains a general averment that the injury was received through the negligence of the defendant and its employees, it is immaterial whether the proofs establish the particular negligence specified in the complaint, some negligence being shown.

And a complaint in an action for negligence stating various things which it alleges the defendant negligently and carelessly did or omitted to do, and which caused the injury complained of, was held in Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565, to be sufficient to support evidence of any facts or circumstances not inconsistent with the particular facts alleged in the complaint which would tend to prove the charge of negligence.

And in Drefahl v. Connell, 85 Wis. 109, 55 N. W. 160, it was held that where a complaint states a good and complete cause of action as to certain failures of duty on the part of the defendant, a general demurrer will not be sustained merely because it attempts, but fails, to state other failures of duty on the defendant's part.

The line of distinction between the two classes of cases is probably found in Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688, holding that a general allegation in a complaint in an action for negligence that an act was negligently done is not superseded or rendered nugatory by a further statement therein of specific facts which do not affirmatively show that there was no cause of action.

On this subject, see also McManamee v. Missouri P. R. Co. 135 Mo. 440, 37 S. W. 119, *infra*, X. b, 3, (a); Gulf, C. & S. F. R. Co. v. Younger, 10 Tex. Civ. App. 141, 29 S. W. 948, *infra*, X. b, 3, (b); Gulf, C. & S. F. R. Co. v. Scott (Tex. Civ. App.) 27 S. W. 827; Otto v. St. Louis, I. M. & S. R. Co. 12 Mo. App. 168, *infra*, X. b, 3, (c); East Line & R. River R. Co. v. Brinker, 68 Tex. 502, 3 S. W. 99; Chattanooga Rapid Transit Co. v. Walton, 105 Tenn. 415, 58 S. W. 737, *infra*, X. b, 4; McCerrin v. Alabama & V. R. Co. 72 Miss. 1013, 18 So. 420, *infra*, X. b, 5; Stanton v. Louisville & N. R. Co. 91 Ala. 382, 8 So. 798, *infra*, X. c, 3; Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680, Affirming 70 Ill. App. 550, *infra*, XII. b, 2, (c); Missouri, K. & T. R. Co. v. Vance (Tex. Civ. App.) 41 S. W. 167, *infra*, XII. b, 2. (d); Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688, *infra*, XIV. c, 1; Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514, *infra*, XIV. e, 2, (b); Fraker v. St. Paul, M. & M. R. Co. 30 Minn. 103, 14 N. W. 366, *infra*, XIV, f, 1; Schmidt v. Kansas City Distilling Co. 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 856, 2 S. W. 417, XIX.

X. *Application of rules to negligence of ordinary railroads.*

a. *Generally.*

The foregoing general rules are particularly applicable to the averment of negligence in actions against ordinary railroad companies, such actions being the ones in which a large proportion of such general rules have been asserted.

Thus, under a general allegation of negligence in the performance of an act causing an injury in an action against a railroad company, the plaintiff has the right to show any negligence of the company which contributed to produce the injury complained of. Braxton v. Hannibal & St. J. R. Co. 77 Mo. 455; Edgerton v. New York & H. R. Co. 35 Barb. 389, Affirmed in 39 N. Y. 229.

And other allegations which are mere surplusage will not have the effect of excluding the facts from the consideration of the court or jury. Edgerton v. New York & H. R. Co. 35 Barb. 389, Affirmed in 39 N. Y. 229.

And a general allegation of negligence and want of skill, and imprudence of persons in the service of defendant, in an action against a railroad company, is not limited by the cause of the accident assigned in the petition so as to warrant disturbance of the verdict of a jury therein, where uncertainty exists as to the cause, and the testimony of witnesses is conflicting. Carmanty v. Mexican Gulf R. Co. 5 La. Ann. 703.

And a general allegation in a petition in an action against a railroad company of negligence in running and managing one of its trains is not too indefinite to warrant a recovery. Otto v. St. Louis, I. M. & S. R. Co. 12 Mo. App. 168.

In the above case, Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514, *infra*, XIV. d, 2, was explained and distinguished, it being said that the petition in that case contained the specific fact constituting the negligence which caused the damage, but the ground of reversal was a variance between the allegation and the proof as elucidated by an instruction to the jury; and it was also said that if this be a binding authority for the general proposition that the general allegation of negligence is too indefinite to warrant a recovery, then the later decision of Edens v. Hannibal & St. J. R. Co. 72 Mo. 212, is an authority to the contrary, since there the petition contains only a general charge of negligence in running the cars, without any specified act or omission in which this negligence was shown; and the court reversed the judgment because of a variance between the allegations and the proofs, but gave no hint of any objection to the framing of the petition.

An allegation in a declaration in an action against a railroad company that it was the duty of the defendant to place a car at a derrick to be loaded by plaintiffs and other employees of an ice company with which it had contracted for a supply of ice, however, is defective, in the absence of any statement as to how such duty arose, the mere statement that it was the duty of the defendant being a conclusion only. Baker v. Louisville & N. Terminal R. Co. 106 Tenn. 490, 53 L. R. A. 474, 61 S. W. 1029.

b. *In case of injury to persons.*

1. *General allegations as to.*

The rule that a declaration, petition, or com-

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plaint must be such as to apprise the defendant of the facts upon which the claim against him is based is particularly applicable to a charge of negligence causing injury to the person.

Thus, a declaration in an action against a railroad company for damages for the death of plaintiff's intestate amounting to an averment simply that plaintiff's intestate was injured by the negligence of the defendant in the operation of its business in using and employing its engines and cars on its railway, not showing whether he was a passenger or an employee or a stranger, or in what manner he was injured, is bad as not showing the facts constituting the cause of action so that they may be understood by the party who is to answer them. Baltimore & O. R. Co. v. Whittington, 30 Gratt. 805; Ensley v. Chewning, 93 Ala. 24, 9 So. 458; Chicago, B. & Q R. Co. v. Harwood, 90 Ill. 425.

And a complaint in an action for a personal injury causing death, against the receiver of a railroad company operating its railroad, alleging that the plaintiff's intestate was killed by being struck with an iron rail through and by the negligence and default of the defendant and his agents and employees, is insufficient as alleging negligence in such general terms as to amount to the mere statement of a conclusion of law. Duval v. Hunt, 34 Fla. 85, 15 So. 878.

So, a petition in an action against a railroad company, alleging that the defendant negligently ran its cars across, against, and over plaintiff, will be required, on motion, to be made more definite and certain by stating in what the negligence consisted. Tuchochi v. Cincinnati Street R. Co. 7 Ohio N. P. 276.

And a complaint in such an action for a personal injury causing death, averring that the defendant by its agents and servants negligently ran over and killed plaintiff's intestate, does not sufficiently aver that the death was caused by the negligence and carelessness of the employees of the railroad company; the particular acts constituting such negligence should be stated. Indianapolis, P. & C. R. Co. v. Keely, 23 Ind. 133.

A declaration alleging that the defendant wrongfully and negligently ran its engine and cars upon and against plaintiff's intestate, causing his death, however, sufficiently gives notice that defendant had been guilty of negligence, and requires it to come prepared to show that it had neither done, nor omitted to do, any act which the law regards as negligence, and evidence that statutory provisions were not complied with is not irrelevant and incompetent, except so far as it might indicate negligence independent of the statute. East Tennessee, V. & G. R. Co. v. Pratt, 85 Tenn. 9, 1 S. W. 618.

And a declaration charging that the defendant company wrongfully, carelessly, and negligently ran its cars and engine upon and against the deceased, plaintiff's intestate, thereby causing his death, is good on demurrer, though the facts constituting the negligence are not alleged. Illinois C. R. Co. v. Davis, 104 Tenn. 442, 58 S. W. 296; Chattanooga Rapid Transit Co. v. Walton, 105 Tenn. 415, 58 S. W. 737; Norfolk & W. R. Co. v. Harman, 83 Va. 553, 8 S. E. 251; Murphy v. New York & N. H. R. Co. 30 Conn. 184.

But while a complaint in an action against a railroad company, alleging that the defendant wrongfully, negligently, and carelessly ran its engine against and over the person of the plaintiff's testator, sufficiently alleges negligence on the part of the defendant abstractly considered, it does not present a cause of action where there is nothing to show whether the plaintiff was rightfully or wrongfully on the track. Montgomery v. Alabama G. S. R. Co. 97 Ala. 305, 12 So. 170.

So, a declaration in an action against a railroad company, alleging that by the careless running of its cars the defendant ran over, mutilated, and killed plaintiff's husband without any carelessness or fault on his part, but entirely by the negligence of the agents of the defendant in running its cars, though too general, embraces a cause of action, and is amendable so as to explain more specifically and with greater particularity the mode in which the killing was done. Central R. & Bkg. Co. v. Kitchens, 83 Ga. 83, 9 S. E. 827; Central R. & Bkg. Co. v. Denson, 83 Ga. 266, 9 S. E. 788.

And a declaration in such an action, for a death alleged to have been caused by the negligent running of the defendant's locomotive and cars, is not demurrable on the ground that it did not allege what particular train, car, engine, or machinery struck the person killed, or in what direction the train was running, or at what hour the accident occurred, or specify the particular acts of carelessness of the defendant, and how and in what manner its locomotive, cars, and machinery were negligently and carelessly run. Sims v. Western & A. R. Co. 111 Ga. 820, 35 S. E. 696.

And a complaint in such an action alleging that the defendant so negligently managed its road that the employees of the company running a locomotive on said road wilfully and purposely and without any regard to the life or rights of the plaintiff, with great force and violence, ran against him without any fault on his part, by reason whereof one of his legs was broken, is clearly sufficient. Terre Haute & I. R. Co. v. Graham, 46 Ind. 239.

So, a complaint in such an action for the alleged negligent causing of the death of a child, averring that the death was caused by the negligence and fault of the defendant, its agents and servants, authorizes evidence of the defendant's neglect or misconduct tending to produce the injury, without a more particular statement. Oldfield v. New York & H. R. Co. 14 N. Y. 310.

2. *On right of way.*

As a general rule a person injured or killed upon the right of way of a railroad, not at a crossing, will be supposed to have been a trespasser to whom the railroad company owed no duty, in the absence of anything to show the contrary; and an averment in an action for such an injury must not be so general as to fail to show that he was rightfully there.

Thus, a complaint in an action for damages for the alleged negligent killing of plaintiff's intestate by a railroad company, merely alleging that plaintiff's intestate was going to his home walking upon the defendant's track, and that he was, by the negligence of the defendant and its servants, in that it failed to give any notice of its approach, run over by defendant's locomotive and killed, is bad on demurrer. Fulp v. Roanoke & S. R. Co. 114 N. C. 697, 19 S. E. 362.

So, a petition in an action by a father and mother against a railroad company, for causing the death of their minor son, who was crushed beneath a car wheel while standing under one of a long train of freight cars on defendant's track, alleging that the defendant kept trains of cars standing on side tracks for the purpose of having them loaded with and unloaded of ice, and that children were attracted there for the purpose of gathering up small pieces of ice, is bad on demurrer in the absence of any averment that the defendant loaded or unloaded such cars or had any hand

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in such loading or unloading, and charging that the cars were being loaded or unloaded in a negligent manner, and how long the son of plaintiffs had been under the car before the car began to move. Rushenberg v. St. Louis, I. M. & S. R. Co. 109 Mo. 112, 19 S. W. 216.

And where a complaint does not show whether the person injured was a passenger, an employee, or a mere trespasser, it will be presumed that he was a trespasser, who can only recover for injuries caused by reckless, wanton, or intentional negligence, and such negligence must be alleged, or must appear from the facts stated. Ensley R. Co. v. Chewning, 93 Ala. 24, 9 So. 458.

In the above case Alabama & F. R. Co. v. Waller, 98 Ala. 459, *infra*, XII. b, 2, (d), was criticised and explained, the court saying that the ruling in that case, that the complaint contained proper statements of facts, was based on the erroneous principle that the collision causing the injury itself and the consequent death of the plaintiff's intestate were facts sufficient to necessitate a presumption of negligence for which the defendant was responsible.

But where the complaint avers that the plaintiff was on the railroad track of the defendant at the instance and request of defendant, a duty to exercise reasonable care and precaution to avoid injuring him springs from that fact; and, that fact being stated, a general averment in addition thereto that the defendant negligently ran over and injured him with one of its engines is sufficient. Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145.

And a petition in an action against a railroad company by a widow for the killing of her husband, charging that the husband was on defendant's railroad tracks by license, and while there, by carelessness and negligence of the defendant, its officers, agents, servants, and employees while running and managing certain cars, was run over by two of such cars, which were carelessly, negligently, and unskilfully conducted and managed, whereby he was killed, is sufficient. Le May v. Missouri P. R. Co. 105 Mo. 361, 16 S. W. 1049.

And a complaint in an action by a child six years of age alleging that plaintiff was rightfully at the defendant's depot, and that the defendant, by its servants and employees, so carelessly, negligently, unskilfully, and improperly moved and governed one of its freight trains that by and through such carelessness and negligence some of its freight cars attached to the locomotive of said freight train were driven upon and against the plaintiff injuring him, avers negligence on the part of the defendant with sufficient certainty. Mobile & M. R. Co. v. Crenshaw, 65 Ala. 566.

So, where a declaration in an action for damages for alleged negligence sets forth when, where, in what manner, and under what circumstances the plaintiff was injured by the default, negligence, and improper conduct of the defendant's servants, it is unnecessary to show in what capacity the plaintiff was upon the premises of the defendant when injured,—whether as trespasser, licensee, or employee. Richmond Locomotive & Mach. Works v. Ford, 94 Va. 627, 27 S. E. 509.

Nor need a complaint in an action against a railroad company for injuries to a person who, while walking on a track, was struck by a train coming from behind, alleging that for more than five years the track had been constantly and notoriously used as a public footway by the acquiescence and permission of the defendant, allege the facts and circumstances connected with the use of the track as a passway, making the operation of the train in question 59 L. R. A.

negligence. Connell v. Chesapeake & O. R. Co. 22 Ky. L. Rep. 501, 58 S. W. 374.

And a petition in such an action, by a person employed by a third party to unload a car, charging that his injury was caused by the defendant's servants in negligently propelling the car in which he was, against another car with great force, thereby causing freight to fall on him, is sufficient on demurrer as well as after verdict. Clay v. Chicago & A. R. Co. 17 Mo. App. 629.

So, a petition in an action against a railroad company, alleging that, as the plaintiff was walking down the railroad track along a certain street, which street and track were commonly and necessarily used by the public in reaching their homes and places of business, the defendant negligently made a drop switch with two cars on a down grade without warning, and sent the two cars down the grade almost noiselessly, by reason of which negligence plaintiff was run over, is good on general demurrer, though it may be that if special exceptions had been interposed on account of the generality of the averments as to the necessity of the use of the track by passengers along the street, and as to the absence of negligence on the part of the plaintiff, they would have been sustained. Lewis v. Galveston, H. & S. A. R. Co. 73 Tex. 504, 11 S. W. 528.

And in Seabord & R. R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773, it was held that a declaration in an action against a railroad company for damages for the killing of plaintiff's intestate, charging that said intestate sat down on the track, and that the defendant company negligently ran its engine upon him, being then and there constantly, clearly, and plainly within seeing distance of the employees of the company who were in charge of the engine, is not bad on demurrer.

8. *At crossings.*

(a) *General allegations as to.*

The rule has been laid down that exceptions to the doctrine that in charging negligence the particular acts or omissions constituting the negligence must be charged do not embrace the case of a collision at a crossing between a railroad train and a traveler on the highway. Wilson v. New York, N. H. & H. R. Co. 18 R. I. 491, 29 Atl. 258.

And it has been held that while some courts have assumed it, the general doctrine is not that any damage done, or any collision between a train and things on the railroad track, is presumably a trespass, so that an allegation of it amounts to an allegation of wrong which requires a defense by way of justification. Schindler v. Milwaukee, L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911.

Within this rule, it is not enough, in an action against a railroad company for damages for injuries caused by a collision at a public crossing, to point out the result which ensued from the collision, and show that it was attributable to the running of a train across a street; it must also be shown that there was something improper in the manner of running the train before the defendant can be held responsible for the consequences. Wilds v. Hudson River R. Co. 29 N. Y. 315.

And a complaint in such an action merely averring that the defendant negligently struck a sleigh at a railroad crossing, the driver not being in fault, thereby injuring the plaintiff, is not good in the absence of anything to show negligence or improper action on the part of the

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defendant. Schindler v. Milwaukee, L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911.

And a general allegation in an action against a railroad company that plaintiff's husband was run over and killed through the negligence, carelessness, and unskilfulness of defendant's agents and servants in charge of an engine and cars while conducting and managing the same will not support a recovery based on common-law negligence, where it also specifically alleged negligence in the violation of several city ordinances, since in such case the plaintiff will be limited and restricted to the truth of the specific negligence alleged. McManamee v. Missouri P. R. Co. 135 Mo. 440, 37 S. W. 119.

The bare allegation of the injury, and that it was caused by the negligence of the defendant, however, has been held to be sufficient, probably upon the theory that since a person at a crossing cannot be deemed a trespasser the railroad company owed him a duty of caution to avoid injuring him and the general allegation of negligence would be equivalent to an allegation of a breach of such duty.

Thus, a petition in an action against a railroad company by a mother for the killing of her son, alleging that without negligence on his part deceased was struck by a passing train and killed, and that the death was caused by the negligence of the defendant, states a good cause of action. Missouri P. R. Co. v. Lee, 70 Tex. 496, 7 S. W. 857.

So, a declaration in such an action, alleging that the plaintiff's husband was killed by the running of the defendant's locomotives, cars, and other machinery, and that his death was the result of no negligence on his part, but was due to the negligence of the defendant in failing to use any of the precautions required of railroad companies at public crossings, and to use reasonable care to prevent injury to persons crossing at such crossings, is sufficient to support an amendment during the progress of the trial so as to adapt the pleading to the evidence in all its aspects. Harris v. Central R. & Bkg. Co. 78 Ga. 525, 3 S. E. 355.

And an averment in such an action for an injury to plaintiff's wife, by being struck by a locomotive at a crossing, that the injury was sustained upon defendant's road from cars managed by its servants, and that it was the result of negligence and want of proper care on the part of the defendant and those in its employ, is not subject to demurrer on the ground that the declaration should have averred upon what road the injury was sustained, so that it might appear upon the record what franchise the defendant was exercising, to what duty it was subject, and to what privileges it was entitled, where the action does not purport to be founded upon the special provisions of any act of incorporation, or upon any statute imposing special duties or obligations upon the owner or manager of the railroad, since the defendant is liable upon common-law principles independent of statute. Austin v. New York & E. R. Co. 25 N. J. L. 381.

So, a petition in an action against a railroad company alleging that plaintiff's intestate was killed by the employees of defendant carelessly and negligently causing a train of its cars to be run over him, and that he was not at the time an employee of the defendant, is sufficient, under Ky. act 1854, § 1. It is not necessary, and would not be proper, to state therein, in detail, the circumstances from which negligence or carelessness might be inferred. Louisville, C. & L. R. Co. v. Case, 9 Bush, 728.

And the plaintiff in an action for damages for personal injuries caused by a collision of the defendant's railroad train with a coal cart he was driving need not state in his petition that the injury was caused by the gross neglect of the defendant's servants or agents; an allegation of ordinary neglect being sufficient to enable him to recover compensatory damages. Ramsey v. Louisville, C. & L. R. Co. 89 Ky. 99, 20 S. W. 162.

(b) *Allegations as to negligent management.*

The general rule is that a declaration, petition, or complaint in an action against a railroad company alleging that the defendant so negligently, wantonly, and unlawfully ran and managed one of its trains of cars, or a locomotive, that the same ran into, against, over, and upon the plaintiff, or his intestate, as the case may be, as he was attempting to cross the track at a crossing, thereby injuring or killing him, sufficiently avers the negligence of the defendant. St. Louis & S. E. R. Co. v. Mathias, 50 Ind. 65; Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Chicago & A. R. Co. v. Redmond, 70 Ill. App. 119; Clark v. Chicago, M. & St. P. R. Co. 28 Minn. 69, 9 N. W. 75; Goldrick v. Union R. Co. 20 R. I. 128, 37 Atl. 635; Shaw v. Missouri P. R. Co. 104 Mo. 648, 16 S. W. 823.

And that it is good on demurrer. Goldrick v. Union R. Co. 20 R. I. 128, 37 Atl. 635; Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Clark v. Chicago, M. & St. P. R. Co. 28 Minn. 69, 9 N. W. 75.

The particular acts of negligence need not be alleged, but may be given in evidence. Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 43 N. E. 218; Clark v. Chicago, M. & St. P. R. Co. 28 Minn. 69, 9 N. W. 75; Chicago & A. R. Co. v. Redmond, 70 Ill. App. 119.

Thus, where a complaint in an action against a railroad company for personal injury causing death of the intestate avers that the intestate was killed at a public crossing, a duty on the part of the defendant is shown to exercise care in conservation of her safety; and an additional averment that the defendant's agents and servants so negligently and carelessly conducted themselves in the management of an engine and train of cars that the engine was caused to run against plaintiff's intestate at such crossing, though general, is sufficiently broad to cover the negligence of the engineer in failing to use all the means at his command, after discovering the peril of the intestate, to stop his train before reaching her, or to lessen its speed so as to afford her opportunity to get off the track. Central R. Co. v. Foshee, 125 Ala. 199, 27 So. 1006.

And an allegation in such an action for an injury to plaintiff, caused by a collision between one of defendant's engines and plaintiff's wagon, that the injuries inflicted were solely attributable to the negligence of the defendant, its servants and agents, in the manner in which said engines and cars were managed and moved, is a substantive, independent averment, and broad enough to admit evidence that the agents of defendant in charge of the colliding engine discovered plaintiff's peril in time to have avoided the injury, and failed to do so. Dickson v. Missouri P. R. Co. 104 Mo. 491, 16 S. W. 381.

And an allegation in a complaint for running over and killing two boys who were attempting to cross the defendant's track on a public highway, that the train was running at a high and dangerous rate of speed at the time of the accident, warrants proof, on the trial, of the speed at which the train was running at the

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time the boys were killed. Illinois C. R. Co. v. Slater, 129 Ill. 91, 6 L. R. A. 418, 21 N. E. 575, Affirming 28 Ill. App. 73.

So, a complaint in an action by a passenger upon a street car, against a railroad company whose track crossed the street-car track, who at the point of intersection was injured by jumping from the car under the impression that a locomotive on the railway was about to collide with it, alleging that the engineer of the defendant's engine negligently and carelessly commenced to back the locomotive upon the track toward the street car, and that the plaintiff, observing the proximity of said engine and that it was rapidly approaching, jumped from the street car and fell and was injured, sufficiently states a cause of action, and is good, except as against a special demurrer. Stephenson v. Southern P. Co. 102 Cal. 143, 34 Pac. 618, 36 Pac. 407.

And a complaint or petition in an action against a railroad company, charging that the defendant unskilfully, carelessly, and negligently managed one of its locomotives with a train of cars so as to strike, knock down, and run over the plaintiff or his intestate at a point where the railroad crosses a public road, is sufficient, in the absence of a motion to make it more definite and certain, to warrant the introduction of any competent evidence tending to show negligence on the part of the defendant in the management of its locomotive and train by which the plaintiff suffered the alleged injury. Spires v. South Bound R. Co. 47 S. C. 28, 24 S. E. 992; St. Louis, A. & T. R. Co. v. Taylor, 5 Tex. Civ. App. 668, 24 S. W. 975.

And a complaint in such an action charging that the defendant ran its train of cars and locomotive at the careless and unusual speed of 50 miles an hour across a street in a designated city, where a great many persons were constantly passing and crossing, and that those in charge of the train made no effort to check or stop the same, but ran it at that speed upon the plaintiff and injured her, is sufficiently specific to enable a proper defense to be made, and will not be required to be made more so on motion on the principle that it does not charge that the defendant's servants saw the plaintiff or might have seen her, or that they knew or might have known that people were passing over the crossing, or that it was a populous part of the city. Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

A charge of negligence in a petition in an action against a railroad company for personal injuries received in a collision at a crossing, however, that the defendant negligently approached and crossed the highway with its locomotive and train of cars at a high and dangerous rate of speed, and negligently operated its locomotive and train of cars, gives no definite or certain notice to the company as to what acts of commission or omission claimed to be negligent would be attempted to be proved or relied upon at the trial; and therefore the petition should be required, on motion, to be made more definite and certain by stating the acts of commission and omission claimed to have caused the injury. New York, C. & St. L. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130.

And a petition in such an action for the killing of plaintiff's wife in a collision at a crossing where plaintiff's wife was attempting to cross the railroad in a buggy, alleging that the collision was caused by the negligence of the defendant in operating its trains, which then continues to set out in detail the acts of negligence relied upon as the basis of recovery, is insufficient, where no fact is set up or averred tending to show that the defendant could have avoided the collision by the exercise of proper care after the discovery of the dangerous situation of plaintiff's wife. Gulf, C. & S. F. R. Co. v. Younger, 10 Tex. Civ. App. 141, 29 S. W. 948.

In the above case, St. Louis, A. & T. R. Co. v. Taylor, 5 Tex. Civ. App. 668, 24 S. W. 976, *supra*, was distinguished upon the ground that in that case there was no specific ground of negligence alleged.

(c) *Allegations as to omission of signals.*

An allegation of the negligent omission by a railroad company, on the approach of a train to a crossing, of a statutory signal, is a sufficient statement of a specific act of negligence. Chicago & N. E. R. Co. v. Miller, 46 Mich. 532, 9 N. W. 841.

Thus, a declaration in an action against a railroad company that at a designated time and place the defendant carelessly and negligently drove a certain locomotive upon its railroad up to and across a certain public highway at its intersection with the railroad, without giving the necessary statutory signals, whereby plaintiff was injured, is not defective in not averring specifically the negligence which caused the injury. Chicago & N. E. R. Co. v. Miller, 46 Mich. 532, 9 N. W. 841.

And a complaint in such an action, alleging that while the person injured was passing the track of said road with necessary care at the usual and known place of crossing the defendant with carelessness and gross negligence, and without giving any warning whatever, caused one of its engines to run upon said track with great speed and without any signal whatever, and by reason of such carelessness and negligence it came into collision with plaintiff's carriage without any fault on his part, is not demurrable for not sufficiently charging negligence. Ohio & M. R. Co. v. Davis, 23 Ind. 553, 85 Am. Dec. 477; Pittsburgh, C. & St. L. R. Co. v. Martin, 82 Ind. 476.

And a complaint, alleging that the defendant so negligently managed its road that employees running a locomotive and train of cars ran the locomotive, without giving the plaintiff any warning of its approach, negligently against him, by means whereof one of his legs was broken, states a good cause of action. Terre Haute & I. R. Co. v. Graham, 46 Ind. 239.

And an averment that the death of plaintiff's intestate was caused by the running of the cars of the defendant at a designated time, and by the failure and neglect of the defendant to give the signals required by the statute of the state to be given at street crossings and other places, and by carelessly and negligently running said train of cars at a high rate of speed that was careless and negligent and forbidden by statute, charges that the company neglected some signal it was required to give by statute, and ran its train at a rate of speed so high as to constitute negligence. Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 433, 2 N. W. 795.

So, a complaint in an action against a railroad company for damages caused by a collision, alleging that as the plaintiff reached the crossing the defendant negligently caused one of its locomotives with a train of cars attached to approach said crossing and pass at a great and unusual rate of speed, negligently and carelessly omitting, while approaching, to give any reasonable or timely signal by ringing the bell or sounding the whistle at a reasonable and proper distance from the crossing, by reason of which said negligence and carelessness the locomotive struck the plaintiff's wagon on such

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crossing, is sufficiently specific as against a motion that the complaint be made more specific by stating in what the negligence and carelessness complained of consisted. Pittsburgh, C. & St. L. R. Co. v. Martin, 82 Ind. 476.

And a complaint in such an action for negligently killing plaintiff's intestate at a highway crossing, alleging that the highway approached the track from the north through a deep cut, so that a person approaching the track thereon from the north was unable for a long distance immediately before reaching the same to see the track or a train thereon coming from the west until the track was reached, and that the defendant, negligently running one of its trains from the west, and negligently omitting to blow any whistle or ring any bell, ran over and killed plaintiff's intestate, fairly advises the defendant of the facts constituting the cause of action, and will not be required, on motion, to be made more definite and certain by specifying for what distance north of such track the view of a train coming from the west was obscured to a person approaching such track on said highway from the north, and the direction from which the intestate was approaching at the time of the injury. Schneider v. Wisconsin C. R. Co. 81 Wis. 356, 51 N. W. 582.

But a complaint in an action against a railroad company for damages caused by a collision between a locomotive and the plaintiff and his horse and carriage, alleging that the defendant negligently caused one of its locomotives operated by its servants and agents to rapidly approach the crossing along its said track without having the headlight lighted in the locomotive, and without giving any reasonable, timely, or proper warning, charges negligence only in the rapid approach of the locomotive toward the crossing, and is insufficient on demurrer, in the absence of any charge of negligence in crossing over the crossing where the injury took place. Pittsburgh, C. & St. L. R. Co. v. Conn, 104 Ind. 64, 3 N. E. 636.

And a complaint in such an action alleging that, as plaintiff was driving along the highway and approached the railroad crossing, and was proceeding to cross the track at the point of intersection, the defendant caused one of its locomotives, with a train of cars attached, to pass rapidly along said railroad track and over said crossing, and in so doing negligently and carelessly omitted to give any signal of its approach, and negligently and carelessly ran against and upon plaintiff and his horse and wagon, and that the injuries received were occasioned by the negligence and carelessness of the defendant, is defective on demurrer in not showing that the injury alleged was caused by any act or omission stated. Ohio & M. R. Co. v. Engrer, 4 Ind. App. 261, 30 N. E. 924.

And a petition in such an action, by a mother for the killing of her son, averring that the servants and employees of the defendant were negligent in running and operating the train by which he was killed in failing to give proper signals or keep a proper lookout, describing the train as an extra train having an officer or officers of the defendant on board, is insufficient to support a judgment for damages in the absence of allegations showing the act of neglect to have been one of a person representing the defendant in its corporate capacity as a corporate officer, or showing approval or ratification of such act. Winnt v. International & G. N. R. Co. 74 Tex. 32, 5 L. R. A. 172, 11 S. W. 907.

Nor will a petition in such an action, stating that plaintiff was injured by the cars of defendant while he was on the track, and that the injuries were caused by the negligence of the defendant's agents in failing to ring the bell and blow the whistle and because of the great speed of the train in violation of law, render admissible evidence of an act of negligence consisting of the failure of the defendant to have a light at the crossing, since the want of lights at a crossing is not a fact peculiarly within the knowledge of the defendant and its servants, but is open to observation, and might have been as well known to plaintiff and his witnesses as to defendant. Missouri P. R. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608.

And a petition alleging that the fault of the defendant consisted in approaching the crossing with its engine and cars without giving any warning, and containing averments of a very general nature relating to the dangerous character of the crossing, and of running the train at a high rate of speed, is insufficient to justify the admission of proof as to any negligence beyond a failure to give proper signals and due warning of the approach of the train, and will not support an instruction submitting to the jury the question as to whether or not the company was guilty of negligence in running the train at a high rate of speed. Missouri P. R. Co. v. Moffatt, 56 Kan. 667, 44 Pac. 607.

But where a petition in such an action charges negligence on the part of the defendant in failing to ring the bell or blow the whistle of a locomotive within 80 rods of a public crossing, it is permissible for a witness to state the volume of sound made by the locomotive whistle, though it is error to permit him to testify that, in his opinion, there was a defect in the whistle, since a defective whistle is not a ground of negligence made by the pleadings. Gulf, C. & S. F. R. Co. v. Scott (Tex. Civ. App.) 27 S. W. 827.

And where the petition in such an action charges in general terms that plaintiff's injuries were the result of negligence upon the part of the defendant, and, in addition, attempts to set out the facts or acts of negligence relied on, which was the failure to ring the bell or blow the whistle within 80 rods of a public crossing, the charge of the court should be confined to this issue. *Ibid.*

Under a general allegation of negligence in an action against a railroad company, however, the plaintiff has the right to prove failure to ring the bell or sound the whistle as required by statute. Braxton v. Hannibal & St. J. R. Co. 77 Mo. 455; Goodwin v. Chicago, R. I. & P. R. Co. 75 Mo. 73; Schneider v. Missouri P. R. Co. 75 Mo. 295; Ravenscraft v. Missouri P. R. Co. 27 Mo. App. 617.

In Schneider v. Missouri P. R. Co. 75 Mo. 295, *supra*, Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514, *infra*, XIV. d, 2, was distinguished upon the ground that that was a suit by an employee against a railroad company to recover damages for personal injuries, and the petition alleged specifically wherein defendant was negligent, and yet plaintiff was permitted to recover for negligence other than that specifically assigned, which was held to be error.

And a jury in such an action, in which there was a general allegation that the plaintiff was injured at a grade crossing while traveling on a highway, by reason of the carelessness and negligence of the agents and servants of the defendant, is entitled to consider whether the defendant had used such reasonable care, in addition to the ringing of the bell and the blowing of the whistle required by the statute, as the safety of travelers demanded at that particular crossing. Eaton v. Fitchburg R. Co. 129 Mass. 364.

And a petition in such an action, charging in general terms that the defendant caused one

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of its locomotives and train of cars to be run and conducted in so negligent a manner as to strike and run over plaintiff, by reason whereof she was injured, warrants a recovery on the general charge of negligence in running the train, though it is also alleged that no bell was rung and that the train was run at a greater speed than that authorized by law, where such allegations appear as independent statements of facts and violations of law. Otto v. St. Louis, I. M. & S. R. Co. 12 Mo. App. 168.

See also Cheney v. Chicago, M. & N. R. Co. 75 Wis. 223, 43 N. W. 1152, *infra*, X. b, 4.

(d) *Allegations as to obstruction of highway.*

The act of a railroad company in obstructing a highway at a crossing with its engines or cars is a negligent one, and a mere statement of the act in an action for an injury arising therefrom, and that it was negligently done, would appear to be sufficient.

Thus, a complaint against a railroad company by parents for the loss of their child, alleging that the railroad company was unlawfully and negligently occupying a street crossing in violation of a city ordinance, and that by reason of the fact that the defendant company so negligently caused and permitted its engines to stand upon the street crossing without any negligence on the part of the plaintiffs or either of them the injury resulted, is sufficient to charge the railroad company with negligence, and that by reason of its negligence the injury resulted. Denver, T. & G. R. Co. v. Robbins, 2 Colo. App. 313, 30 Pac. 261, 434.

And a declaration in such an action, alleging that the defendant, as the plaintiff approached the track at a crossing, placed thereon in the highway at the point of intersection several cars, obstructing the passage over the highway, and negligently permitted the same to remain there for upwards of twenty minutes, whereby the cutter in which plaintiff was riding was overturned in attempting to pass them, and she was injured, discloses a good cause of action. Young v. Detroit, G. H. & M. R. Co. 56 Mich. 430, 23 N. W. 67.

So, an allegation in a complaint against a railroad company that the defendant carelessly, negligently, and unlawfully permitted a car to remain upon its track at a highway crossing partially across the highway, and that as plaintiff with a team of horses was attempting to cross the railroad at said crossing the car in its then condition caused the team to become frightened and unmanageable and to run away and in their fright overturn the wagon, injuring plaintiff, though not very full or accurately stated, is sufficient to withstand a demurrer for want of facts. Cleveland, C. C. & I. R. Co. v. Wynant, 100 Ind. 160.

And it is not subject to demurrer because it does not aver that the car was permitted to remain on the highway an unreasonable time, and that therefore it may have been placed there only a moment before the accident. Cleveland, C. C. & I. R. Co. v. Wynant, 119 Ind. 539, 20 N. E. 730.

And such an averment is, both as to the placing the car in the highway and the allowing it to remain, broad enough to include the employees, whose duty it was to move cars and to remove them from improper places, and whose duty it would have been to have placed the car in question at some other point than upon a highway crossing and to remove it after it was placed there; and is not objectionable on demurrer because it does not specifically allege what employee left the car there, and that it was the duty of such employee to have removed it. Pittsburgh, C. & St. L. R. Co. v. Kitley, 118 Ind. 152, 20 N. E. 727.

Nor is it subject to objection because it failed to allege that there was anything peculiar and unusual about the car likely to frighten a horse. *Ibid.*

So, an averment in an action against a railroad company for damages for negligence, that the defendant carelessly and negligently placed and left one of its freight cars upon and partly across a public highway, and by means thereof said car was an object calculated to frighten horses passing over the highway at the crossing, is substantially an averment of an obstruction of the highway. Baltimore & O. S. W. R. Co. v. Faith, 71 Ill. App. 59.

And a general averment in a petition in such an action, by one who was injured while attempting to pass between two cars coupled together and forming part of defendant's train standing across a public street, that the injury was caused by certain careless and negligent acts of the defendant, following a statement of the specific acts of negligence complained of, is sufficient as a statement of a cause responsible for plaintiff's injury, as against an objection to the introduction of evidence by plaintiff on the ground that the petition does not state a cause of action. Hudson v. Wabash & W. R. Co. 32 Mo. App. 667.

And an allegation charging that the railroad company negligently and carelessly obstructed a crossing of a public street, and that plaintiff attempted to pass between two cars, and that when he had got partly over the defendant's servant carelessly and negligently caused said train to back up, without giving any signal, by reason whereof plaintiff was injured, is not subject to the objection that it shows no causal connection between the act of obstructing the crossing and the injury to plaintiff, and that the moving of the train was the proximate cause of the injury, since the two negligent acts charged are not independent of each other, but both unite in constituting one act of negligence, the negligent management of the train, and both concurred in producing the damage. Burger v. Missouri P. R. Co. 112 Mo. 238, 20 S. W. 439.

Two such charges are not separable in the sense that one only would be the proximate cause of injury, and, taken together, they constitute a sufficient allegation of negligence as against a general demurrer. Lake Erie & W. R. Co. v. Mackey, 53 Ohio St. 370, 29 L. R. A. 757, 41 N. E. 980.

4. *From defective structure or appliances.*

The rule governing this class of cases would seem to be that in charging negligence it is sufficient to specify the act the doing of which caused the injury and state generally that it was carelessly or negligently done. And a mere statement that the defendant negligently permitted its structure or appliances to become and remain defective would appear to be sufficient, though the duty to maintain them in proper condition for the benefit of the person injured must be made to appear.

Thus, a complaint in an action against a railroad company for killing the plaintiff's husband by alleged negligence, stating that the defendant kept a bad track and switch at a designated place, which would not hold the cars in place and which repeatedly failed, to defendant's knowledge, and that by reason thereof a car struck plaintiff's husband, killing him, is proper, and evidence that cars were repeatedly thrown from the track with the knowledge of the defendant is material and pertinent thereunder. Wolz v. Dry Dock, E. B. & B. R. Co. 36 N. Y. S. R. 328, 13 N. Y. Supp. 129.

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And an allegation in a petition against a railroad company that it had made an excavation 10 feet in depth for its railway, so close to a designated street that the plaintiff while walking along said street and exercising due care fell into it, and that the defendant had taken no precautions to prevent accidents, is good on demurrer. Rathburn v. Burlington & M. River R. Co. 16 Neb. 441, 20 N. W. 390.

And a complaint in such an action, showing that the defendant owed the duty to all persons traveling on a highway crossing a railroad to make the approaches and crossing reasonably safe to such traveler, and that it failed to perform this duty and left unguarded a deep and dangerous pit in the highway, into which the plaintiff fell and was injured, makes at least a prima facie case of negligence against the defendant. Washburn v. Chicago & N. W. R. Co. 68 Wis. 474, 32 N. W. 234.

So, a complaint in such an action for a collision at a railroad crossing, charging that at the crossing the railroad was insufficiently constructed and in bad order, and dangerous for teams and vehicles to cross, and that the company was negligent in the manner of running an engine and train of cars across the highway with great velocity and without warning of its approach, though awkwardly expressed, is sufficiently definite to apprise the defendant that it must be prepared to meet evidence on such points. Lehnertz v. Minneapolis & St. L. R. Co. 31 Minn. 219, 17 N. W. 376.

And a petition in such an action, charging that the injury complained of occurred through the negligence of the defendant in failing to repair and keep in repair a good, safe, and substantial crossing over the railroad track at a place where it crosses a highway, and that such crossing was defective and insufficient, warrants the introduction of any evidence as to rottenness of the plank of which the crossing was constructed, and the specification of one particular in which the crossing was defective does not confine the plaintiff to proof of that defect alone; the clear and natural construction of the averment being that the crossing had not been properly prepared and kept in repair, and that it was rotten and otherwise defective and insufficient. East Line & R. River R. Co. v. Brinker, 68 Tex. 502, 3 N. W. 99.

Likewise, the rule that in charging negligence it is sufficient to specify the act, the doing of which caused the injury, and state generally that it was negligently and carelessly done, applies, in an action against a railroad company for an injury caused by a train jumping the track while in proximity to the person injured, to an objection to a failure to allege that the defendant had knowledge of the defective condition of the truck and car, or was negligently ignorant of such defects. Cederson v. Oregon Nav. Co. 38 Or. 343, 62 Pac. 637, 63 Pac. 763.

And a complaint in such an action, charging that the defendant and its employees negligently and carelessly operated over its road a truck and car which were too wide for its track, the wheels of which car and the flanges thereon were cracked, broken, and unsafe, and so negligently operated said train and the engine and cars attached thereto that the train jumped the track nearly opposite where plaintiff's intestate was walking, thereby causing his death, will not be required to be made more definite and certain, since it appears from the particulars that the questions in litigation must have been more within the defendant's knowledge than within the plaintiff's. *Ibid.*

Nor is an allegation in a complaint against a railroad company that at a highway crossing mentioned the railroad is so erected and constructed that a train or engine approaching thereon cannot be seen by a person on the highway until so near that it is difficult or impossible to avoid being struck, and that it was negligent in the defendant to so locate and construct it, obnoxious to the charge of uncertainty. Lehnertz v. Minneapolis & St. L. R. Co. 31 Minn. 219, 17 N. W. 376.

So, a complaint in an action against a railroad company for damages for personal injuries, caused by the failure of the defendant to restore one of the streets of a city, which it had used, to its former condition of safety, and by the failure of the defendant to make proper signal of the approach of a train, and by running at too great a rate of speed, will not be required on motion to be made more definite and certain, where most of the facts were more within the knowledge of the defendant than the plaintiff, and any more definiteness or certainty does not seem to be necessary in order to apprise the defendant of any material facts not clearly set out, or to aid it in making a defense. Cheney v. Chicago, M. & N. R. Co. 75 Wis. 223, 43 N. W. 1152.

And a complaint alleging that the defendant negligently permitted one of its turntables to remain in an unsafe condition in respect to leaving a dangerous opening in it unprotected, and that the foot of plaintiff's child passed through and he was injured thereby, states a cause of action, and is good on demurrer. Ekman v. Minneapolis Street R. Co. 34 Minn. 24, 24 N. W. 291.

And it has been held that a declaration in such an action, charging that the defendant negligently ran its train over plaintiff, is sufficient to let in evidence of any statutory negligence of which the defendant may have been guilty in so running over him, and will support evidence of the defective condition of a brake, though there was no specific averment in the declaration as to the condition of the brake, and though in other counts of the declaration other specific acts of negligence were enumerated. Chattanooga Rapid Transit Co. v. Walton, 105 Tenn. 415, 58 S. W. 737.

But an allegation in a declaration in an action against a railroad company for a personal injury alleged to have been sustained in consequence of the defective condition of a street crossing at a place where two streets cross each other, along one of which the track of the defendant was laid, is bad where it alleges no facts from which the law would imply a duty on the part of the defendant as to the street, and where it alleges by implication a duty which did not exist, not to permit holes to remain in the street outside of and adjacent to its tracks, and bases its right to recover upon that neglect. Rockford City R. Co. v. Matthews, 50 Ill. App. 267.

And a petition in such an action, charging that the defendant was guilty of negligence in running the car or cars which collided with plaintiff and ran over him, does not justify the submission to the jury therein of the question of defendant's negligence in having a defective sand box on the engine, and in keeping a defective frog in its track. Edens v. Hannibal & St. J. R. Co. 72 Mo. 212.

Nor is an allegation that a railroad company negligently permitted an iron pin to be and remain on a tender in such a manner that the movement of the train threw it off and injured the plaintiff sufficient in the absence of any averment that it was dangerous to carry the pin on the tender, or that it was left in an unsafe position or where one might reasonably expect it would be thrown off. Cleveland, C. C. & St. L. R. Co. v. Berry, 152 Ind. 607, 46 L. R. A. 33, 53 N. E. 415.

And an averment that a railroad switch was

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negligently allowed to be open is not sufficient to show a defect in the ways, works, and machinery of a railway corporation, in an action against it for negligence under the Alabama statute, and has no legal or proper connection with the person whose duty it was to see that the ways, works, and machinery were in proper condition. Birmingham R. & Electric Co. v. Allen, 99 Ala. 359, 20 L. R. A. 457, 13 So. 8.

5. *From frightening horses.*

Though the sounding of whistles and the ringing of bells are necessary incidents to the running of railway trains, it would seem to be necessary only, in actions against a railway company for injuries caused by horses taking fright at such sounding of whistles or ringing of bells, to state that it was negligently done, that being a specific act within the meaning of the general rule.

Thus, a complaint against a railroad company, charging that the injury complained of resulted from the alleged careless, negligent, and unnecessary sounding of the whistle on one of the defendant's locomotives, which frightened the horses of said decedent so that they ran away, is sufficient on demurrer. Chicago & E. R. Co. v. Cummings, 24 Ind. App. 192, 53 N. E. 1026; Cincinnati, I. St. L. & C. R. Co. v. Gaines, 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. 34, 5 N. E. 746; Race v. Easton & A. R. Co. 62 N. J. L. 536, 41 Atl. 710; Culp v. Atchison & N. R. Co. 17 Kan. 475.

If it is too general, the defendant's remedy would be by motion to strike it out. Race v. Easton & A. R. Co. 62 N. J. L. 536, 41 Atl. 710.

Or by motion to make it more specific and certain. Culp v. Atchison & N. R. Co. 17 Kan. 475; Cincinnati, I. St. L. & C. R. Co. v. Gaines, 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. 34, 5 N. E. 746.

And an allegation in such an action for alleged negligence in frightening the plaintiff's mule and causing it to run away whereby he was injured, that the mule became frightened at the engine of the defendant owing to the negligence of the defendant's employees in running and managing such engine, is not subject to demurrer upon the ground that it does not sufficiently appear that the plaintiff was injured by reason of the defendant's negligence. Oxford Lake Line Co. v. Stedham, 101 Ala. 376, 13 So. 553.

So, that the injury was the natural and proximate result of the alleged wrongful act is implied in an action against a railroad company from a complaint alleging the wrongful blowing of a locomotive whistle by one of defendant's engineers near a crossing, with a frightful noise, so that plaintiff's horse standing in the highway near the crossing became unmanageable and ran away and struck plaintiff, though not directly alleging that the accident was caused thereby, and, though subject to some criticism, it is not demurrable. Dugan v. St. Paul & D. R. Co. 40 Minn. 544, 42 N. W. 538.

And a complaint in such an action, charging that plaintiff was on a street in close proximity to defendant's engine, to the knowledge of the employees operating it, and that they carelessly and negligently ran and managed it so as to cause it, while blowing its whistle and the blowing off of its steam and allowing steam to escape, to make loud and unusual noises, which noises frightened plaintiff's horse and caused it to throw plaintiff and injure him, is sufficient to withstand demurrer. Indianapolis Union R. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551.

And an averment in such an action, that the defendant negligently, wrongfully, and unlawfully blew off steam from its engine where its railroad crossed one of the principal streets of the city, whereby the plaintiff's horses were frightened and ran away, breaking his leg, implies that steam was blown off needlessly and unnecessarily, and is sufficient to sustain the action where no objection was made by demurrer, since, if steam was blown off negligently and wrongfully, it was unnecessary and in violation of duty. Omaha & R. Valley R. Co. v. Clark, 35 Neb. 867, 23 L. R. A. 504, 53 N. W. 970.

So, a declaration in an action against a railroad company, that while a train was approaching plaintiff from the rear defendant's servants caused the whistle to be sounded in a loud, shrill, and unnecessary manner, needlessly, wantonly, negligently, and maliciously, whereby plaintiff's horse was frightened and he was injured, is sufficient, and warrants proof of defendant's negligence. Chicago, B. & Q. R. Co. v. Dickson, 88 Ill. 431.

And a complaint in such an action, alleging in general terms the blowing of a whistle carelessly, negligently, and without necessity as plaintiff was driving under a viaduct over which the railroad crossed the highway, alleges a cause of action, since it is natural that horses should be frightened by sudden and extraordinary sounds. Rodgers v. Baltimore & O. S. W. R. Co. 150 Ind. 397, 49 N. E. 453.

And that a railroad company wrongfully and negligently ran one of its locomotives and cars attached through a street without having a brakeman at the forward end of the train, whereby plaintiff's horse was frightened, is a sufficient allegation of negligence in an action to recover damages for a death alleged to have been caused thereby. Johnson v. St. Paul & D. R. Co. 31 Minn. 283, 17 N. W. 622.

But a petition in an action against a railroad company, charging that in attempting to cross the railroad track on depot grounds of defendant the horse which plaintiff was driving became frightened at an arrangement caused by the placing of cars and other implements near the crossing in such a manner as to present a horrid and frightful appearance, whereby plaintiff was thrown from his buggy and injured, is bad on demurrer, since the statement "a horrid and frightful appearance" is simply the expression of the opinion of the plaintiff, and too indefinite and uncertain. Atchison & N. R. Co. v. Loree, 4 Neb. 446.

And though a declaration in such an action alleges, generally, that the injury was caused by the defendant carelessly, improperly and negligently operating its hand car, it is insufficient where it also states specifically what was done with reference to speed, motion, noise, and sudden appearance; and such acts specifically stated would not of themselves singly or collectively constitute negligence. McCerrin v. Alabama & V. R. Co. 72 Miss. 1013, 18 So. 420.

And a specific statement in such case, charging the rapid movement of the hand car by a noisy and disorderly crew, and its sudden appearance from behind an obstruction of the view near a crossing of the railroad by a public street, on which plaintiff was seeking to cross the railroad, which frightened plaintiff's horse, which was more than ordinarily gentle, fails to set forth a cause of action in not averring that what was complained of was unusual and such as common prudence would condemn as being calculated to frighten horses. *Ibid.*

As to municipal negligence, frightening horses and causing personal injury, see Rushville v. Adams, 107 Ind. 475, 57 Am. Rep. 124,

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6 N. E. 292; Roblee v. Indian Lake, 11 App. Div. 435, 42 N. Y. Supp. 326, — *infra*, XIII. a.

As to objects on or near highway frightening horses, see *infra*, XVIII.

As to persons frightening horses by other means, see Holland v. Bartch, 120 Ind. 46, 22 N. E. 83; Jackson v. Castle, 82 Me. 579, 20 Atl. 237, — *infra*, XXI. c.

c. In case of injury to stock.

1. By collision generally.

Injury to stock by collision at a crossing or while on the track without fault on the part of the owner seems to be treated in the same way, with reference to general allegations of negligence, as a like injury to persons, the stock probably being regarded as rightfully in the highway.

Thus, a complaint in an action against a railroad company, alleging that the defendant, by the carelessness and negligence of its servants and employees, ran its locomotive and train of cars over defendant's horse and killed it at a highway crossing, is sufficiently specific to constitute a good cause of action. Chicago, St. L. & P. R. Co. v. Nash (Ind.) 24 N. E. 884.

And one alleging that, through the fault and misconduct and negligence of the servants and employees of the defendant in running one of its locomotives and trains out of regular time and at a high rate of speed at the rate of 40 miles per hour and without giving any of the proper signals of their approach, struck and killed two mules of the plaintiff and injured a third then and there upon the railroad track at a public highway crossing, without the fault of the plaintiff, sets forth the negligence imputed to the defendant with sufficient particularity and certainty. Indianapolis, C. & L. R. Co. v. Hamilton, 44 Ind. 76.

And ordinary negligence renders a railroad company liable for stock killed at a public crossing, and an allegation in a petition in an action therefor need not allege gross negligence, as such an allegation would be superfluous. Central Branch R. Co. v. Phillipi, 20 Kan. 9.

So, a complaint in an action to recover for animals killed by a railroad company, stating that they were run over by and through the carelessness and wilful negligence of the persons engaged in running the train, and that the animals were upon the railroad track without fault of the plaintiff, sets forth a good cause of action. Wright v. Indianapolis & C. R. Co. 18 Ind. 168; Antisdel v. Chicago & N. W. R. Co. 26 Wis. 145, 7 Am. Rep. 44.

As a general rule, however, it is not deemed necessary to specifically allege that the injury occurred at a crossing, or that the stock was on the track without fault upon the part of the owner, the allegation of defendant's negligence being sufficient, since, if the stock was on the track because of the fault of the owner, the injury would be due to his negligence, and not that of the railroad company.

Thus, there is no necessity, in a declaration in an action against a railroad company for negligently killing the plaintiff's stock on its track, to specify the acts of omission or commission which constituted the negligence of the defendant which is the basis of the action. The degree of certainty required by the rules of pleading is met by an allegation that the defendant negligently, carelessly, and wrongfully caused a train of cars on its railroad to be propelled and driven upon the stock of the plaintiff, whereby it was injured or killed. Hawker v. Baltimore & O. R. Co. 15 W. Va. 628, 36 Am. Rep. 825.

And an allegation in a complaint that because of the negligence or want of skill of the employees of the defendant it did run over, kill, or injure a horse or colt belonging to the plaintiff is not subject to demurrer on the ground that it stated only a legal conclusion, and not the facts constituting the alleged negligence. East Tennessee, V. & G. R. Co. v. Watson, 90 Ala. 41, 7 So. 813; Indianapolis, P. & C. R. Co. v. Taffe, 11 Ind. 458.

And a petition, declaration, or complaint in an action alleging that defendant by its servants so carelessly and negligently ran and managed its locomotive and cars on its railroad as to run over plaintiff's horses, or other stock, and injure or kill them, states facts sufficient to constitute a cause of action. Schneider v. Missouri P. R. Co. 75 Mo. 295; Berkley v. Chicago, R. I. & P. R. Co. (Mo.) 3 West. Rep. 765; Housatonic R. Co. v. Waterbury, 23 Conn. 101; Jacksonville, T. & K. W. R. Co. v. Garrison, 30 Fla. 557, 11 So. 929; Jacksonville, T. & K. W. R. Co. v. Jones, 34 Fla. 286, 15 So. 924; Rockford, R. I. & St. L. R. Co. v. Phillips, 66 Ill. 548; Jeffersonville, M. & I. R. Co. v. Vancant, 40 Ind. 233; Missouri P. R. Co. v. Morrow, 36 Kan. 496, 13 Pac. 789; Smith v. Eastern R. Co. 35 N. H. 356; Blaine v. Chesapeake & O. R. Co. 9 W. Va. 252.

In Jacksonville, T. & K. W. R. Co. v. Garrison, 30 Fla. 557, 11 So. 929, *supra*, Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 425, *supra*, VIII. c, and X. b, 1, was distinguished upon the ground that the objection to the declaration in that case was not taken by demurrer, and the court held that it was too late to urge the objection after trial on the general issue.

So, a complaint in an action by an owner of stock against a railroad company alleging that some of his stock was killed and some of it injured or damaged by the negligence of the defendant in running a train of cars and locomotive on its railroad sufficiently avers that the injury complained of was caused by the negligence of the defendant. East Tennessee, V. & G. R. Co. v. Carloss, 77 Ala. 443.

And a complaint in such an action, charging that the defendant, while operating its railway through the plaintiff's pasture, negligently killed the stock of plaintiff, and that the stock was killed solely through the negligence of the defendant, is not subject to objection on general demurrer that it does not state how the defendant killed them, or in what the alleged negligence consisted. Gulf, C. & S. F. R. Co. v. Washington, 1 C. C. A. 286, 4 U. S. App. 121, 49 Fed. 347.

Nor need a declaration in such an action for killing plaintiff's cattle by carelessly and unskilfully running a locomotive against them also allege that this was done on the defendant's railroad track. Baylor v. Baltimore & O. R. Co. 9 W. Va. 270; Housatonic R. Co. v. Waterbury, 23 Conn. 101.

And a complaint in such an action showing that the stock was injured by the company's trains, is not subject to objection that negligence on the part of the company was not averred, where the statute makes this prima facie evidence of negligence. St. Louis, I. M. & S. R. Co. v. Brown, 49 Ark. 253, 4 S. W. 781.

So, a complaint in an action against a railroad company alleging that the defendant carelessly, negligently, and wrongfully ran its train over and upon the defendant's mule, indicates clearly the particular act of negligence complained of, and will not be required to be made more specific on motion. Ohio & M. R. Co. v. Craycraft, 5 Ind. App. 335, 32 N. E. 297.

And a count in a complaint for damages for killing a colt, stating that the defendant did, because of negligence or want of skill of de-

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fendant's employees in the management or running of a locomotive and cars, run over and kill such colt, states negligence on the part of the defendant's employees and its connection with the result as a cause with sufficient certainty. East Tennessee, V. & G. R. Co. v. Watson, 90 Ala. 41, 7 So. 813.

And a complaint in such an action for killing a cow, stating that the engine was so negligently operated by the defendant's agents that the plaintiff's cow was killed, coupled with the further allegation that the cow was killed on account of said negligence, is sufficiently explicit to show that the damage done the animal resulted from the alleged negligence of such agents, and therefore of the defendant itself. Western R. Co. v. Lazarus, 88 Ala. 453, 6 So. 877.

So, a petition in an action against a railroad company, averring that the defendant by its servants and agents carelessly and negligently caused one of its locomotives with a train of cars attached to strike plaintiff's cattle, is good on motion to arrest. McPheeters v. Hannibal & St. J. R. Co. 45 Mo. 22; Garner v. Hannibal & St. J. R. Co. 34 Mo. 235.

And a declaration alleging that the plaintiff's horse being upon the track of the defendant's railroad, was there negligently and carelessly run over and killed by a train, is good after verdict, though it may have appeared in evidence that the negligence of the defendant existed with relation to its fences, and not in the management of its train. Smith v. Eastern R. Co. 35 N. H. 356.

And a petition in such an action charging that the defendant's railway train and cars with locomotive attached, then in charge of defendant's engineer, fireman, and servants, carelessly and with gross negligence ran said locomotive engine and cars over and killed two colts of the plaintiff, though unfortunately worded, will not be held defective on objection first raised in the appellate court. Atchison, T. & S. F. R. Co. v. Bartlett, 2 Kan. App. 167, 43 Pac. 284.

So, a complaint in an action against a railroad company in an action for damages for killing stock belonging to the plaintiff, averring generally that the killing was the result of the negligence or want of skill of defendant's employees in the management or running of its train, locomotive, or cars, is broad enough to warrant the admission of evidence upon the trial that there was not on the train causing the injury a sufficient force to manage and control it. South & North Ala. R. Co. v. Thompson, 62 Ala. 494.

Likewise, a petition in an action against a railroad company for damages for killing animals at a private crossing, charging negligence generally, is sufficient to admit of the issue, though it is not specially charged that the defendant did not exercise proper care to avoid killing the animals after they were observed to be on the track. Galveston, H. & S. A. R. Co. v. Dyer (Tex. Civ. App.) 38 S. W. 218.

And a declaration or petition in such an action, alleging that defendant, by its agents or employees, while running at a high rate of speed carelessly and negligently without using due caution, ran its engine and train upon plaintiff's animals, when, by exercising proper care and skill, the engine and train could have been stopped before striking them, and that the engineer saw them, or by the exercise of due care could have seen them, in time to have so stopped, states a good cause of action at common law, and sufficiently alleges the defendant's negligence. Omaha & R. Valley R. Co. v. Wright, 49 Neb. 456, 68 N. W. 618; Hawker v. Baltimore & O. R. Co. 15 W. Va. 628, 36 Am. Rep. 825.

And it is not objectionable for failure to allege that the injury could have been prevented by the use of proper precaution. Hawker v. Baltimore & O. R. Co. 15 W. Va. 628, 36 Am. Rep. 825.

So, an account in justice court, filed against a railroad company for damages "for the killing of one brown ox valued at $40," is sufficiently specific to warrant the admission of proof, though the manner of the killing is in no way specified. St. Louis S. W. R. Co. v. Denson (Tex. Civ. App.) 26 S. W. 265.

But an allegation in an answer in an action against a railroad company for killing the plaintiff's horse, that the horse was killed without any fault or negligence of the defendant, and because of the gross negligence of the plaintiff, states a mere conclusion, and is not sufficient; the facts should have been stated. Jeffersonville, M. & I. R. Co. v. Dunlap, 29 Ind. 426.

On the subject of collision with stock, see also the following subdivision of this note.

2. *Collisions from failure to properly inclose track.*

The statutes of some of the states make railroad companies absolutely liable for injury to stock without reference to negligence, where they omit to maintain proper fences inclosing their tracks. Cases under these statutes are not based upon negligence, but upon the statutory liability, and are not, therefore, a part of this note. Under other statutes and in other states, however, the general rule is that the failure of a railroad to properly inclose its tracks may be either actual common-law negligence or constructive negligence under the statutes with relation to inclosing tracks.

And under a general allegation of negligence in an action against a railroad company for killing plaintiff's horse, the plaintiff may succeed, either by proving negligence at common law, or by proving the constructive negligence of the statute in failing to erect and maintain fences in the given situation. Hill v. Missouri P. R. Co. 49 Mo. App. 520.

And a declaration in such an action, alleging that the defendant so carelessly and negligently ran and conducted a locomotive and train that they struck and killed animals of the plaintiff that had got upon the track through the neglect of the defendant to keep side fencing along the railroad in repair, warrants the jury in considering any evidence admitted without objection tending to prove, not only the main allegation, but also evidence as to the sending out of the train without enough brakemen to keep it under control. McDonald v. Chicago & N. W. R. Co. 51 Mich. 628, 17 N. W. 210.

So, a complaint in such an action, alleging that by reason of the defendant's neglect to repair a certain fence on the side of its railroad at a designated point, which it was bound to repair, and by reason of its neglect to build or repair a certain culvert and cattle guard which it was bound to build and repair, the plaintiff's horse came on the track and, by reason of defendant's negligence in running its cars, was killed, is not demurrable for not alleging sufficient facts, on the ground that the mode of allegation is not positive, and that plaintiff does not allege the doing of the acts, but merely that by the defendant's neglect in not doing them the injury was caused. Downs v. Central Vermont R. Co. 38 N. Y. S. R. 228, 14 N. Y. Supp. 573.

And a declaration charging that the defend-

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ant neglected to keep a fence on the line of its railroad adjoining plaintiff's land as required by law, and that for want of such fence plaintiff's horse escaped from his pasture and went at large, and by means of going at large as aforesaid the horse was killed, though perhaps demurrable for not setting out the facts which connect the injury with the going at large to show how the one resulted from the other, is not subject to objection after verdict that it alleges generally that by means of the going at large the horse was injured, when it should have set forth particularly in what manner and by what means the going at large produced the injury; the general rule being that a verdict by legal and necessary intendment supplies facts the proof of which was necessary to satisfy the jury in finding the verdict, and which may be reasonably inferred to have been so supplied by their connection with those that are alleged. Holden v. Rutland & B. R. Co. 30 Vt. 302.

So, a declaration in a justice's court against a railroad company, charging that it had not fenced its track, and that plaintiff's colt, lawfully in the township, went on the track and was there killed through the negligence of the defendant and because said track was not fenced, sets out a good cause of action, and is as full as is necessary or usual in justices' courts. Talbot v. Minneapolis, St. P. & S. S. M. R. Co. 82 Mich. 66, 45 N. W. 1113.

And a statement in such an action, charging that the defendant, by its agents and servants, carelessly and negligently with its engine and cars ran over and killed the plaintiff's cow, is sufficient to warrant proof tending to show the defendant's legal duty to erect and maintain a fence on the sides of its road, and that it had neglected to do so. Boone v. Wabash, St. L. & P. R. Co. 20 Mo. App. 232.

An allegation of duty without stating the facts from which the duty arises, however, is insufficient and without legal significance, and a petition in an action against a railroad company alleging that the company was by law bound to fence and inclose its track, and that, in consequence of the neglect and failure of the defendant to do so, plaintiff's horse entered said track and was killed, is insufficient in not stating the facts from which the duty arises. Baltimore & O. R. Co. v. Wilson, 31 Ohio St. 555.

And a declaration in such an action, alleging that the defendants were the owners and occupiers of a certain railway and a certain station thereon for the landing and delivery of cattle carried by it, and of a yard adjoining the station, into and through which the cattle were carried and were of necessity obliged to pass in going from the station to the highway; and that the defendant, by reason of the premises, ought to have maintained a good and sufficient fence between the yard and the railway, but that it failed to do so, by reason of which an animal belonging to plaintiff, lawfully in the yard, strayed upon the railway and was killed, —merely charges that the accident arose from the want of a sufficient fence between the yard and railway, and is insufficient for want of a showing of a duty upon the part of the defendant to maintain such fence. Roberts v. Great Western R. Co. 4 C. B. N. S. 506, 27 L. J. C. P. N. S. 266, 4 Jur. N. S. 1240.

So, a declaration for alleged negligence on the part of a railroad company in failing to construct and maintain a cattle guard at a highway crossing, sufficient to prevent horses from getting on the railroad, by reason of which the plaintiff's horse or other stock was killed by one of the defendant's trains, is bad on demurrer where it fails to point out any specific defect in which the insufficiency consisted, relying upon an allegation of general insufficiency Sinead v. Lake Shore & M. S. R. Co. 58 Mich. 200, 24 N. W. 761.

And such an averment does not sufficiently state a default in the performance of the legal obligation to maintain a fence or cattle guard, within the contemplation of the Kentucky statute imposing such duty. McGhee v. Gaines, 98 Ky. 182, 32 S. W. 602.

Nor will an allegation in a complaint in an action against a railroad company, that, animals of the plaintiff having strayed upon the track without any fault of the plaintiff, the defendant so carelessly and negligently ran and managed its locomotive and cars and its railroad track, grounds, and fences that its said locomotive and cars ran over them, support a recovery on the theory that the defendant neglected to keep its fences in repair whereby the animals escaped upon the track. Antisdel v. Chicago & N. W. R. Co. 26 Wis. 145, 7 Am. Rep. 44.

3. *By frightening.*

Injury to stock by frightening it seems to fall under the same rules with reference to pleading negligence as injury to the person caused by frightening horses, a general allegation of the negligent performance of the act causing the fright appearing to be sufficient.

Thus, a petition in an action against a railroad company alleging the negligent frightening of the plaintiff's cattle while they were grazing on his farm along the railroad, by defendant's locomotives and trains, so that they ran against a wire fence and other obstructions along the railroad and were injured, will not be required on motion to be amended so as to show specifically the damage done to each particular head of cattle. Dooley v. Missouri P. R. Co. 36 Mo. App. 381.

And an averment in a petition that the defendant negligently killed the plaintiff's horse, which is not objected to before trial, is sufficient to authorize proof of any act whatever of the defendant's servant which caused such killing or contributed thereto; and in such case it is not error to admit testimony as to the piling of ties in the highway near the track, alleged to have contributed to the injury. Mack v. St. Louis, K. C. & N. R. Co. 77 Mo. 232.

So, in Billman v. Indianapolis, C. & L. R. Co. 76 Ind. 166, 40 Am. Rep. 230, it was held that a complaint against a railroad company alleging that the servants and agents of the defendant managed and operated one of its locomotives and cars in such a reckless and negligent manner as to wilfully and wrongfully cause a team of horses belonging to a third party to take fright and run away, which, while unmanageable and running away, ran against plaintiff's horse and caused its death, shows a good cause of action; but the question in the case was as to whether or not the injury was the proximate result of the negligence.

But a petition in an action against a railroad company charging that the engineer of the defendant negligently and wilfully caused the death of plaintiff's horse, when the horse was plainly visible and seen by him, by causing the mud valve of the engine to be opened, and thereby a loud noise was made, and, from the escape of steam and mud, the horse was frightened and ran against a tree and was killed, does not justify the submission of the case upon the theory of negligence of the defendant in failing to discover the dangerous proximity of the horse to the engine. Wallace v. San Antonio & A. P. R. Co. (Tex. Civ. App.) 42 S. W. 865.

And if the facts averred in a complaint in

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such an action for negligence in frightening a horse and causing it to run away, injuring the horse and carriage, prima facie show that the damages claimed were not the natural consequences of the negligence complained of, or were too remote to be held as the cause of the damage, the pleading is demurrable, although it ends with the general averment that the injury complained of was the result of such wrongful or negligent acts or omissions. Stanton v. Louisville & N. R. Co. 91 Ala. 382, 8 So. 798.

As to municipal negligence resulting in frightening horses, see Cairncross v. Pewaukee, 78 Wis. 66, 10 L. R. A. 473, 47 N. W. 13, *infra*, XIII. a.

d. In case of injury to other property in general.

1. By collision.

Cases of injury to property other than stock by collision have usually included injury to the person also, such cases generally consisting of the running of locomotives and cars against horses and vehicles and their drivers; and such injuries have usually been treated as incidental to the personal injury, and damages therefor have been sought, as a general rule, in the action for damages for the personal injury; and the effort to recover for injury to the property also does not seem to have affected the rules with reference to pleading negligence. Such cases are set forth *supra*, X. b, 2 and 3. And in case of injury to property by collision independent of personal injury it would appear that the same rules are applicable.

Thus, in Evansville & T. H. R. Co. v. Taft, 2 Ind. App. 237, 28 N. E. 443, it was held that a complaint in an action against a railroad company alleging that the defendant, by its agents, servants, and employees, so carelessly and negligently managed and operated a locomotive and train of cars that the same ran into the threshing machine of the plaintiff at a crossing and injured it, sufficiently avers the defendant's negligence.

2. From defective construction.

Injury to property by railroads, from defective construction, seems to call for no different rules with reference to pleading negligence than does injury to persons from a like cause.

Thus, a petition in an action against a railroad company, alleging that the defendant carelessly and negligently constructed ditches along its tracks through the lands of plaintiff, in such a manner as to cause surface waters to collect in said ditches and be precipitated on plaintiff's land, whereby certain of his property was injured and destroyed, is good as against a demurrer, but is open to a motion to make it more definite and certain. Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L. R. A. 417, 70 N. W. 263.

And a complaint in such an action charging that the defendant had constructed the roadbed of its railroad along the side of the plaintiff's land at an elevation above the natural surface of the ground, and that the plaintiff was damaged thereby, and alleging generally that plaintiff's damage was caused solely by the negligent and unskilful manner in which said roadbed was constructed, and by the obstruction of the natural drains occasioned through the negligence and carelessness of the defendant in such construction, states a cause of action, and is sufficient on general demurrer. Borchsenius v. Chicago, St. P. M. & O. R. Co. 96 Wis. 448, 71 N. W. 884.

But a petition alleging that the defendant, a railroad company, failed to keep its road in such a condition as to prevent injury to the plaintiff, an adjoining landowner, and negligently failed to make and keep open proper ditches for the purpose of leading water off of plaintiff's land, is defective, and fails to state a cause of action for want of anything to show any legal obligation upon the part of the defendant to maintain ditches for plaintiff's benefit. Field v. Chicago, R. I. & P. R. Co. 76 Mo. 614.

3. From setting fires.

(a) *Allegations as to communication from right of way.*

The mere fact that a railroad company sets fires along its right of way is of no concern to others. The negligence which will give rise to a cause of action against it is negligence in permitting the fire to escape to the premises of others, and the declaration, petition, or complaint in an action therefor must not be so general as to fail to explicitly allege such negligence.

Thus, a complaint against a railroad company by an owner of lands adjoining the railroad, alleging that coals were negligently dropped and sparks and fire emitted from the defendant's locomotives, which set dry grass and other combustibles, negligently suffered to gather on the right of way, on fire, which fire was communicated to plaintiff's lands, is bad on demurrer in the absence of an allegation that the fire was communicated to plaintiff's property by any fault or negligence of the defendant. Pittsburgh, C. & St. L. R. Co. v. Hixon, 79 Ind. 111; Indiana, B. & W. R. Co. v. Adamson, 90 Ind. 60; Louisville, N. A. & C. R. Co. v. Ehlert, 87 Ind. 339; Indiana, B. & W. R. Co. v. McBroom, 91 Ind. 111.

And so is one in an action by one who had piled his wood near the line of a railroad, alleging that the defendant railroad company carelessly and without license from the plaintiff and without fault or negligence on his part, set fire to rubbish and trash upon the grounds which the defendant used for operating trains of cars upon its road, which fire communicated with plaintiff's wood and consumed the same, since in such case negligence in permitting the spread of the fire to contiguous property constitutes the gist of the action. Pittsburgh, C. & St. L. R. Co. v. Culver, 60 Ind. 469.

And the same rule applies to an allegation of negligence in failing to provide its locomotive with proper spark arresters whereby rubbish was set on fire, and such fire escaped from the premises of the defendant and set fire and destroyed the plaintiff's wheat. Indiana, B. & W. R. Co. v. Adamson, 90 Ind. 60.

In the above case, Louisville, N. A. & C. R. Co. v. Krinning, 87 Ind. 351, *infra*, was distinguished upon the ground that in that case it was not only averred that the defendant negligently set fire to dry grass on its right of way, but also that it negligently suffered and permitted the fire to spread from its right of way to adjoining lands and thence to the lands of the plaintiff, and Louisville, N. A. & C. R. Co. v. Hanmann, 87 Ind. 422, *infra*, was distinguished upon the ground that there it was averred that the defendant so negligently conducted the running of one of its engines that it fired the grass, weeds, and rubbish along its track, and that said engine fired the grass and other combustible material grown and accumulated upon the land in the vicinity of adjoining land lying between the railroad and the plaintiff's land.

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So, a complaint in an action against a railroad company, alleging that the railroad runs near the farm of a third party and that the premises of said third party were fired from sparks and coals emitted from a passing locomotive belonging to defendant, and that said defendant carelessly and negligently omitted to provide said locomotive with sufficient and proper spark arresters, and permitted the spark arresters used to become defective, and that coals of fire emitted therefrom set fire to the premises aforesaid, which communicated to lands of the plaintiff, destroying his property, charges negligence with relation to the spark arresters only, and is insufficient on demurrer in failing to allege that the railroad company was negligent in permitting the fire to spread from the third party's land to the land of the plaintiff, and in failing to show that the injury to plaintiff's land was the proximate result of the defendant's negligence. Lake Erie & W. R. Co. v. Miller, 9 Ind. App. 192, 36 N. E. 428; Lake Erie & W. R. Co. v. Pettijohn, 9 Ind. App. 695, 36 N. E. 429.

In Lake Erie & W. R. Co. v. Miller, 9 Ind. App. 192, 36 N. E. 428, *supra*, previous Indiana cases in which the concluding charge of the complaint avers that the fire was caused wholly by the fault and negligence of the defendant, were distinguished upon the ground that there is no such averment in the complaint in this action.

Likewise, an averment in an action against a railroad company that the employees and workmen of the defendant permitted or suffered fire to escape from its right of way to the plaintiff's land, without stating that the company thus permitted or suffered it, cannot be upheld, where it does not appear that the employees and workingmen were then engaged in the line of their employment. Louisville, N. A. & C. R. Co. v. Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400.

But the negligence charged in a complaint against a railroad company, averring that it negligently permitted combustible matter to accumulate upon its right of way and negligently failed to remove the same, and that fire caught therein, and through the carelessness and negligence of defendant was permitted to spread to plaintiff's land where it destroyed his property, relates to the spread of the fire; and, thus construed, the complaint is sufficient on demurrer. Chicago & E. R. Co. v. House, 10 Ind. App. 134, 37 N. E. 731.

And a complaint in such an action by the owner of land adjoining the right of way alleging that a fire on the defendant's right of way, by the carelessness and negligence of the defendant, was allowed to spread from such right of way to the plaintiff's property, injuring it, sufficiently avers that the defendant negligently suffered or caused the fire to escape from its right of way to the plaintiff's premises. Lake Erie & W. R. Co. v. Griffin, 8 Ind. App. 47, 35 N. E. 396; Terre Haute & L. R. Co. v. Walsh, 11 Ind. App. 18, 38 N. E. 534; Chicago, St. L. & P. R. Co. v. Williams, 131 Ind. 30, 30 N. E. 696; Pittsburgh, C. & St. L. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285; Wabash, St. L. & P. R. Co. v. Johnson, 96 Ind. 44; Black v. Aberdeen & W. E. R. Co. 115 N. C. 667, 20 S. E. 713, 909; Haugen v. Chicago, M. & St. P. R. Co. 3 S. D. 394, 53 N. W. 769.

And it is sufficient on demurrer for want of sufficient facts. Pittsburgh, C. & St. L. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285; Terre Haute & L. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534.

And it is also sufficient to warrant an instruction to the jury with reference to the damages suffered. Black v. Aberdeen & W. E. R. Co. 115 N. C. 667, 20 S. E. 713, 909.

And it is not subject to objection that the allegation as to the spread of the fire and destruction of the property are not sufficient in that it does not charge that the fire reached and destroyed plaintiff's property by a continuous burning. Chicago, St. L. & P. R. Co. v. Williams, 131 Ind. 30, 30 N. E. 696.

So, a general averment at the close of a complaint against a railroad company for negligently permitting fire to escape from its right of way to premises of the plaintiff is sufficient to characterize as negligent all that the defendant had done or permitted. Louisville, N. A. & C. R. Co. v. Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400; Brinkman v. Bender, 92 Ind. 234; Pittsburgh, C. & St. L. R. Co. v. Jones, 86 Ind. 496, 44 Am. Rep. 334.

And a complaint in such an action, alleging that sparks and fire escaped from a locomotive and negligently set fire to grass upon the plaintiff's land and burned and destroyed it, and that said fire, injury, and damages were caused wholly by the neglect and carelessness of the defendant, though not aptly worded, fairly charges in general terms that the plaintiff's property was destroyed by fire which escaped from the defendant's engines through neglect and carelessness, and is not subject to demurrer. Ohio & M. R. Co. v. McCartney, 121 Ind. 385, 23 N. E. 258.

Nor is a complaint in such an action, alleging negligence of the defendant in allowing dry grass, weeds, and other combustible material to accumulate and remain upon its right of way at a time when a drought prevailed, and that the defendant by its agents and servants so negligently conducted the running of one of its engines that it fired said grass and other combustible material, and that such fire destroyed plaintiff's property and was wholly the result of the carelessness and negligence of the defendant, objectionable as containing no allegation that defendant negligently permitted fire to escape from its right of way to the land of the plaintiff. Louisville, N. A. & C. R. Co. v. Hanmann, 87 Ind. 422.

So, objections in an action against a railroad company for negligence, in which the complaint alleged that the plaintiff owned land near the railroad, and that the defendant negligently permitted combustible material to accumulate upon its right of way in proximity to plaintiff's land, and that by its agents and employees it so negligently conducted the running of its engines that an engine fired it, and defendant carelessly and negligently permitted the fire to spread from its right of way to adjoining lands and thence to the lands of the plaintiff, and that the engine was not in proper condition to prevent fire escaping, and that the fire was a continuous one, burning over the intervening space and destroying property on plaintiff's land, that it is not stated how near plaintiff's land is to the railroad, in what particular the engine was defective, what the negligent acts on the part of the defendant were, or that the injury was the natural and proximate result of the negligent acts of the defendant,—cannot be taken by demurrer. The proper way to reach such defects, if they existed, is by motion to make the complaint more specific. Louisville, N. A. & C. R. Co. v. Krinning, 87 Ind. 351.

But where a complaint against a railroad company for damages resulting from an escape of fire from its right of way avers negligence on the part of the company in permitting a fire started on its right of way to escape therefrom to the adjoining premises, if the averment is indefinite and uncertain the defendant may by

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motion have it made more definite and certain. Louisville, N. A. & C. R. Co. v. Parks, 97 Ind. 307.

And a petition in such an action, charging that defendant, through its agents and servants, negligently permitted fire to escape from its engines, whereby fire was communicated to plaintiff's fences, should be required, on motion, to be made more specific with respect to the time of the escape of the fire, so that the defendant might be abie to determine who its agents were in charge of the train. Melvin v. St. Louis & S. F. R. Co. 89 Mo. 106, 1 S. W. 380.

Such a complaint by an owner of land adjoining the railroad, alleging that the defendant negligently suffered fire to escape from its right of way to the lands of the plaintiff, injuring his property thereon, however, is sufficiently specific, and will not be required, on motion, to be made more specific by stating the acts of negligence imputed to the defendant. Chicago, St. L. & P. R. Co. v. Barnes, 2 Ind. App. 213, 28 N. E. 328.

And a petition in such an action charging that the defendant negligently ran a specified locomotive so that fire was permitted to escape to plaintiff's farm and to the right of way, and that it negligently permitted combustible matter to accumulate and thereby set fire to property belonging to the plaintiff, sufficiently states the specific acts of negligence relied on for recovery. Palmer v. Missouri P. R. Co. 76 Mo. 217.

In the above case, Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514, *infra*, XIV. d, 2, was distinguished upon the ground that there no direct connection between the negligence and the injury is shown, whereas here the negligence alleged is the careless running and management of the locomotive, and the consequence alleged is the escape of sparks of fire by which fire was communicated to plaintiff's property, clearly showing the connection between the negligence and the injury.

So, a complaint in an action against a railroad company by one owning land adjoining the right of way, alleging that the defendant negligently allowed combustible rubbish to accumulate and remain upon its right of way, and in operating locomotives such rubbish was set on fire, and that defendant carelessly permitted the fire so set to escape from the right of way to plaintiff's premises, there injuring and killing trees growing thereon, will not be required on motion to be made more specific by stating more particularly the acts or omissions which constitute defendant's negligence in permitting the fire to escape from the right of way, since reasonable certainty is all that can be practically accomplished, and it would be beyond the province of pleading to aver specifically every possible method by which the escape of the fire might have been prevented. Ohio & M. R. Co. v. Wrape, 4 Ind. App. 100, 30 N. E. 428.

Nor will it be required, on motion, to be made more specific by stating the number of trees injured, the number killed, and the number destroyed, and the number and particular kinds of oak, and the number and specific classification of all other kinds for which damages are claimed, since these are matters of evidence, which would be treated as surplusage had they been alleged. *Ibid.*

And a complaint in such an action, alleging that the defendant, while running a locomotive on its road, carelessly discharged sparks and coals of fire therefrom upon its right of way, igniting combustible materials which it had negligently permitted to accumulate, and that it carelessly permitted the fire so set out to escape and communicate to plaintiff's premises adjoining, where it destroyed his crops, will not be required, on motion, to be made more specific so as to show in what the alleged negligence in discharging coals and sparks consisted, —whether in improper equipment or careless operation,—the gist of the wrong being negligence in suffering the fire to escape from the premises of the defendant; though the rule might be different if the fire had been communicated directly to the plaintiff's property. Ohio & M. R. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812.

(b) *Other allegations in general.*

An allegation that the defendant, a railway company, negligently set fire to and destroyed property of the plaintiff from its locomotives is not insufficient on account of failure to state the facts constituting the negligence, where the mere communication of fire by a railway engine is of itself sufficient to raise a prima facie presumption of negligence. Louisville & N. R. Co. v. Marbury Lumber Co. 125 Ala. 237, 50 L. R. A. 620, 28 So. 438; Seska v. Chicago, M. & St. P. R. Co. 77 Iowa, 137, 41 N. W. 596.

And it is only necessary to allege and prove that the fire complained of was caused by the operation of the defendant's railroad to make out a prima facie case for damages caused thereby, under Kan. Gen. Stat. ¶ 1321; and a petition containing such an allegation is not subject to demurrer, or to a motion to make it more definite and certain. Ft. Scott, W. & W. R. Co. v. Tubbs, 47 Kan. 630, 28 Pac. 612.

In the above case, St. Louis & S. F. R. Co. v. Fudge, 39 Kan. 543, 18 Pac. 720, *infra*, was distinguished on the ground that that case was decided, or intended to be decided, under the old law, and not under the statute.

So, a complaint in an action against a railroad company, alleging that the defendant negligently permitted combustible material to accumulate on its right of way and set fire thereto, and negligently permitted it to escape to the lands of an owner adjoining the right of way, is not bad for want of an averment that the fire was caused by some negligent act or defective machinery of the defendant. Lake Erie & W. R. Co. v. Clark, 7 Ind. App. 155, 34 N. E. 587.

And a declaration in such an action, alleging that the defendant, while using a locomotive and other rolling stock on its road, so negligently managed it that the plaintiff's cotton mill was set on fire by sparks from said locomotive, is not subject to objection that the injury was charged to have been occasioned by the careless management, not of the engine, but of the fire in the engine, since the management of an engine consists in part of the management of the fire which generates its motive force. Smith v. Old Colony & N. R. Co. 10 R. I. 22.

Nor is a complaint in such an action, alleging that the defendant negligently suffered coals and sparks of fire to escape from its locomotive, which set fire to combustibles which defendant negligently suffered and permitted to gather and remain on its right of way, near to and adjoining plaintiff's lands, and, spreading to said lands, burned his fences, grass, corn, and soil, demurrable on the theory that the gravamen of the action is the burning of the fences, corn, crops, grass, etc., and not the injury to the soil, since the pleader had the right to charge the burning of numerous objects. Chicago & E. R. Co. v. Smith, 6 Ind. App. 262, 33 N. E. 241.

And a charge in a complaint against a railroad company in an action by one who had piled up wood near the defendant's line of railroad, that the defendant, without any license so to

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do from the plaintiff, and without right, unlawfully burned up and destroyed said wood, is a direct charge that the defendant burned and destroyed the plaintiff's wood, and is sufficient. Pittsburgh, C. & St. L. R. Co. v. Culver, 60 Ind. 469.

So, a complaint in an action against a railroad company that it negligently ran its train filled with oil over its track, which was defective, at a rate of speed forbidden by ordinance, and that the train was wrecked by reason thereof, and the oil flowed on to plaintiff's premises and caught fire and destroyed her property, states a good cause of action for negligence. Lake Erie & W. R. Co. v. Lowder, 7 Ind. App. 537, 34 N. E. 447, 747.

And while a complaint in such an action, alleging that the defendant negligently permitted great quantities of combustible materials to accumulate along the line of its road where it passed through plaintiff's farm, and that the defendant, by its agents, servants, and employees, ran a locomotive, over that portion of its road which was not provided with a sufficient spark arrester to prevent the discharge of sparks of fire and live coals, and that such rubbish became ignited and the fire was by the said rubbish negligently communicated to the plaintiff's field, which was fired thereby and destroyed plaintiff's property, does not contain the exactness and precision which characterize skilful or careful pleading, it sufficiently appears therefrom that the negligence referred to was intended to be imputed to the defendant, and is good on demurrer. Louisville, N. A. & C. R. Co. v. Parks, 97 Ind. 307.

And while such a petition should be required to be made more specific on motion by stating what train caused the injury,—whether it was a freight or a passenger train, and what direction it was going,—refusal to require it to be made more specific in this respect is not a ground for reversal, where it appears that some of the servants of the company were present when the fire escaped, and that they had the same information with respect thereto as was possessed by the plaintiff. Missouri P. R. Co. v. Merrill, 40 Kan. 404, 19 Pac. 793.

And the overruling of a motion to make such a complaint more specific by stating therein what train the engine which started the fire complained of belonged to is not reversible error, since the motion itself was indefinite, and should have specified in what respects the defendant wished the engine to be identified in such a manner that it would be apparent that the sustaining of the motion would be beneficial. Chicago & E. R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033.

So, while an allegation in a complaint in an action for damages against a railroad company for the destruction of plaintiff's mills by fire emitted from a locomotive operated by the agents of the defendant, that an engine of the defendant was imperfectly constructed and unskillfully and negligently run and managed, and that by reason thereof it caused the destruction of the plaintiff's property, not undertaking to identify any particular engine, is indefinite as to the engine, and liable to a motion to be made more definite, where it is sufficiently specific, in connection with other facts alleged as to time and place, to enable the defendant to ascertain, with a reasonable degree of certainty, what engine passed at the time alleged, and the claim is that it is so specific as to identify the particular engine and limit the plaintiff to his proof to that engine,—it may be taken for granted that the allegation is sufficiently definite to enable the defendant to ascertain the engine which caused the loss, and prepare itself to meet the cause. Koontz v. Oregon R. & Nav. Co. 20 Or. 3, 23 Pac. 820.

But a petition in an action for damages on account of property burned on plaintiff's land by a fire set out from an engine operated on defendant's railroad, which does not allege that the defendant was negligent as to the construction of the engine, or that the engine was negligently or improperly constructed, is not sufficient to support an instruction to the jury that if they found that the fire was caused through the negligence of the defendant in the construction or management of the engine, damages should be awarded. Miller v. Chicago, M. & St. P. R. Co. 76 Iowa, 718, 41 N. W. 28.

In Wise v. Joplin R. Co. 85 Mo. 178, however, it was held that a petition in an action against a railroad company alleging that the defendant negligently ran and controlled one of its engines so as to permit fire to escape, whereby plaintiff was injured, states a good cause of action, though negligence in failing to provide a properly constructed and equipped engine is not mentioned; and that an instruction on the trial with reference to such failure is not a variance.

So, an allegation in a complaint against a railroad company that the defendant negligently and carelessly took and permitted fire to be taken from its engine and placed upon the ground in and among straw and stubble, and thereby allowed it to communicate to and consume plaintiff's property, is insufficient to justify a recovery on the sole ground that the defendant was negligent in not extinguishing the fire after it had been taken from the engine. Lleuallen v. Musgrove, 33 Or. 282, 54 Pac. 200, 664.

And a petition alleging that the defendant negligently permitted fire to escape from its engines upon its road, whereby fire was communicated to plaintiff's fences, contains no charge whatever of negligence in permitting dry grass to accumulate upon the right of way, and that issue should not be submitted to the jury. Melvin v. St. Louis & S. F. R. Co. 89 Mo. 106, 1 S. W. 380.

Nor is a petition in such an action, alleging that defendant negligently permitted large quantities of dry grass to accumulate upon its right of way near plaintiff's premises, and that its servants, agents, and employees running its engine over the road, negligently permitted it to cast out sparks and coals which set fire to the dry grass, which fire spread to the land of plaintiff, sufficient to support a finding that the negligence of the company consisted in some defect in the engine. St. Louis & S. F. R. Co. v. Fudge, 39 Kan. 543, 18 Pac. 720.

But an allegation in a petition in such an action against a railroad company for negligently managing its train and failure to employ suitable means to prevent the escape of fire from its engines, that the company was also negligent in permitting combustible material to accumulate on the road, does not so broaden the charge as to make Kan. Laws 1885, chap. 155, prescribing the rule in actions for damages by fire caused by the operation of a railroad, inapplicable on the theory that caring for the right of way is not operating a railroad within the terms of that act. Missouri P. R. Co. v. Merrill, 40 Kan. 404, 19 Pac. 793.

And a complaint against a railroad company, alleging that the defendant's engine was so negligently, carelessly, and insufficiently constructed and equipped as to emit and throw out large sparks of fire, is broad enough to include the condition of the engine for arresting sparks, whether its defects in that respect resulted from the original construction or from

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defects caused by use, wear, or injury to its parts. Smith v. Chicago, M. & St. P. R. Co. 4 S. D. 71, 55 N. W. 717.

And it is sufficient to support a special finding of the jury that the negligence of the defendant which caused the damage to the plaintiff was the condition of its locomotive. *Ibid.*

So, a petition charging that fire was caused by the negligence of the defendant's agents and employees in operating its locomotives is sufficient to require proof on the part of the defendant to rebut the prima facie case made by plaintiff, by showing that such engines were provided with necessary spark arresters, that they were in good repair, and that they were properly managed, and does not restrict the proof to the mere handling of the locomotive by the engineer, irrespective of the defective character of the engine for preventing the escape of fire. Texas & P. R. Co. v. Gains (Tex. Civ. App.) 26 S. W. 873.

And under the rule that a liberal view is to be taken of pleadings in suits before a justice of the peace, a bill of particulars in such a suit against a railroad company, alleging that the defendant was running one of its trains carelessly and negligently, and that it failed to employ suitable means to prevent the escape of fire from the engine that was hauling the train, and that it permitted combustible matter to remain on the right of way, and that, by reason of its negligence, fire escaped, states a cause of action. Missouri P. R. Co. v. Henning, 48 Kan. 465, 29 Pac. 597.

Likewise, in Louisville & N. R. Co. v. Miller, 109 Ala. 500, 19 So. 989, it was held that a complaint alleging damages to the plaintiff caused by fire from the engines operated by the defendant destroying his fence and a building, all of which was caused by the negligence of the defendant, counts upon whatever negligence caused the fire to start and to injure the plaintiff's premises, and recovery may be had upon proof of any negligence the proximate cause of the injury, whether it was done in respect to the equipment of the engine or the prevention of the escape of sparks, or in respect to the condition of the roadway whereby it readily became ignited from fire escaping from the engine whether negligently or not; but there appears to have been no objection to the complaint upon the ground that negligence was not sufficiently stated, the question appearing to have been one as to the proof admissible under it.

As to allegations of negligence in setting fires by others not railroad companies, see Keating v. Brown, 30 Minn. 0, 13 N. W. 909; Kelley v. Anderson, 15 S. D. 107, 87 N. W. 579,—*infra*, XXI. c.

XI. *Application of rules to negligence of street railroads.*

The rule as to pleading negligence in actions against street railroad companies is certainly no more strict with reference to averring negligence than that applicable to ordinary railroads, but is probably somewhat more liberal in some respects in view of the fact that such street railroads operate in public streets, where the person injured could seldom be regarded as a trespasser, and would not, therefore, be called upon to show his right to be at the place where he was when injured.

Thus, it is sufficient, in an action against a street railway company for damages for personal injuries alleged to have been caused by the negligence of the defendant in running a car against the plaintiff in the operation of its railway, to allege such negligence generally. Shenners v. West Side Street R. Co. 74 Wis. 447, 43 N. W. 103; Consumers' Electric Light & S. R. Co. v. Pryor (Fla.) 32 So. 797.

And a general allegation of negligence in running a car against plaintiff warrants proof that the street and car were out of repair. *Ibid.*

And a declaration in such an action, alleging, in general terms, that by the careless management of the car in a public street, by the agents of the defendant, it ran over plaintiff's body and arm, though loosely drawn, is good on demurrer. Breese v. Trenton Horse R. Co. 52 N. J. L. 250, 19 Atl. 204.

And a petition in such an action by parents for damages for the killing of their child, charging that the child, not being of years of discretion, was near to or on the track, in plain view of persons in charge of the car, and that they failed to exercise ordinary care, and, by their negligence and carelessness ran over the child and killed it, sufficiently alleges the negligence of the defendant and its servants. Austin Rapid Transit R. Co. v. Cullen (Tex. Civ. App.) 29 S. W. 250.

And such a petition, stating that the killing of the child was the result of negligence of the officers, agents, employees, and servants of the defendant, and that the car was running at about 12 miles an hour, and at such a rate of speed the motorman driving the car could have seen the child upon the track, is not subject to exception for not alleging the facts constituting negligence, or what officer or servant was negligent. San Antonio Street R. Co. v. Mechler (Tex. Civ. App.) 29 S. W. 202.

So, an allegation, in an action against a street railway company for a collision with the carriage in which the person injured was riding, that the defendant negligently drove its cars against the carriage, is sufficient; it is not necessary to set forth the variety of circumstances which might have contributed to the negligence, since that would be to plead the evidence. Chicago City R. Co. v. Jennings, 57 Ill. App. 376; Citizens' Street R. Co. v. Lowe, 12 Ind. App. 47, 39 N. E. 165; Pope v. Kansas City Cable R. Co. 99 Mo. 400, 12 S. W. 891.

And it warrants proof by the plaintiff to show the rate of speed at which the car was running, that such speed was greater than allowed by the city ordinance, and that in the management of the car the warning bell was not rung. Traver v. Spokane Street R. Co. 25 Wash. 225, 65 Pac. 284.

But such a pleading is indefinite in failing to set forth the specific facts of the negligent act, and probably subject to motion to make the complaint more specific. Citizens' Street R. Co. v. Lowe, 12 Ind. App. 47, 39 N. E. 165.

So, a complaint in an action against a street railway company alleging that while the plaintiff, a child of five years, was in the act of crossing a designated street on the crosswalk, the driver of a street car so negligently and carelessly managed his team that the horses knocked her down and injured her, distinctly states negligence in the management and control of the team, and its meaning and application are definite and certain, and she will not be required to state what act of commission or omission of the driver was negligence. Agnew v. Brooklyn City R. Co. 20 Abb. N. C. 235.

Nor is an allegation in such an action, that the defendant by its servants so carelessly and improperly drove and managed one of its motors and trains of cars that said motor and train of cars ran into and against the plaintiff's carriage and crushed and destroyed it, subject to objection for vagueness, uncertainty, and indefiniteness, or to special demurrer therefor, since in such case the pleader could not know exactly what caused the failure of the defend-

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ant's servants to properly drive and manage the motor car. Chicago City R. Co. v. Jennings, 157 Ill. 274, 41 N. E. 629.

In the above case, Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 425, *supra*, VIII. c, and X. b, 1, was distinguished on the ground that the declaration here is full in its allegations charging the collision directly to the carelessness and mismanagement of the servants driving and managing the motor car, while there the charge was made against the company generally without reference to the conduct of the servants employed by it.

And a declaration in an action for an injury in a collision caused by a street car striking the rear end of plaintiff's wagon, charging negligence in the management of the car, whereby it was permitted to run with great speed and force against the wagon, is sufficiently specific in its description of negligence to warrant proof that the plaintiff was upon the track, of the rate of speed of the car, of the fact that the wagon box fell upon plaintiff, and of the fact that one track was higher than the other, and of its general condition. Bush v. St. Joseph & B. H. Street R. Co. 113 Mich. 513, 71 N. W. 851.

So, it is not necessary, in an action against a street railway company for damages for an injury caused by frightening a horse, to specially set forth in the declaration the injudicious sounding of the gong as an element of negligence. Sounding the gong is an incident to the running of the car, and a general averment of negligence in the running of the car is sufficient to include it. Benjamin v. Holyoke Street R. Co. 160 Mass. 3, 35 N. E. 95.

And an allegation in a declaration in such an action for a personal injury to the plaintiff and the breaking of his carriage by an electric car due to the horse becoming frightened at the car and backing before it, that the motorman, seeing that the car was frightening and making the horse unmanageable, did not slacken and lessen the speed and noise of the car, but negligently persisted in and continued the same, thereby causing the injury, is a sufficiently specific averment of negligence. Richter v. Cicero & P. Street R. Co. 70 Ill. App. 196.

And a petition in an action against a cable-car company by a person injured by being thrown from his buggy on account of the wheel of the buggy running into the slot of one of defendant's railway tracks, alleging that by reason of the negligence of the defendant said slot or opening became dangerously and negligently large so as to permit the wheel of plaintiff's carriage to sink down into it, thereby causing the injury, is not subject to objection for failing to allege that the defendant had notice or knowledge that the slot was dangerously wide at the place of the injury, there being no rule of pleading requiring such an allegation. Keitel v. St. Louis, C. & W. R. Co. 28 Mo. App. 657.

But a declaration in an action against a street railway company for digging up the ground on the street and throwing up quantities of dirt and rubbish into the street adjoining the track, by which the plaintiff's buggy was capsized, does not set forth a cause of action, where it does not allege any neglect of duty on the part of the defendant in failing to erect and maintain barriers or danger signals. Cowan v. Muskegon R. Co. 84 Mich. 583, 48 N. W. 166.

And Fla. act 1891 (Rev. Stat. Appx. p. 1008, chap. 4071), defining the liability of railroad companies, and regarded as applicable to street railroads, does not change the rule of alleging negligence in actions against them for colliding with persons crossing its tracks to the extent of requiring only an allegation of injury or damage by the running of locomotives, cars, or other machinery of the defendant company. Consumers' Electric Light & Street R. Co. v. Pryor (Fla.) 32 So. 797.

As to pleading negligence of street railroad companies causing injury to passengers, see *infra*, XII. b, 3.

XII. *Application of rules to negligence of carriers.*

a. *Of goods or property.*

The facts concerning an injury to goods or property in the hands of a carrier are usually more within the knowledge of the carrier than of the owner. For this reason, and for the reason that a high degree of care is required of a carrier, so that a loss or injury of itself alone raises, at least to some extent, an inference of negligence, pleading negligence generally in an action for such loss or injury, or at least a statement of the act causing the injury and that it was negligently done, is all that is necessary.

Thus, a general charge in an action against a railroad company for alleged negligence in the transportation of a load of horses whereby they were injured, that the defendant negligently handled the car containing the horses in giving momentum to the train so that the horses were injured, is a sufficient averment of negligence on objection to the introduction of evidence thereunder. Union P. R. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457.

And a general charge of negligence in an action by an owner of a steamboat with relation to the shipment of lumber by water, for freight and for expenses incurred in salvage, is good as a basis for proof unless objected to at a proper time before trial. Conrad v. De Montcourt, 138 Mo. 311, 39 S. W. 805.

So, an allegation in a petition in an action against a railroad company for an injury caused by delay in transportation of cattle, that the delay to the cattle was caused by the negligence of the defendant, warrants the admission of evidence that defendant's track at the place where the delay occurred was in bad condition to show such negligence. St. Louis, A. & T. R. Co. v. Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008.

And a petition in an action against an express company alleging the receipt by the defendant from the plaintiff of a hog for transportation and the failure to deliver the same at the point of destination, and that said hog died while in transit through the negligence of the defendant, is sufficient, as against an objection that it fails to state a cause of action, in that there is no allegation of any specific act of negligence or duty neglected. Lachner Bros. v. Adams Exp. Co. 72 Mo. App. 13.

Likewise, a good cause of action is stated in a complaint alleging the delivery of goods by the owner to another, and the acceptance by the latter, to be carried from one place to another without reward, and the loss of such goods by the bailee, and that such loss was occasioned by his gross negligence. McCauley v. Davidson, 10 Minn. 418, Gil. 335.

A complaint in an action for neglecting and refusing to provide cars at the time appointed and as requested and promised for the transfer of live stock, however, charging that the defendant neglected and refused to provide said cars for several days, and when provided neglected and refused to carry the stock with reasonable diligence, should be made more definite and certain on motion in respect to the damages complained of, so as to inform the defend-

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ant what part of such damages is claimed to have arisen from the failure to furnish the cars in proper time as agreed, and what part is claimed to have arisen from the negligent running of the trains and delay on the route. Ayres v. Chicago & N. W. R. Co. 58 Wis. 537, 17 N. W. 400; Richardson v. Chicago & N. W. R. Co. 58 Wis. 534, 17 N. W. 399.

But such an allegation is sufficiently definite and certain where the claim for damages is predicated upon the delay in furnishing the cars, and not on the negligent running of the cars or delay on the route. Richardson v. Chicago & N. W. R. Co. 58 Wis. 534, 17 N. W. 399.

And a petition in an action against a proprietor of a steamboat for injury to a shipment of hogs, alleging that the defendant did not exercise due and proper care in their carriage, and that defendant, its officers, servants, and agents, negligently managed and conducted the steamboat carrying them, and by reason of such negligent conduct the hogs were destroyed by fire, is intelligible and sufficient to notify the defendant what it must meet on the trial. Carlisle v. Keokuk Northern Line Packet Co. 82 Mo. 40.

And a complaint alleging delivery by the plaintiff of poultry to the defendant, who was a common carrier of freight on board his boat, and his receipt of the same for the purpose of carrying it to New York on that day, and that did not proceed on that day to New York, nor within a reasonable time afterwards, but so negligently conducted himself in this behalf that the poultry was not conveyed to New York and delivered there until it became spoiled, sufficiently avers negligence on the part of the defendant in the care of the poultry. Peck v. Weeks, 34 Conn. 145.

So, a petition in an action against a railroad company for damages for delay in transporting a shipment of cattle, alleging that 500 head of cattle, reasonably worth $10 per head, were killed, and that 620 head were injured to the extent of $6 or $7 per head, is sufficiently specific, and not subject to the exception that it does not state how many cattle died in transit, or how many, in the aggregate, or the number or value of those alleged to have been injured. Missouri P. R. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607.

Likewise, the location of feeding and watering stations for the purpose of feeding and watering live stock that might be transported over lines of railway companies is a fact peculiarly within the knowledge of railway companies and owners of transporting lines, and is not a matter to be pleaded by the shipper in bringing action for damages that may have occurred on such lines of railways through the failure and negligence of such railroad or transporting companies and employees thereof to properly feed and water stock shipped or carried over such roads. Gulf, C. & S. F. R. Co. v. Wilhelm (Tex. App.) 16 S. W. 109.

A complaint in an action against a common carrier by water, for damages for negligence in transporting goods, alleging that the defendant so negligently and carelessly misbehaved itself in transporting the goods in question that they were damaged, however, containing no suggestion of any fact showing the character of the negligence, whether by improper stowage, or careless handling, or negligent exposure, or any one of the numerous acts, omissions, and circumstances by which negligence might be made apparent, should be required on motion to be made more definite and certain. Reubens v. Ludgate Hill S. S. Co. 21 Abb. N. C. 464, 2 N. Y. Supp. 30.

So, a statement of a cause of action before a justice of the peace in an action against a railroad company, that the railroad company was debtor to plaintiff for damages in negligently breaking soda apparatus shipped on a designated date, discloses a cause of action, and is sufficient on objection to the introduction of evidence therein. Witting v. St. Louis & S. F. R. Co. 101 Mo. 631, 10 L. R. A. 602, 14 S. W. 743.

And a petition in an action against a railroad company for the value of a cargo of mules burned to death while in transit by the burning of the car, alleging the delivery and loss of the mules while in defendant's possession as a common carrier, and charging negligence in managing and operating the train whereby the car was set on fire, is sufficient, and an objection to the introduction of evidence thereunder is properly overruled. McFadden v. Missouri P. R. Co. 92 Mo. 343, 4 S. W. 689.

But a petition in an action against a railroad company for injury to stock while transporting it, alleging that the defendant, its agents, servants, and employees so negligently loaded such stock that it was greatly damaged, and that such damage was caused by negligently furnishing and causing said stock to be loaded on a defective and unsound car, will not support proof of injury to the stock by being improperly bedded in the car. Atchison v. Chicago, R. I. & P. R. Co. 80 Mo. 213.

b. *Of passengers.*

1. *General rules.*

Though passengers are not so entirely under the control of the carrier as goods or property, a high degree of care is required in their carriage as well as in the carriage of goods or property, and, as in case of goods or property, information as to the cause of an accident is more easily obtained by the carrier than by the passenger, so that as a general rule a statement of the act causing the injury in an action therefor, and that it was negligently done, is sufficient, since that constitutes an averment of a specific act of negligence.

There is a material difference between a suit by an employee and a suit by a passenger for a personal injury, with respect to the necessity of specifying in the complaint the facts constituting the negligence sued for, since the latter has, as a general rule, no means of knowing what has caused the accident or injury, and is not, therefore, required to specify the acts of negligence or facts showing want of care on the part of the defendant.

It is not sufficient in an action for negligence, however, merely to allege generally the negligence and carelessness of the defendant, without giving any particulars of such negligence, even in a case of injury to passengers. King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975.

And it is not sufficient in such an action to allege that it was the duty of the defendant to do certain things. Such allegations are mere conclusions of law which are not traversable. The declaration must state facts from which the law will raise the duty. Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680, Affirming 70 Ill. App. 550.

But the relative rights and obligations of passenger and carrier are matters of law, and the objection in an action by a passenger against the carrier for an alleged negligent injury, that the duty alleged as a conclusion of law does not harmonize with the facts averred as a breach of the duty, does not render the declaration insufficient to sustain a judgment

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if it contains facts sufficient to raise the duty of which a breach is alleged. *Ibid.*

2. *On ordinary railroads.*

(a) *Generally.*

The general rules above laid down are particularly applicable to ordinary railroads as carriers of passengers.

And averments that a car was derailed through the negligence of the railway company and its servants, and that plaintiff, who was a passenger therein, was thereby injured, are sufficient without stating the particular act of negligence. Gulf, C. & S. F. R. Co. v. Wilson, 79 Tex. 371, 11 L. R. A. 486, 15 S. W. 280; Gulf, C. & S. F. R. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104; Clark v. Chicago, B. & Q. R. Co. 4 McCrary, 360, 15 Fed. 588.

In such case it is sufficient to state generally that the injury was the result of defendant's negligence. Clark v. Chicago, B. & Q. R. Co. 4 McCrary, 360, 15 Fed. 588.

The fact that a car runs off the track is evidence of defect or negligence somewhere, and, the track and the cars being under the exclusive control of the defendant, it is sufficient to charge negligence generally in the absence of any explanation showing that the acts had happened without the fault of the defendant. Gulf, C. & S. F. R. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104.

And an allegation in a declaration in an action against a railroad company showing merely that the plaintiff was in a car, under a duty of the defendant to carry her safely, and that she was, through the negligence of the defendant and its agents, thrown therefrom and under the coaches, though it should be struck out on motion, is clearly good on general demurrer; the defect being one of form, and not of substance. Central R. Co. v. Van Horn, 38 N. J. L. 133.

So, a complaint specifically describing an injurious act by the defendant, a railroad company, wilfully and maliciously performed by it, acting by its agents and servants, upon the plaintiff while a passenger upon one of its trains, is sufficiently specific, and will not be required to be made more specific on motion by setting out the kind of train he took passage on, whether freight or passenger, and stating what servant or servants inflicted the injury, and what time of day or night the train left the station, the complaint being, not for an injury resulting from some general and unspecified negligence, but for a specifically described injurious act wilfully and maliciously performed by it. Wabash R. Co. v. Savage, 110 Ind. 156, 9 N. E. 85.

But a complaint in an action for damages for death alleged to have been caused by the negligence of the defendant, a railroad company, stating that the plaintiff's intestate, being rightfully on a train of cars of the defendant, by the gross negligence of the defendant was slain and killed, is demurrable on the ground that the negligence complained of is not sufficiently and legally made out. Conley v. Richmond & D. R. Co. 109 N. C. 692, 14 S. E. 303.

And a declaration in such an action brought by a passenger for an injury to himself and wife while being transported, going upon the ground of the negligence of the defendant in discharging its duty to safely transport them, not setting forth the facts which give rise to the duty, is defective as merely stating a conclusion of law, and is bad on demurrer. Devino v. Central Vermont R. Co. 63 Vt. 98, 20 Atl. 953.

So, a general averment in an action by a parent against a railroad company for damages for an injury to his child while being permitted to ride upon one of defendant's trains, that the acts of defendant's servant in permitting the child to ride were done in the range of his employment, is a conclusion of law, and not sufficient. It must be made to appear that the act was done, not only while the servant was engaged in the service he was employed to render, but also that it pertained to the particular duties of that employment. Snyder v. Hannibal & St. J. R. Co. 60 Mo. 413.

(b) *Through improper structure or appliances.*

If a railway corporation carries a passenger, and the passenger suffers injury from defective structure or failure to make proper repairs, this is negligence or unskilful conduct on the part of the corporation, and gives a right of action; and, the defect of structure or want of repairs being much better understood by the corporation or persons operating the road than by the person who suffers the injury, an averment that the corporation so negligently and unskilfully conducted itself and its train upon which the passenger was riding as to cause injury is sufficient. Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 So. 902.

And a complaint in an action against a railroad company by an express messenger having the rights of a passenger, for damages for injuries received while riding on defendant's train, the first count of which charges the use of defective appliances and the second the employment of unskilled agents and servants, in consequence of which the messenger was injured, states a good cause of action, and is not defective on demurrer. Lyon v. Union P. R. Co. 35 Fed. 111.

So, a complaint in an action by a passenger on a passenger train against a railway company, alleging that the defendant by its agents and servants carelessly and negligently used a defective locomotive on the train on which plaintiff was a passenger not suitable or sufficient to draw a passenger train at a high rate of speed, and carelessly and negligently ran the train at the dangerous rate of 50 miles per hour upon a down grade without applying brakes, and around a curve not properly elevated, and over defective rails not properly spiked, and over decayed, rotten, and defective cross ties, and over an insufficient roadbed, by reason of which acts of negligence the train was thrown from the track and the plaintiff was injured, though not as specific and methodical as it ought to be, is sufficient to withstand demurrer. Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476.

And a complaint in such an action to recover damages for personal injuries received by plaintiff while riding on one of defendant's freight cars accompanying a carload of live stock, alleging that the defendant did not use due care and diligence and skill in carrying the plaintiff, but that the track of its railway was in bad condition and repair, and the defendant by its servants and employees negligently, unskilfully, and carelessly conducted and ran the train, whereby the caboose upon which the plaintiff was a passenger was thrown from the track and he was injured, is not subject to objection on demurrer that negligence of the defendant is not sufficiently charged, and that under it proof is admissible that the road was in bad condition elsewhere than at the place of the accident; if uncertain in these respects the defendant should have moved the court to require the plaintiff to make the complaint

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more specific. Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719.

In the above case, Indianapolis, P. & C. R. Co. v. Keely, 23 Ind. 133, *supra*, X. b, 1, was distinguished upon the ground that the negligence complained of in the present case related to the condition of the track and the manner in which the train was run and managed, while in that case no act was stated to which the negligence averred to exist could be applied.

So, an allegation in a complaint in an action by a passenger in a railway train against the railroad company for negligence, that the defendant had carelessly hung or fixed a glass bottle containing a fluid in the car in which he was riding and above the seat provided for him, and that said bottle was broken or exploded and the contents negligently spilled upon his person and clothing, which injured and destroyed his clothing and burned and scalded his person, is not demurrable upon the ground that it fails to aver that the bottle was broken by the negligence of the defendant or its servants. Alabama G. S. R. Co. v. Collier, 112 Ala. 681, 14 So. 327.

And a petition in such an action charging negligence on the part of the defendant, its agents and servants, through which the car in which plaintiff was riding ran off the track, injuring her, and that her injuries were caused by the negligence of the defendant, its agents, servants, and employees, is sufficient to authorise the introduction of evidence tending to show that the derailment resulted from the spreading of the track, caused by want of support from the ties, some of which had been burned. Gulf, C. & S. F. R. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104.

But a complaint in an action for damages for injuries received by plaintiff in a wreck on defendant's railroad, caused by the giving way of a bridge and the falling through of the train on which plaintiff was riding, charging negligence in keeping the bridge in repair, and failing to keep a proper watch and oversight over it in order to ascertain its condition, will not support evidence tending to show that the bridge was a defective structure, and was originally improperly and negligently constructed. Knahtla v. Oregon Short Line & U. N. R. Co. 21 Or. 136, 27 Pac. 91.

Nor will an allegation in an action against a railroad company, brought by the parents of a child injured at a depot, that the defendant, by its servants, so carelessly and improperly drove and managed its engine and train that it was run against such child, warrant evidence as to negligence in the construction of the passenger platform. Murray v. Silver City, D. & P. R. Co. 8 N. M. 580, 9 Pac. 369.

(c) *By negligent running or management.*

The principle that if injury be suffered at the hands of a common carrier the law, in the absence of all explanation, presumes it was the result of the carrier's fault, and casts on the latter the burden of overturning the presumption, or of showing that diligence and a careful observance of duty could not have prevented the injury, is applicable to a complaint against a common carrier for personal injury to a passenger, alleging that the defendant did not use due and proper care or skill in carrying the passenger, but so negligently and unskilfully conducted itself in managing and directing the coach in which the passenger was that injury resulted to her. Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 So. 902.

And a declaration in an action by a passenger against a railroad company for damages for a personal injury, charging that the defendant by its agents and servants suddenly caused a train on which the plaintiff was a passenger to be given a very violent jerk, by means whereof the injury occurred, sufficiently alleges negligence. Lavis v. Wisconsin C. R. Co. 54 Ill. App. 636.

And a petition in such an action for the killing a passenger, charging negligence in conducting and running a train, is sufficient to cover the conduct of the engineer in the management of the train at the time of the accident. Ellet v. St. Louis, K. C. & N. R. Co. 76 Mo. 518.

So, a complaint in an action against a railroad company averring that plaintiff's intestate was killed by the oversetting and throwing down of the car in which he was riding, and that this was caused by the negligence of the defendant, sufficiently avers the negligent act which caused the injury, under the West Virginia system of pleading as modified by statute. Searle v. Kanawha & O. R. Co. 32 W. Va. 370, 9 S. E. 248.

And a declaration in such an action charging that the plaintiff was a passenger on one of defendant's trains, and that in making a coupling with the car in which he was a passenger the train approached at a very great and negligent speed, and came with such force against the car which was to constitute a part of the train that he was thrown against the corner of the seat before him and greatly injured, sets forth a cause of action, and is not demurrable. Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494, 15 S. E. 848.

So, allegations in an action for personal injuries causing death, brought against a railroad company, charging negligence in backing a train on a dark night upon one of the defendant's railroad tracks at a certain depot where the decedent was at the time pursuing it to take passage, and running over and killing him, clearly charges negligence, the two allegations presenting issuable questions of fact; and the plaintiff should recover on demurrer thereto, unless there were facts and circumstances averred which bar recovery, notwithstanding defendant's negligence. Andrew v. Chicago & N. W. R. Co. 45 Ill. App. 269.

And a complaint in such an action alleging that the injuries were caused by, and were the direct result of, the carelessness and negligence of the defendant in pushing plaintiff off its train, and in negligently running over him with the train, directly avers that the injuries alleged to have been sustained were the direct result of the negligence of the company, and does not constitute a mere recital which should be disregarded. Louisville, N. A. & C. R. Co. v. Kendall, 138 Ind. 313, 36 N. E. 415.

And one for injuries received in getting off one of defendant's trains, alleging that the infirmity of plaintiff was well known to defendant, and it knew that it was dangerous for her to alight from the train without the aid of a footstool, which it was the custom of defendant to provide, but which was not provided in this instance, sufficiently charges knowledge of the defendant, though it does not state the probative facts necessary to sustain such allegation. Madden v. Port Royal & W. C. R. Co. 35 S. C. 381, 14 S. E. 713.

So, a general charge of negligence in a petition in an action by a passenger against a railroad company for a personal injury, caused by the backing of an engine and cars attached, against a car in which plaintiff was a passenger, includes a failure to give warning; and if a defendant desires a more specific statement as to what was relied upon as constituting the neg-

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ligence charged, he should move to have the petition made more specific. Winter v. Central Iowa R. Co. 80 Iowa, 445, 45 N. W. 737.

And a complaint in such an action, alleging that the car in which plaintiff and his family were then and there riding as passengers was, by and through the fault and carelessness and negligence of the defendant, its agents and employees, thrown with great violence from the railroad track over and down an embankment, causing injury to the person of the plaintiff and of his wife and of his children, is sufficient on demurrer, but should be required to be made more specific, definite, and certain in regard to the charge of negligence on motion therefor. Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 207.

And a declaration alleging that the plaintiff was a passenger for hire on one of the defendant's sleeping cars, and that the defendant undertook to use reasonable and proper diligence in guarding and protecting her from loss by theft while she slept during the usual hours of sleep, but that it so negligently and carelessly guarded and protected her that her money and jewelry were stolen, though defective in not setting forth any particular act of omission constituting negligence, which defect might be reached by special demurrer, is good in substance, and not subject to general demurrer. Pullman Palace Car Co. v. Martin, 92 Ga. 161, 18 S. E. 364.

And an allegation that it was the duty of the defendant to furnish safe ingress and egress to and from its cars, and that, by the negligence of its servants, the car upon which plaintiff was a passenger was halted upon a trestle a great distance from the ground, and that no warning was given to passengers of its position, whereby he stepped off and was injured, though containing an indefinite and very broad statement of duty, sufficiently charges the defendant with a failure to perform its duty to provide a reasonably safe and convenient means of ingress to and egress from its cars. Falk v. New York, S. & W. R. Co. 56 N. J. L. 380, 29 Atl. 157.

But a petition in an action against a railroad company, charging that while plaintiff was in the act of mounting a car an employee of defendant, who had requested him to mount, signaled the engineer to back the train, and said engineer did this so as to produce a violent jolt, by which plaintiff's feet and legs were caught, or that, if plaintiff is mistaken about the giving of the signal, then that the engineer so backed the train without signal or direction, lacks the element of certainty to a common intent, and is bad on demurrer. Mayton v. Texas & P. R. Co. 63 Tex. 77, 51 Am. Rep. 637.

And a petition in such an action for failure to rescue a passenger who fell or was thrown from a train is not sufficient when it does not allege that the train could have been stopped to rescue him without risk of collision with other trains, or that there were means by which the trainmen could have procured others to rescue him. Reed v. Louisville & N. R. Co. 104 Ky. 603, 44 L. R. A. 823, 47 S. W. 591, 48 S. W. 416.

Nor are allegations in such an action, that the conductor of the train on which plaintiff rode negligently and carelessly carried her beyond her destination, and stopped the train at a distance from the depot and roughly ordered and forced her to get off, sufficient to constitute a cause of action, in the absence of an allegation that she had conformed to the rules of the company, and had paid her fare, or offered to do so. Scott v. Cleveland, C. C. & St. L. R. Co. 144 Ind. 125, 32 L. R. A. 154, 43 N. E. 133.

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And allegations that the carrier's servants carelessly and negligently caused a passenger to enter a train for which she had a ticket given her by mistake are not sufficient to constitute a cause of action, in the absence of averment of their knowledge that she did not desire to take passage on the train indicated by such ticket. *Ibid.*

A complaint in an action against a railroad company, however, alleging that while plaintiff was in defendant's depot waiting to take a train defendant negligently propelled one of its cars against him, whereby he was injured, states the negligent acts complained of with sufficient certainty and definiteness, and will not be required to be made more definite and certain on motion. McCarthy v. New York C. & H. R. R. Co. 24 N. Y. S. R. 924, 6 N. Y. Supp. 560.

And a declaration in an action by a passenger on board the defendant's car, alleging that he was injured by the derailment of the train on which he was traveling, and that the injury resulted from negligence on the part of the defendant, is good as against a motion to make the declaration more specific, though he does not state in what the negligence consisted, since it is sufficient to state in the declaration generally that the injury was the result of defendant's negligence. Clark v. Chicago, B. & Q. R. Co. 4 McCrary, 360, 15 Fed. 588.

And averments in a petition in such an action that by the negligence of the conductor plaintiff was induced and directed to step off the train before it reached the platform at a station, and that in doing so he received injuries, are sufficiently certain and definite to support the action. Depp v. Louisville & N. R. Co. 12 Ky. L. Rep. 366, 14 S. W. 363.

So, a petition which, after setting out that plaintiff was a passenger on defendant's train, avers that the defendant, by and through its servants, agents, and employees in charge of such train, negligently ran and managed it in such a way as to check its speed very suddenly and to jolt and pitch the car in which plaintiff was riding, suddenly and with great force backward and forward so as to throw plaintiff out of the car, by reason of which he was injured, sufficiently notifies the defendant of what it has to defend against, and will not be required to be made more specific. Coudy v. St. Louis, I. M. & S. R. Co. 85 Mo. 79.

And a complaint in such an action alleging that the passenger got on the platform of one of defendant's cars, and when about to enter the car an employee of defendant negligently pushed him from the platform just as the train was starting, and that he was carelessly and negligently caught and run over by the defendant's train and seriously injured, and that all of said injuries were caused by, and the direct result of, the carelessness and negligence of defendant in pushing him off of the train, is not subject to objection for failing to allege expressly or by facts necessarily sustaining the inference that the wrongful act was committed by the agent or servant in the course of, or in the scope of, his employment. Louisville, N. A. & C. R. Co. v. Kendall, 138 Ind. 313, 36 N. E. 415.

And a complaint in such an action for damages resulting from injuries to the plaintiff by reason of alleged negligence of the defendant's employees in failing to stop a passenger train at a railway station a sufficient length of time to allow plaintiff to get off in safety after having assisted a sick person in getting on, alleging that the instant he was in the act of stepping off the lower step of the platform of the car to the station platform the defendant negli-

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gently and wrongfully caused the motion of the car to be greatly accelerated, by reason whereof plaintiff was thrown violently upon and from the platform of the station and upon the railroad track, and the cars ran over his right foot, is sufficiently specific, and will not be required to be made more so on motion, by stating what agent or employee of the defendant caused the motion of the cars to be accelerated, and what acts of said agent caused the motion to be thus accelerated, and how and in what respect such acts of such agent were negligent and wrongful. Louisville & N. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31.

So, a complaint in an action by a passenger against a railroad company, alleging that the defendant and its servants in managing its cars were so negligent that it was unsafe for plaintiff to remain in one of them, and that, in order to free himself from danger in which he was placed, he jumped from the car and received an injury, is sufficient without stating all the circumstances that produced the peril to which he claims to have been exposed. Eldridge v. Long Island R. Co. 1 Sandf. 89.

And an averment in a declaration in an action against a receiver of a railroad for a personal injury to a child, that the defendant's servants in charge of an engine negligently permitted the child to get upon and ride upon the footboard of the tender, and that the servants of the receiver so negligently managed and controlled the engine by bringing it to a sudden stop that the child was thrown off and injured, is equivalent to an averment that they negligently brought the engine to a sudden stop, and is not subject to objection that it does not show that the bringing of the engine to a sudden stop was not, under the circumstances, necessary, or apparently so. Anderson v. Hopkins, 33 C. C. A. 346, 63 U. S. App. 533, 91 Fed. 77.

But a complaint in an action by a passenger upon a railway train against a railroad company, alleging that the agents, servants, and employees of the defendant while said train was in motion compelled plaintiff, who was an infant, to jump from said train, whereby he received injuries, and that said injuries were perpetrated upon him by the carelessness and negligence of the agents, servants, and employees of the defendant, should be required, upon motion therefor, to be made more specific by showing by proper averment of facts by what right plaintiff was upon the train at the time, and what constituted the negligence of the defendant and its employees. Pennsylvania Co. v. Dean, 92 Ind. 459.

So, a complaint, the gravamen of which is that plaintiff went to the passenger depot of defendant just before the time published by the defendant for the arrival and departure of one of its regular passenger trains, and remained upon or near the platform until the train arrived, but that the train passed through without stopping, and he was not permitted to get upon it, states a good cause of action as against an objection by special demurrer that it does not allege the price of the ticket, special damages, and other matter which would have been proper in actions *ex contractu*, the action being one for tort, and not for contract. Purcell v. Richmond & D. R. Co. 108 N. C. 421, 12 S. E. 956.

Likewise, a petition in an action against a railroad company for the killing of a passenger, which charges negligence in conducting and running a train by it, though it should be made more specific on motion to cover the conduct of the engineer in the management of the train at the time of the accident, will be deemed sufficient after verdict when no objection was taken before trial. Eliet v. St. Louis, K. C. & N. R. Co. 76 Mo. 518.

And a complaint in such an action averring that the plaintiff became a passenger on one of defendant's trains, and that, while about to alight at his destination with due care and diligence, the defendant, not giving the passenger a sufficient length of time to get off, violently and suddenly moved the train forward, by reason of which the plaintiff was thrown from and off of the train and to the platform, and injured thereby, is sufficient after verdict. Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680, Affirming 70 Ill. App. 550.

And such a complaint, alleging generally that the defendant negligently and carelessly started its train, causing injury to the plaintiff, is sufficient to warrant testimony that, as he was about to get off, the train either ran over a joint or made a jerk, causing him to fall, and to warrant an instruction with reference thereto; and where no motion to make the complaint more specific in its allegations was made, it cannot be objected to on the ground that there was no allegation or proof that the negligence of defendant caused the jolting or jerking. Johnson v. Southern R. Co. 53 S. C. 203, 31 S. E. 212.

But a declaration in an action against a railroad company for a personal injury received by a passenger, charging that the defendant negligently and carelessly ran its train of cars, on which plaintiff was a passenger, against and over a horse, by means whereof the car occupied by plaintiff was thrown from the track, which caused plaintiff's injuries, does not support proof that the railroad track was not properly fenced, and that a gate was down so that animals could go upon the road, and that the train was not provided with steam brakes. Toledo, W. & W. R. Co. v. Foss, 88 Ill. 551.

And a petition in such an action brought by a passenger for personal injuries received by him while attempting to pass through an opening between cars standing on either side of a path, charging that defendant's servants and agents negligently drove one or more loose cars against a stationary car near the path, whereby the stationary car was driven against him, will not support a claim of negligence on the part of the defendant in leaving the cars standing on the track without securing them. Gurley v. Missouri P. R. Co. 93 Mo. 445, 6 S. W. 218.

See also Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719,—*supra*, XII. b, 2, (b).

And see, in this connection, cases set forth in the following subdivision of this note, collisions being usually the result of negligent running or management.

(d) *By collision.*

A declaration in an action for damages resulting from a collision between railway trains is usually framed in general terms, and such a declaration leaves it open to the plaintiff to give in evidence any kind of mismanagement which led to the collision. Torpy v. Grand Trunk R. Co. 20 U. C. Q. B. 446.

And an allegation in an action for a personal injury causing death, ascribing the injury to the negligence of the defendant and its employees in so running a passenger train that it collided with the engine of a freight train, and to negligence in so conducting itself in and about carrying the person killed, and in and about the management and control of the train upon which he was being carried, and in and about the management of the freight train, that the trains collided, is sufficiently

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broad to cover all negligent acts and omissions of the defendant, or any of its employees, in respect to the movements, the running, the management and control of both the trains which collided, from and including the starting thereof to the time of and including the collision between them. Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 13 So. 57.

So, a complaint in an action for a personal injury, alleging that the plaintiff was rightfully on a train of cars of the defendant, and that while on said train a collision occurred by the negligence of the defendant and its servants, whereby the plaintiff was injured, is sufficient as against a general demurrer, under the rule that evidence must not be pleaded, and that only the general or ultimate facts need be alleged. Hobson v. New Mexico & A. R. Co. (Ariz.) 11 Pac. 545.

And a complaint in an action against a railroad company for damages for injuries causing the death of the plaintiff's intestate, charging that the intestate came to his death by a collision of two freight trains belonging to the defendant, in consequence of the wrongful act and culpable negligence of the engineer in charge of one of them, is sufficient, since the collision itself and the consequent death of the plaintiff's intestate were facts sufficient to create a presumption of negligence for which the defendant was responsible. Alabama & F. R. Co. v. Waller, 48 Ala. 459.

And a declaration in such an action, alleging that the defendant so negligently conducted itself that one of its trains was negligently propelled against the train on which plaintiff was a passenger, whereby he was injured, though the injuries complained of are not set forth with as much particularity as good pleading would seem to require, will be sustained on demurrer. Birckhead v. Chesapeake & O. R. Co. 95 Va. 648, 29 S. E. 678.

And a declaration in an action against a railroad company, charging that the defendant wrongfully, wilfully, and negligently caused two trains of cars to be run on its road upon a single track in opposite directions at a speed of 30 miles an hour, thereby producing a collision of such trains which caused the injuries that resulted in the death of the plaintiff's intestate, is sufficiently certain and definite in its specification of the acts of negligence by the defendant and its agents. Madden v. Chesapeake & O. R. Co. 28 W. Va. 610, 57 Am. Rep. 695.

And a statement in a declaration in an action for damages resulting from a collision between railway trains, that the plaintiff, being a workman under a contractor employed by the defendant to keep the railway in repair, was a passenger in one of the trains belonging to the defendant and managed by its servants, which was at the time employed in conveying the workmen of such contractor to and from their work, and that while plaintiff was in such train for the purpose of such conveyance he was injured by such collision, reasonably shows, that he was being carried as a passenger. Torphy v. Grand Trunk R. Co. 20 U. C. Q. B. 446.

Likewise, a petition in an action against two railroad companies jointly for injuries received in a collision between trains of the two companies at a point where the roads crossed each other, charging that the train of one company negligently struck the cars of the other company, is sufficient, though it does not show how such train negligently struck such cars. Galveston, H. & S. A. R. Co. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

And an allegation in a complaint by a passenger upon a railway train against a company owning another railway which crossed the one upon which he was riding, for injuries received in a collision between the train on which he was riding and one upon the defendant's road, that the injury was caused by negligence in the management or running of the defendant's said train by the person or persons put in charge thereof by the defendant, is good on demurrer. Highland Ave. & Belt R. Co. v. South, 112 Ala. 642, 20 So. 1003.

And so is an allegation in such a case that the cause of the injury was the negligence of some person or persons in charge of the defendant's train, in that, after discovering the peril of the train in which the plaintiff was riding and the plaintiff's peril, such person failed to give the usual and proper signal, which would have enabled the train on which the plaintiff was riding to avoid the collision, or would have enabled the plaintiff to escape. Highland Ave. & Belt R. Co. v. Swope, 115 Ala. 287, 22 So. 174.

And an allegation in such an action for negligence causing the death of the plaintiff's intestate by a collision between a passenger train and a passenger car at a junction between two roads, that the engineer negligently permitted and suffered the locomotive and train to run into and against the passenger car, is sufficient as a count for simple negligence. Louisville & N. R. Co. v. Anchors, 114 Ala. 492, 22 So. 279.

So, a charge in a petition in an action against a railroad company by a passenger for a personal injury caused by the backing of an engine and cars attached against the cars in one of which the passenger was, that the engineer carelessly and negligently ran the engine, will support proof that neither the engine whistle nor bell was sounded, since care required that he signal the approach, and the omission to do so would be the careless running of the engine. Winter v. Central Iowa R. Co. 80 Iowa, 443, 45 N. W. 737.

But where there is a general averment in a petition in an action against two railroad companies for damages for personal injuries to plaintiff and wife sustained in a collision between the trains of the two companies at a crossing of the two roads, to the effect that the defendants were grossly negligent in the operation of their trains, whereby the collision resulted, and there are also averments which set out particular acts of negligence which are charged to have caused the collision and the consequent injuries that resulted, consisting in the failure of each train to stop at the crossing and to ring its bell or sound its whistle, the issues will be limited to the acts of negligence specially set up. Missouri, K. & T. R. Co. v. Vance (Tex. Civ. App.) 41 S. W. 167.

And a declaration in an action against a railroad company by a passenger, charging that the parties having the management of the train in which plaintiff was being carried negligently managed the train, and, in part by their negligence as well as in part by the negligence of the defendant, another railroad company running trains upon the same track, the defendant's train ran against the train in which plaintiff was being carried and caused the injuries complained of, is defective in not showing, not only that the parties under whose management the plaintiff was riding were guilty of negligence, but also that by ordinary care they could have avoided the consequences of defendant's negligence. Bridge v. Grand Junction R. Co. 3 Mees. & W. 244.

And a petition in an action for damages for personal injuries received in a railway wreck on one of the trains in which the plaintiff was

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being conveyed as a passenger, charging that the damages claimed resulted from inconvenience and delay, does not state a cause of action with the required precision, and an exception thereto should be sustained, and a charge referring to inconvenience ought not to be given. Missouri P. R. Co. v. Mitchell, 75 Tex. 77, 12 S. W. 810.

As to collisions causing injury to employees, see Wild v. Oregon Short Line & U. N. R. Co. 21 Or. 139, 27 Pac. 954; Shuler v. Omaha, K. C. & E. R. Co. 87 Mo. App. 618; Woodward v. Oregon R. & Nav. Co. 18 Or. 289, 22 Pac. 1076; Deremer v. Delaware, L. & W. R. Co. 54 N. J. L. 407, 24 Atl. 481,—*infra*, XIV. d, 2; Cramer v. Union P. R. Co. 3 Utah, 504, 24 Pac. 911; Sullivan v. Toledo, W. & W. R. Co. 58 Ind. 26,—*infra*, XIV. f, 1.

3. *On street railroads.*

The same rules with reference to pleading negligence seem to apply to actions against street railroads as carriers of persons as those applicable to ordinary railroads, and it would appear that the same degree of generality in statement may be employed.

Thus, where a complaint in an action against a street railway company for personal injury resulting in the death of the plaintiff's intestate avers that the plaintiff's intestate was a passenger on one of the defendant's street cars when he received the injuries which caused his death, a duty on the part of the defendant to conserve the safety of the intestate is shown; and a further averment that the defendant then and there so negligently conducted said business that, by reason of such negligence, plaintiff's intestate received personal injuries which caused his death, though very general, is sufficient on demurrer. Armstrong v. Montgomery Street R. Co. 123 Ala. 233, 26 So. 349.

And a complaint in an action for a personal injury charging the defendant with so negligently and carelessly running one of its electric cars in which the plaintiff was a passenger for hire and was then riding that the said car jumped from the track and threw plaintiff therefrom, thereby causing the injury complained of, sufficiently alleges negligence, and specifies the circumstances relied upon. King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975.

So, a petition in an action against a street railway company by a father for the loss of services of his minor daughter, charging that she was violently thrown through a window of a car, by reason whereof she was seriously injured and permanently crippled so as to disable her from performing service or labor of any kind, is not subject to exception upon the ground that it does not show in what manner the child was injured or crippled, and does not describe the alleged injuries. San Antonio Street R. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

And a petition in such an action charging that the defendant's servant in charge of the car upon which plaintiff's daughter was riding negligently applied the full power to the car, and by reason of a defective brake was unable to control or check the speed thereof when the car reached a defective track at a curve, and thereby its derailment was caused, is not subject to exception on the ground that the allegation of the application of the full power is a conclusion of the pleader, and that the facts constituting such application should have been stated, and is sufficient to warrant a jury in finding that it was an act of negligence, when considered in connection with the concomitant facts alleged. *Ibid.*

And a declaration by a husband in such an action alleging that his wife, being a passenger on one of defendant's cars, undertook to alight, and while doing so, and by reason of defendant's negligence, the car suddenly started up, causing her to fall, and seriously injuring her, so as to deprive plaintiff of her company and services, though wanting in sufficient fulness and detail as to the manner in which the injury was caused, of which advantage could be taken by special demurrer, sets forth substantially a cause of action which should not be dismissed at the trial term on motion on the ground that, as to the extent of the injuries, it was too vague, uncertain and indefinite to put the defendant on notice as to the nature of the case to be proved. James v. Atlanta Street R. Co. 90 Ga. 695, 16 S. E. 642.

And a complaint in such an action alleging that while plaintiff was riding on one of defendant's cars he was thrown and precipitated therefrom an account of the gross carelessness and negligence of the person in charge and control of the car, and that by reason of such negligence of defendant and its employees plaintiff was greatly injured, is sufficient, and a bill of particulars should be denied, since the allegation that the defendant was guilty of negligence whereby the plaintiff was thrown down is an allegation of fact, and not a conclusion of law. Richmond v. Second Ave. R. Co. 47 N. Y. S. R. 306, 19 N. Y. Supp. 597.

An allegation in an action for negligence that the injuries received by the plaintiff were caused by his having been thrown from one of the defendant's electric cars through the carelessness and negligence of the defendant, however, is insufficient in not showing what act or omission constituted the defendant's negligence, and upon what specific negligent act or omission the plaintiff relies for a recovery. King v. Wilmington & N. C. Electric R. Co. 1 Penn. (Del.) 452, 41 Atl. 975.

And a declaration in an action against a street railroad company, charging that the plaintiff was on one of the street cars of defendant, and that it thereupon became the duty of the defendant to protect him in getting off, but that it did not use proper care to do so, whereby he was injured, is bad on demurrer in failing to show that the duty alleged had any existence in fact. Breese v. Trenton Horse R. Co. 52 N. J. L. 250, 19 Atl. 204.

And so is an allegation in a declaration in such an action, that the plaintiff was on the defendant's car, and that it thereby became the duty of the latter to use proper care so that the plaintiff should be safely and securely carried so long as he remained on the car, and that such duty was not observed, since, under the allegation, he may have been on the car as a mere trespasser, and not as a passenger. *Ibid.*

A petition in an action against a street railway company for damages for an injury to plaintiff's wife, who was a passenger on one of defendant's cars, caused by a collision between the car and a freight car of a railroad company, however, charging that the car upon which the injured wife was a passenger, as well as that of the railroad company, was so carelessly run and operated that the collision resulted, giving time, place, and in part the circumstances, though not the details, of the accident, is good on general demurrer, and sufficiently specific. Ft. Worth Street R. Co. v. Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61.

And while an allegation in an action against a street railway company by a passenger, to recover for an injury caused by the car in which he was riding being run

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into from the rear by another car belonging to the defendant, that the defendant negligently ran and operated its road and the cars propelled thereon, and that by reason thereof the injury occurred, might be required to be made more specific, if that is not done the plaintiff would be entitled to prove thereunder any negligence in running or operating the road or the cars propelled thereon, and prove that the road was operated without sandboxes on grip cars. North Chicago Street R. Co. v. Cotton, 41 Ill. App. 314.

But a petition in an action against a cable car company for a personal injury received by plaintiff in jumping from a car of defendant upon the approach of a locomotive at a crossing, alleging it to be the duty of the defendant to provide proper appliances for stopping its cars, does not include, and will not support, an instruction as to the duty of the defendant to maintain and provide safe, suitable, and trustworthy road, tracks, cables, cars, grips, grip-irons, brakes, machinery appliances, etc. Jacquin v. Grand Ave. Cable Co. 57 Mo. App. 320.

And a declaration in an action against a street railroad company for a personal injury, averring that it was the duty of the defendant, through its agents and servants in control and management of the car by which the injury was caused, when said car met the car from which the plaintiff alighted, to cause said car to stop or move so slowly as not to endanger persons alighting from the other car and passing to the rear thereof, and at the same time warn them of the approach of said car, and that it did not regard its duty in this behalf, but was grossly careless and negligent, is insufficient, since negligence is the fact to be averred, and whether the omission was negligence or not is for the jury to determine. West Chicago Street R. Co. v. Colt, 50 Ill. App. 640.

So, an allegation in an action against a railroad company for personal injuries alleged to have been caused by defendant's negligence, that the defendant's servants carelessly and wantonly or intentionally caused a child to leave cars of a dummy line in a street while they were in motion, is not sufficient to show negligence without anything to show that the conditions were not proper for the child to get off, since the defendant's servants had the right to cause a trespassing child to get off under proper conditions. Jefferson v. Birmingham R. & Electric Co. 116 Ala. 294, 38 L. R. A. 458, 22 So. 546.

4. By stage or boat.

Averments of negligence of carriers by stage or by boat are also governed by the rules applicable to other carriers in general set forth in previous subdivisions of this note.

Thus, a complaint in an action against persons running a stage coach, by a passenger, alleging that by reason of the negligence of the defendants in failing to provide lights, the night being dark, so as to enable the driver to see and keep in the road, and by providing unreliable horses and a negligent and inefficient driver, the vehicle was upset, whereby the plaintiff was severely injured, is not subject to objection on demurrer that no connection is shown between the particular acts of negligence charged and the injury complained of, since, the relation of carrier and passenger appearing, the fact that the passenger sustained an injury by the overturning of the carriage makes a prima facie case of negligence against the carrier. Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125.

And the omission to state in a complaint in such case just how the defendant's failure to supply the carriage with lights on a dark night, or to furnish safe and tractable horses or a careful and efficient driver, resulted in the overturning of the carriage, does not make the complaint bad, since they were causes sufficient to produce the injurious result. *Ibid.*

So, a plaintiff in an action for a personal injury in which it is alleged in the declaration that the defendants carelessly and negligently provided, fitted out, managed, and conducted their coach, so that it broke down and broke plaintiff's leg, is not limited to proof thereunder of unskilfulness in the mode of driving or conducting the coach, but may also prove any insufficiency in the carriage. Ware v. Gay, 11 Pick. 106.

And a declaration in an action against a stage proprietor charging that plaintiff's daughter took passage in defendant's coach, and that thereupon it became defendant's duty to use proper care in carrying her, but that defendant, not regarding such duty, neglected to use such care, and the coach was overturned and plaintiff's daughter injured, though very general both in regard to the description of the negligence and the statement of the obligation resulting from defendant's business, is sufficient to put the defendant on his defense, and is good, at all events after verdict. Taylor v. Day, 16 Vt. 566.

Likewise, an allegation in a complaint that the plaintiff's intestate was a passenger on one of the boats of the defendant, and that he came to his death by being drowned, and that his death was caused by the wrongful neglect and default of the defendant in refusing to stop the boat or render him any assistance though requested to do so, constitutes a good cause of action. Melhado v. Poughkeepsie Transp. Co. 27 Hun, 99.

And a complaint in an action against a steamboat company for damages for injuries sustained in falling from a gang plank leading from a dock to the deck of a steamer of the defendant, charging that the gang plank of the steamer was carelessly and negligently supported on said boat, and was not properly tied or fastened thereto, and that the same was negligently put out and maintained from the vessel to the dock, is sufficiently particular and specific in alleging that the gang plank was carelessly and negligently supported, and will not be required to be made more so on motion. Croft v. Northwestern S. S. Co. 20 Wash. 175, 55 Pac. 42.

c. Of messages.

While the cases with reference to pleading negligence of carriers of messages, such as telegraph companies, etc., are few, it is thought from such cases, as well as upon general principles, that the general rule as to pleading negligence, that it is sufficient to state the act causing the injury and that it was negligently done, is applicable, the general rules applicable to negligence applying to such carriers.

Thus, a statement in an action before a justice's court against a telegraph company, that the defendant negligently and carelessly altered a telegram and transmitted it as altered, by reason of which the plaintiff was injured and damaged, is sufficient, although it does not state the language of the telegram nor point out wherein the mistake consisted. Lee v. Western U. Teleg. Co. 51 Mo. App. 375.

But allegations in a petition in an action against a telegraph company for negligently failing to deliver messages, charging the incompetence of the operators, and that the defendant was frequently warned of their incompe-

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tence and gross negligence, and that, notwithstanding such warning, it continued such operators in its employment, are too vague and indefinite, and too disconnected with allegations of facts showing acts on the operators' part of a negligent character resulting in loss to the patrons of the company, or of loss incurred therefrom to the plaintiff on previous occasions, to be deemed sufficient to support a claim for exemplary damages. Daniel v. Western U. Teleg. Co. 61 Tex. 452, 58 Am. Rep. 305.

XIII. *Application of rules to municipal negligence.*

a. *Defective or dangerous streets or highways.*

The rule that the act causing the injury complained of may be stated and characterized as having been negligently done seems to apply to allegations of negligence in actions against municipal corporations for injuries caused by defective or dangerous streets or highways. But knowledge or notice, or circumstances from which such knowledge or notice will be inferred, must appear.

Thus, it is sufficient to allege generally, in an action on the case against a town for damages for an injury to the person of plaintiff caused by a defect in a highway, that the injury was caused by the defect, insufficiency, and want of repair of the highway; it is not necessary that the declaration should set out the particulars in which the highway was defective. Corey v. Bath, 35 N. H. 530.

And it is not necessary, in a declaration against a town for a special damage happening by reason of the insufficiency of a highway, to allege that the highway was established in one of the modes authorized by statute. Hurley v. Manchester, 39 N. H. 291.

Nor is a complaint charging a town with neglect under Conn. Rev. 1875, p. 526, § 2, providing that every town which neglects or refuses to erect and maintain guide posts as required by law or suitable substitutes therefor, shall forfeit annually the sum of $5 for every such post, insufficient on demurrer because it does not allege that the selectmen did not erect a post at a place referred to, since the town could not be guilty of neglect if the selectmen had erected a guide post. Bronson v. Washington, 57 Conn. 346, 18 Atl. 264.

And an allegation with sufficient certainty in a complaint, that the injuries of which the plaintiff complained were received by him by and through the defendant's negligence in permitting one of its public streets to be and remain out of repair, cannot be held bad on demurrer for want of sufficient facts because it failed to aver in what particular manner he received his injuries; that objection should have been taken by motion for an order requiring him to make his complaint more specific. Evansville v. Worthington, 97 Ind. 282.

And a general averment in a complaint in an action for damages for a personal injury to plaintiff's wife caused by plaintiff's horse becoming frightened at a fire in the street used by persons in manufacturing candy, that the injury was caused wholly by the negligence of the town in permitting the carrying on of the business of making candy on the streets, is sufficient on demurrer for want of facts; a motion to make the complaint more specific is required to reach such a defect in the definite statement of facts. Rushville v. Adams, 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292.

In order to maintain an action against a municipal corporation for an injury to a person resulting from the bad condition of its streets, however, it must be alleged and proved that the corporation or its officers had notice of such defects and want of repair, or at least a state of facts must be shown from which notice might be inferred. Mack v. Salem, 6 Or. 275.

And a general charge in a complaint for negligence of the defendant in an action against a city for an injury caused by an obstruction in a roadway therein, without averring notice of the obstruction or alleging facts from which notice might be inferred, is insufficient on demurrer. Turner v. Indianapolis, 96 Ind. 51.

But a petition in an action against a city for an injury caused by an alleged defective street, charging that the street was one of the principal business streets of the city and one of the most traveled, and that there was and had been for some time a cut or hole therein 20 feet long, 12 feet wide, and 10 feet deep, and that such hole was left open through the carelessness and negligence of the city, is sufficient on demurrer, and not subject to objection that it does not show that the city had notice of the defect in the street. Serrot v. Omaha City, 1 Dill. 313, Fed. Cas. No. 12,673.

And a complaint in an action against a village, alleging that the defendant negligently authorized and permitted a street to be obstructed by a steamboat placed across it in a dangerous and narrow portion thereof, where the same extended along by the side of a lake, so that nearly the entire width of the street was rendered impassable for twenty hours, whereby teams were liable to become frightened, and that thereby plaintiff's horse was frightened and became unmanageable and ran away, injuring the horse and wagon, is sufficient on demurrer. Cairncross v. Pewaukee, 78 Wis. 66, 20 L. R. A. 473, 47 N. W. 13.

But a petition in an action against a city, simply stating the duty of the city to keep its streets and thoroughfares, including its public scales and approaches, free from obstruction and in a safe condition, as a legal conclusion, instead of stating the facts from which the legal conclusion might be drawn that the defendant's duty to the plaintiff was as charged, fails to show a cause of action. Mitchell v. Clinton, 99 Mo. 153, 12 S. W. 793.

And a declaration in an action to recover damages from a town for suffering water to flow from a highway in the town upon adjoining lands belonging to plaintiff, charging that water escaping from the highway upon the plaintiff's land injured it, and that the water ought to have been carried by the town in the gutters or sluiceways of the street, is bad on demurrer as not properly setting forth any cause of action, the question of duty being one of law; and the defendant is entitled to have the facts alleged on which the duty is predicated. Wakefield v. Newell, 12 R. I. 75; Smith v. Tripp, 13 R. I. 152.

The mere statement of the existence of a highway does not show a duty of the town or city to keep water flowing in it from overflowing adjoining land. Smith v. Tripp, 13 R. I. 152.

And an allegation in an action against a municipal corporation for damages caused by its neglect of duty in repairing the streets and constructing sewers, that the defendant wrongfully refused to repair the streets, and wrongfully and negligently allowed large quantities of water to flow from a sewer and accumulate upon the land of the plaintiff, is insufficient, since the question whether the allowing of the water to flow from the sewer upon the land of the plaintiff was wrongful is a question of

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law. Montgomery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

And so is an allegation in a complaint by the owner of a lot abutting upon a street, in an action against the city for changing the grade of the street, that he was subjected to great loss and damage by the negligent and unskilful manner in which the work of changing the grade was conducted; it is necessary in such case to allege in what the negligence or unskilfulness consisted. Healey v. New Haven, 47 Conn. 305.

A declaration in an action for damages for an alleged injury caused by the insufficiency of a highway, describing the road and its defects in very general terms, however, not stating what the defects were nor where they were, though perhaps open to objection on demurrer, is cured by verdict, and is good on motion in arrest of judgment, since the defects are those merely of defective description. Powers v. Woodstock, 38 Vt. 45.

And a complaint in such an action, averring that there was a large stump in or near the middle of the main traveled track of the highway, against which the plaintiff's wagon struck and caused the injury complained of, sufficiently states a cause of action to warrant the admission of evidence thereunder, as against the objection that it is not stated whether the stump was attached to the soil or detached therefrom, or whether it had been there five minutes or five years. Cremer v. Portland, 36 Wis. 92.

Nor will an allegation in such an action for damages for personal injuries to plaintiff and to his horse and carriage, alleged to have been caused by the defective condition of the highway on which he was driving, be dismissed on motion at the commencement of the trial on the ground that in alleging negligence of the town and its agents and assistants it fails to allege any cause of action, because no duty rests upon the town to maintain the highway within its limit, where that duty is imposed upon the commissioners of highways by law, and there is sufficient in the allegation charging negligence on its officers to embrace that of the commissioners of the town in that respect as the cause of the injuries suffered by the plaintiff. Farman v. Ellington, 46 Hun, 41.

And a complaint in an action against a town, alleging that plaintiff's horses were frightened while traveling over a highway in the town along the bank of a lake, by the waters of the lake dashing up over the highway whereby they were frightened and plaintiff was injured, and that such injury was caused by reason of the defective and unsafe condition of the highway at that point and by reason of the lack of a proper barrier or guard between the road and the lake, and that the commissioners of highways of the town had knowledge of the defective condition of the highway and negligently omitted to erect a barrier or guard, will sustain evidence on the trial showing that the commissioners negligently omitted to make the highway at that point reasonably safe, by reason whereof the accident happened, and that the injury was sustained by reason of the defect existing because of the neglect of the commissioners; and should not, therefore, have been dismissed on motion. Roblee v. Indian Lake, 11 App. Div. 435, 42 N. Y. Supp. 326.

But a complaint in an action against a town, alleging that while engaged in grading a street it caused a hole to be dug in it, and that the plaintiff stepped into said hole and was injured, and that said hole was, through the negligence of defendant permitted to remain in the street, and left uncovered and unguarded, is defective in not showing that the injury suffered was the result of the alleged negligence, and whether or not the plaintiff was hurt during the time it was alleged to have been negligently left uncovered, and is not sufficient to support a judgment. Rushville v. Poe, 85 Ind. 83.

And a complaint in such an action for damages for an injury alleged to have been caused by the unsafe condition of a public highway therein, describing the defective highway as a graded one, 9½ feet wide on the surface, with a ditch or gully about 2½ feet deep on each side, and no guard, and alleging that, as plaintiff was traveling on the highway with a team of horses and sleigh loaded with logs, on which he was standing, the sleigh slued into the ditch, whereby it was overturned, and plaintiff was injured, reasonably shows from the description an ordinary turnpike road, constructed as such roads generally are, and fails to show that the alleged defective condition of the road caused the sleigh to slide into the ditch, and states no cause of action; and a ruling sustaining an objection to any evidence thereunder is correct. Bodah v. Deer Creek, 99 Wis. 509, 75 N. W. 75.

And a complaint in an action against a city charging that a bob-sleigh on which were several persons came at great speed down a specified street and collided with plaintiff's sleigh, breaking the same and injuring his horse, and, the horse becoming unmanageable, he was injured while attempting to hold him, and that such accident was due to the neglect and carelessness of the defendant, is insufficient, where the only allegation intended to connect the city with the accident was that it was due to the neglect of the city, and that it occurred by reason of the wrongful act of the city authorities in permitting the street to be used for coasting purposes; since the defendant was entitled to know how its neglect caused the accident, and since saying that the city wrongfully permitted such use of the street is merely to say that it did not prevent it. Toomey v. Albany, 38 N. Y. S. R. 91, 14 N. Y. Supp. 572.

b. *Defective or dangerous sidewalks.*

Allegations in an action against cities for injuries caused by defective or dangerous sidewalks appear to fall within the rule applicable to actions for defects in streets, permitting general allegations, provided notice or knowledge appears.

Thus, a declaration charging that the defendant, a city, failed to light a street, so that by the walk's being out of repair and being unlighted the plaintiff was injured, is not demurrable for want of facts, the negligence claimed not being that the city did not properly light its streets, but that it left a dangerous hole in the walk, and, the walk being unlighted, the plaintiff fell into it. Griswold v. Ludington, 116 Mich. 401, 74 N. W. 663.

And a petition in an action for personal injuries resulting from a defective sidewalk, brought against a city, alleging that the sidewalk was built in such a negligent manner that when a person stepped on the outside of the walk it would tip up and throw him to the ground, and that by reason of such defect plaintiff was seriously injured, is not subject to objection on demurrer that it fails to state facts showing negligence on the part of the city. Eskridge v. Lewis, 51 Kan. 376, 32 Pac. 1104.

Nor is a complaint in such an action, alleging a defective sidewalk within the corporate limits, and that it was the duty of defendant

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to keep it in repair, and that it knowingly suffered the said walk to get out of repair and remain so for two months, so that it became tipped and slanted and would yield 6 or 8 inches under the weight of a person walking upon it, and that because of such defect plaintiff fell thereon and was injured, subject to demurrer. Washington v. Small, 86 Ind. 462.

And a complaint in an action brought against persons holding the office of mayor and aldermen of a city, by a person injured from falling upon a sidewalk, alleging that the defendants negligently and carelessly, after full knowledge, allowed and permitted such sidewalk to become and remain out of repair and large quantities of snow and ice to accumulate there, and allowed it to remain in a dangerous condition, whereby plaintiff slipped and fell, is not demurrable for not stating facts sufficient to constitute a cause of action. Piercy v. Averill, 37 Hun, 361.

So, an allegation in a declaration in an action against a city for damages for an injury occasioned to plaintiff by reason of a defective sidewalk, that the city had notice of the bad condition of the sidewalk, and that the supervisor of the city had knowledge of its bad condition previous to the injury complained of, is not rendered defective by the fact that it is silent as to the kind of notification the supervisor had, where it appears that the sidewalk was out of repair for a long time before the accident occurred. Springfield v. Doyle, 76 Ill. 202.

And a declaration in such an action to recover for a personal injury received by reason of plaintiff's foot being caught in a hole in a sidewalk, averring that the accident occurred upon one of the principal streets in the city, through and by reason of a defective sidewalk, and that the defect was a dangerous one and had existed for three months, and that the defendant knew it was unsafe and not fit for travel, sufficiently states knowledge or notice of the defect by the defendant without further specification of facts. Tice v. Bay City, 78 Mich. 209, 44 N. W. 52.

And under W. Va. Stat. § 53, chap. 43, Code, imposing an absolute liability upon cities, villages, and towns for injuries sustained by reason of the failure of the municipal authorities to keep in repair streets, sidewalks, etc., within the corporate limits, which its authorities have opened and controlled and treated as public streets, sidewalks, etc., in an action against a town by a person injured by a defective sidewalk, he is not required to allege in his declaration or prove on the trial that the defendant had notice of the defect or want of repair; but, in order to entitle him to recover, he must allege and prove that the sidewalk upon which the injury occurred was at the time and place of the injury controlled and treated by the town authorities as a public one, and opened as such. Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22.

So, a complaint in an action against a city, charging that there was a dangerous hole in a sidewalk on a public street, and that the defendant negligently allowed it to remain in said walk for a period of several months prior to the injury complained of, and that it had had sufficient time and opportunity to learn and know of the hold, but negligently failed to repair it, and that plaintiff stepped into such hole and received injuries therefrom, sufficiently charges that the injuries were occasioned by the negligent failure of the defendant to repair the defect, and is good on demurrer. Huntington v. Burke, 21 Ind. App. 655, 52 N. E. 415.

And an allegation in such an action that the sidewalk in question was, by defendant, negligently allowed to become out of repair, weak, and unsafe, and that defendant had notice of said condition for more than a month before the date of the injury, but failed and neglected to repair the same, and that such walk gave in under the weight of plaintiff and precipitated him down an embankment, injuring him, states a good cause of action, and is not subject to objection, on demurrer, that it does not contain any allegation that proper signals of the dangerous condition of the walk were negligently omitted, such an allegation not being necessary. New Albany v. McCulloch, 127 Ind. 500, 26 N. E. 1074.

But a petition in an action against a city for an injury received by plaintiff from a fall on a sidewalk, charging that the city carelessly allowed snow and ice to accumulate at the point where the injury occurred, and that on account of a slope on the sidewalk it presented an inclined surface, uneven, slippery and dangerous to pedestrians, is bad on demurrer, since the allegation that it was dangerous is a mere conclusion of the pleader. Bretsh v. Toledo, 1 Ohio N. P. 210.

And an averment in a declaration in an action against a town charging that the plaintiff, while passing over a public brick sidewalk in the town, in bad repair, rough, uneven, sideling, and slippery, caught his foot against a projecting brick and fell, injuring himself, is demurrable for not stating a sufficient cause of action, since such accidents are liable to occur with the old and feeble, careless and indifferent, at almost any place or time. Waggener v. Point Pleasant, 42 W. Va. 798, 26 S. E. 352.

And a petition in an action against a city for damages for injuries received from a fall on an icy sidewalk, charging that for a number of days preceding the accident the city had negligently suffered ice and frozen snow to accumulate on the sidewalk in question so as to become dangerous for persons passing along the same, having been beaten smooth and slippery so that children made a slide there, which had been there for some days, and that the city might have informed itself of this condition in time to have made it safe before the accident, is insufficient on demurrer in that it fails to show notice to the city. Chase v. Cleveland, 44 Ohio St. 505, 38 Am. Rep. 843, 9 N. E. 225.

A declaration in an action against a city for an injury received from a fall on a sidewalk, however, charging the negligence to consist in the fact that the entire sidewalk at the place in question was old and out of repair, though not specific enough if objection had been taken on demurrer for failure to point out the specific defect claimed to have caused the injury, is good when objection is not taken until the time of trial. Campbell v. Kalamazoo, 80 Mich. 655, 45 N. W. 652.

And objections to swearing the jury in an action against a city for damages claimed to have resulted from a defective sidewalk, on the ground that the place of the accident is not sufficiently described, and that the allegation is in the alternative and therefore not set forth with sufficient certainty, are not sufficient; if such objections were good they should have been raised by demurrer, and not after pleading the general issue. Fuller v. Jackson, 82 Mich. 480, 46 N. W. 721.

And a declaration in such an action for the death of the plaintiff's intestate caused by a fall upon an alleged defective sidewalk, charging that the defendant negligently suffered the sidewalk to be and remain in bad and unsafe

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repair and condition, and divers of the planks to remain broken and unfastened, and the stringers on which they were laid to become rotten and broken, and that the defendant then and there had notice, and that said intestate was tripped by one of the loose and broken planks, and thrown,—is good after the general issue has been pleaded, though it is not averred that after knowledge or notice the defendant had reasonable time and opportunity to put the walk in a proper condition. Storrs v. Grand Rapids, 110 Mich. 483, 68 N. W. 258.

So, a petition in an action against a city for damages for injuries received from a fall on an alleged defective cross walk, charging that the cross walk was allowed to become out of repair in that the planks forming it were not nailed down or fastened, and that the ends of the planks were warped and raised in such a manner as to render them unsafe to persons passing thereon on foot, and that the defendant knowingly and negligently suffered and permitted such cross walk to remain in such dangerous condition, contains a sufficient allegation of negligence on the part of the defendant to warrant the introduction of evidence thereof. Lawrence v. Littell, 9 Kan. App. 130, 58 Pac. 495.

But a petition in such an action charging that the defendant permitted a ditch or drain to become out of repair by washing, widening, and deepening to a dangerous width and depth so as to render the crossing exceedingly unsafe and hazardous, is defective, on exception to the sufficiency thereof, in the absence of an averment of notice of the facts to the city. Austin v. Ritz, 72 Tex. 391, 9 S. W. 884.

See also, as to cross walks, Alexander v. Big Rapids, 76 Mich. 282, 42 N. W. 1071, *infra*, XIII. d.

c. *Dangerous or defective bridges.*

Bridges are usually parts of streets, and naturally, in alleging negligence in their construction or maintenance, the same rules as to particularity apply.

Thus, a complaint in an action against a town charging that a bridge therein was too narrow to be safely traveled, and dangerously high, and without guards or railings, and that by reason of said defects a team of horses and a wagon attached, in which plaintiff was riding, was precipitated off of said bridge into the stream, causing serious injuries to plaintiff, is good on general demurrer. Kelly v. Darlington, 86 Wis. 432, 57 N. W. 51.

And a complaint in an action against a county alleging that, by carelessness and negligence of the defendant in not keeping in proper repair and not putting up proper brackets at the approach of an embankment at the end of a bridge, the death of plaintiff's intestate was caused by his horses, wagon, and load going over the embankment and falling on him, sufficiently charges the defendant with negligence in failing to put up and keep in repair brackets at that portion of the approach of the bridge where the injury occurred. Huntington County v. Huffman, 134 Ind. 1, 31 N. E. 570.

But a complaint in such an action averring that the defendant constructed a bridge across a stream in a careless, negligent, and improper manner, and negligently failed and neglected to construct a railing to protect persons, animals, or vehicles from being precipitated therefrom into the stream, is defective on demurrer in not showing that the bridge was one which the county had authority to build. Shelby County v. Deprez, 87 Ind. 509.

And a complaint in such an action, charging that while plaintiff's team was hauling a single ordinary load of freight across a county bridge it broke down, and that the breaking down was caused by the neglect and refusal of the defendant to keep the bridge in repair, is insufficient to show negligence on the part of the defendant or its officers. It should not only have been averred that the bridge was defective and out of repair and the particulars in which it was so, but also that the county authorities knew of it, or a state of facts should have been averred from which they might have known it with reasonable diligence, and that with such means of knowledge within their possession they neglected and failed to repair within a reasonable time. Heilmer v. Union County, 7 Or. 83, 33 Am. Rep. 703.

And a complaint in an action against a municipal corporation, alleging that there was no guard or railing upon either side of an embankment constituting an approach to a bridge, for the protection of travelers and persons using the highway, and that such guard or railing is necessary to make it safe for ordinary travel, and that plaintiff was injured by slipping off from said embankment, is bad, not only because indefinite, but because it fails to designate any act or omission of the defendant as the cause of the injury. Williamsport v. Smith, 2 Ind. App. 360, 28 N. E. 156.

A complaint in an action against a city to recover damages for injuries to plaintiff's wife caused by a defective bridge, however, is not objectionable for failure to show that 'there was a duty resting upon the defendant to keep the bridge in repair, where the complaint avers the incorporation of the defendant, and states the title of the act of incorporation, a section of which provides that the common council of said city shall have the care, supervision, and control of all bridges within the city, since by such statement the court is charged with judicial notice of the provisions of such statute. Shartle v. Minneapolis, 17 Minn. 308, Gil. 284.

And a defect in a declaration in an action for damages for injuries alleged to have been sustained by the plaintiff in consequence of a defect in the bridge of the defendants, expressly alleging that the defendants were by law bound to keep the bridge in repair, and in a safe and convenient state for travel, in not showing how they became so bound, goes only to the manner of alleging the defendants' liability, and is a defect in the title as stated, and not in the manner of stating it, and is cured by verdict. Worster v. Canal Bridge, 16 Pick. 541.

So, a complaint in an action against two towns for damages resulting to plaintiff from the alleged failure of the towns to keep a bridge in repair which crossed a river between them, alleging that the defendants, and each of them, neglected to repair and keep in repair the said bridge, and negligently suffered it to remain out of repair and in an unsuitable and dangerous condition to pass over, warrants proof of any fact which tends to establish negligence, and the evidence of the fact need not be stated in the pleading. Oakley v. Mamaroneck, 39 Hun, 448.

In Bartlett v. Crozier, 17 Johns. 439, 8 Am. Dec. 428, however, it was held that where a civil action will lie at the suit of a person injured by a bridge out of repair, it must be on the statute, and the declaration ought to state specially the cause of action arising under the statute and every fact requisite to enable the court to judge whether there has been a breach of duty: and it is not enough to state generally that the defendant was an overseer of highways, and wilfully neglected his duties, and

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suffered the bridge to remain out of repair, whereby the plaintiff's horse fell through and broke his leg; and such a declaration is not aided by a verdict, since, though a title defectively set out may be cured by verdict, yet it will not cure a total defect of title.

See also Lebanon v. McCoy, 12 Ind. App. 500, 40 N. E. 700, *infra*, XIV. d, 1.

d. *Excavations.*

In case of injury from excavations made by municipal corporations or by private persons adjoining streets or public places, to hold the corporation liable it must be averred, not only that it was negligent in permitting the excavation or in allowing its continuance in an unguarded condition, but it must also appear that it owed a duty of protection to the person injured.

Thus, a complaint the gist of which is that the defendant was in possession and occupancy of premises adjoining a public highway, and that on these premises was a dangerous pit, and that it was the duty of the defendant to protect the public against liability to injury by falling into the pit, by covering the same or otherwise guarding against the danger, and that it failed to perform that duty, is insufficient. The pleader must state facts from which the law will raise the duty. Ayers v. Chicago, 111 Ill. 406.

So, a complaint in an action against a city for damages resulting to plaintiff from injuries received by her from falling into a cellar excavated on lands belonging to third parties, alleging that said third parties and their employees negligently left said excavations and excavations in the sidewalks in front of such lands uncovered and without guards or lights to prevent persons from falling into them, and that the city suffered such excavations to be made and to remain open, and the passage of the sidewalk to be obstructed and rendered dangerous to persons passing upon it, and that, by reason thereof, plaintiff fell into one of the excavations and was injured thereby, is insufficient on demurrer in failing to state that the city or its officers had notice of the condition of said excavations, or facts from which notice might reasonably be inferred. Fort Wayne v. DeWitt, 47 Ind. 391.

And a declaration charging the careless and negligent digging and excavating of a river bottom by a city, causing the displacement and dislodgment of piles upon which plaintiff's building was constructed, is defective where it does not show in what respect the city was negligent in so excavating. Pomroy v. Granger, 18 R. I. 624, 29 Atl. 690.

So, an allegation in a complaint in an action the gist of which is the invalidity and worthlessness of certain certificates delivered by the defendant to the plaintiff in payment for labor performed, that by reason of gross negligence of the commissioners of the defendant city, and of the defendant's agents in causing to be made an estimate of the expense of such work and of the proportion to be assessed and charged to each lot, of the number of cubic yards to be filled in and excavated in front of each lot, and in not causing such estimate to be filed with the city comptroller, for the inspection of the parties interested, each and all of said certificates were worthless,—is insufficient on general demurrer, since the statement that the certificates are worthless is a mere conclusion of law. Griggs v. St. Paul, 9 Minn. 246, Gil. 231.

But a declaration charging a city with digging in and excavating a river bottom in a negligent and careless manner around and near piles on which plaintiff's buildings rested, whereby they were undermined, for the purpose of saving the expense of frequently removing the sand, filth, and sewage which were deposited by the city in the river through its sewer, and to provide a settling basin for the purpose of holding such sand, filth, and sewage, is good on demurrer. Pomroy v. Granger, 18 R. I. 624, 29 Atl. 690.

And a declaration in such an action for an injury caused by plaintiff falling into an excavation, alleging that defendant negligently allowed a cross walk to remain in a dangerous and unsafe condition, and negligently permitted it to remain so out of repair and unguarded that plaintiff, who was passing along said cross walk, fell into an excavation thereunder and was injured, sufficiently alleges that the injury was the joint product of the tearing up of the cross walk and the excavation in the street under it, as against an objection that before the repairs were made the place where the injury occurred had been a sidewalk, required to be built by the lot owner, and not by the city. Alexander v. Big Rapids, 76 Mich. 282, 42 N. W. 1071.

And an allegation in a petition in such an action for an injury received at a crossing, that the city negligently and improperly dug and excavated a ditch or drain so as to render the crossing dangerous and unfit for safe travel, is sufficient on exception to the sufficiency of the petition, without allegation of notice on the part of the city, since, where a corporation itself makes a dangerous crossing, no notice of it is necessary to be proved. Austin v. Ritz, 72 Tex. 391, 9 S. W. 884.

So, a complaint in an action against a city for an injury received by plaintiff by falling into an excavation, alleging that the defendant carelessly and unskilfully removed portions of a certain hill for the purpose of procuring dirt, and that the injury resulted from its failure to guard a dangerous pathway and precipice while it was doing the work, is not subject to objection, on demurrer, that it is not shown, either that the city was the owner of the hill, or had control of it, since there is no distinction between the ownership or possession, and that control over the property which must be inferred from the facts stated. Mackey v. Vicksburg, 64 Miss. 777, 2 So. 178.

As to averments as to excavations by individuals or persons other than municipal corporations, see *infra*, XVIII., XIX; and see Buffalo v. Holloway, 7 N. Y. 493, 57 Am. Dec. 550, Affirming 14 Barb. 110, *infra*, XXI. c.

XIV. *Application of rules to negligence of employer injuring employee.*

a. *General rules.*

As a general rule the use of the generic word "negligence," in a petition in an action against an employer for a personal injury to an employee, is sufficient without averring its degrees. The degree, whether wilful, gross or ordinary, is a matter of proof, and the general averment of negligence authorizes proof of any negligence of any degree. Louisville & N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. 706.

And an allegation in an action for personal injuries that while the plaintiff was in defendant's employ he was injured by the carelessness and negligence of fellow servants while they were engaged with him in a specified act in the course of their employment states a cause of action, and is not objectionable as stating a mere conclusion. Lindgren v. Minneapolis & St. L. R. Co. (Minn.) 90 N. W. 881.

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Nor is it necessary in a complaint framed under Ala. Code, § 2590, subsec. 5, giving a right of action to an injured employee when such injury was caused by reason of the negligence of any person in the service or employment of the master or employer who has charge or control of any signal points, locomotive engine, switch car, or train upon a railway, to aver that the engineer knew, or might have known by the exercise of reasonable diligence, that at the time of the accident the plaintiff was in a dangerous position, or any other particular acts or omissions constituting the negligence complained of. Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145.

But a declaration in an action against an employer for negligence causing the death of an employee, not the negligence of a fellow servant, should state facts from which the law will raise a duty from the master to the servant, and from which negligence will be presumed: and if it fails to do so it is insufficient to support a judgment. Northern Milling Co. v. Mackey, 99 Ill. App. 57.

And a general allegation of negligence in such an action is properly dismissed on special demurrer. Miller v. Merchants' & M. Transp. Co. 115 Ga. 1009, 42 S. E. 385.

b. *With respect to the relationship of the parties.*

In order to establish a duty on the part of one person to protect another in the performance of a service for the former, it is obvious that the relation of employer and employee must be made to appear. A very general statement as to the employment, however, is all that is necessary.

Thus, an allegation in a declaration that at the time of receiving the injuries complained of the plaintiff was employed by the defendant about its grounds and machinery to assist in carrying on its foundry business, and that at the time of receiving such injuries he was engaged in such employment, sufficiently sets forth the plaintiff's relation to the defendant as its servant, engaged in the duty of his employment, to show that it was bound to the exercise of due care not to expose him unnecessarily to injury. Di Marcho v. Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

And a petition alleging that while plaintiff was in the employment of defendant she was required by him to work in a place that was rendered unsafe and dangerous by reason of the negligent acts and doings of men engaged in repairing defendant's factory building, in consequence of which she was injured, sufficiently states the plaintiff's relation to the defendant at the time of the injury, since the question as to whether this constituted a breach of defendant's duty is a conclusion of law which she was not required to plead. Sackewitz v. American Biscuit Mfg. Co. 78 Mo. App. 144.

So, a declaration alleging that the defendant was the owner of, and had the management and control of, a certain vessel, and that the plaintiff was at work thereon discharging the cargo in the employ of a stevedore, then doing the work of discharging such cargo, will be taken, on general demurrer not pointing out any specific defect, to mean that the stevedore was doing the defendant's work of discharging the cargo in the course of business, and thus as disclosing a duty owing from the defendant to the plaintiff. Coughlin v. Boston Tow-Boat Co. 151 Mass. 92, 23 N. E. 721.

And an allegation in an action for damages against a railway company for personal injuries, that the plaintiff was in the service of the defendant in the capacity of a switchman, and that while in the active discharge of his duties as such switchman he received the injuries for which the action was brought, is a sufficient statement of the duty which the defendant owed to the plaintiff, and is not subject to special objection on the theory that the allegation that the plaintiff was at the time in the active discharge of the duties incident to his employment was a conclusion of the pleader, and not the statement of a fact. Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240, 12 So. 88.

But a declaration in an action for damages for negligence, alleging that the defendant operated a mill, and in connection therewith used a side track for loading and unloading material; and that, while the plaintiff's intestate, who was an employee, was lawfully on said side track, the defendant's servants, not the plaintiff's fellow servants, pushed a car along the side track and against him without giving him warning, and thereby caused his death, fails to state a cause of action, in the absence of allegations showing that the plaintiff's intestate was ordered by defendant to work or be where he was, and that the defendant's servants knew, or ought to have known, that he was there, or that he was exposed to any danger. Northern Milling Co. v. Mackey, 99 Ill. App. 57.

In Jones v. Old Dominion Cotton Mills, 82 Va. 141, however, it was held that a declaration in an action for a personal injury distinctly setting forth where, in what manner, and under what circumstances, giving ample details, the plaintiff was injured by the default, negligence, and improper conduct of the defendant's servant, who was then and there in the care and management of certain machinery of the defendant, is sufficient, though it does not state whether the plaintiff was an employee or a mere trespasser.

c. *With reference to proper place to work.*

1. *Averments as to defects.*

Where a cause of action by an employee against an employer is predicated upon a claim that the employee was required to perform his services in an unsafe place, and that his injury was due thereto, a general allegation of negligent failure to provide a safe and proper place is sufficient, even as against a motion to make the pleading more definite and certain.

Thus, a petition in an action by a wife against the employer of her husband for causing the husband's death, alleging that the deceased was a carpenter employed as such by the defendant, and that his death was caused by the negligence of the defendant in failing to provide a safe and proper place for him to perform the work required of him, will not be required on motion to be made more specific and certain so as to show whether or not he was an experienced workman, and whether or not the danger to which he was exposed was obvious or hidden, and whether or not the defendant made any assurance that it would be safe for him to do his work in the required place, since, if the defendant relied on the claim that the defect complained of was obvious, and that the danger arising therefrom was of such a character as to raise a presumption that the plaintiff, by undertaking to do the work, assumed the risk, such claim would be matter of defense. Fulger v. Bothe, 43 Mo. App. 44.

And a petition by the mother of an employee in an action against his employer, stating with reasonable certainty the grounds on which the plaintiff predicates her right of recovery, and that, in consequence of the wrongful acts, neglects, and default of the defendant stated,

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and without fault on his part, plaintiff's intestate fell through a hatchway and was killed, is sufficiently definite, with reference to the alleged negligence being the proximate cause of the injury, and will not be required, on motion, to be made more definite and certain as to the facts which show that the negligence alleged was the proximate cause of the injury. Schultz v. Moon, 33 Mo. App. 329.

So, a general allegation of negligence in an action against a receiver of a railroad, brought for the death of a brakeman in his employ, is not superseded by an allegation that the defendant negligently permitted a flat car to be negligently loaded with cord wood and two green, slippery elm ties placed at one end of the car, lower than the cord wood, so that the brakemen in passing over the cars in the discharge of their duty would be obliged to step upon them, and that they were slippery and dangerous, and that by reason thereof plaintiff's intestate was killed, though uncertain and not specific for want of an affirmative showing whether the ties complained of were placed crosswise or lengthwise of the car, or whether they were horizontal or one end lower than the other, since the latter allegation does not show that there was no cause of action. Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688.

And a petition in an action by an employee against a company engaged in manufacturing iron, for a personal injury, charging that while upon an unprotected platform in the course of his employment the plaintiff was knocked off by another employee, and that defendant was negligent in the construction of the platform in not providing it with sufficient guard rails, and negligently allowed a large quantity of material to be piled thereon, so that it was not suitable for the work in which plaintiff was engaged, taken as a whole, with an averment, as a part of the prayer for relief, that plaintiff was damaged by reason of defendant's negligence, alleges that the injuries were caused by defendant's negligence, and should be sustained as against an objection to the introduction of evidence thereunder, on the ground that it did not state sufficient facts to constitute a cause of action. Young v. Shickle, H. & H. Iron Co. 103 Mo. 324, 15 S. W. 771.

So, an allegation in a complaint against a company operating a coal mine for injuries resulting in death to the plaintiff's intestate, who was suffocated or asphyxiated by smoke and gas resulting from a fire in a coal mine in which he was at work, that his death was caused by the negligence of a person in the service or employment of the defendant who had superintendence intrusted to him, and who was negligent while in the exercise of such superintendence, is sufficient under the rule that the averment of specific negligence is not required. Bessemer Land & Improv. Co. v. Campbell, 121 Ala. 50, 25 So. 793.

And a declaration by a servant against his master for injuries caused by an explosion of fire-damp in a coal mine need not state with particularity the acts of omission or commission which constituted the negligence of the master. If it is specific enough to inform the master of what he is called upon to answer, so that he will not be surprised at the trial, it is sufficient. Berns v. Gaston Gas Coal Co. 27 W. Va. 285, 55 Am. Rep. 304.

But a complaint in an action against a coal company for personal injuries to an employee causing death, alleging that the defendant knowingly and negligently permitted inflammable gases to accumulate in its mine, and permitted quantities of coal dust impregnated with sulphur to accumulate in the passages thereof, and permitted the same to become dry and inflammable and explosive, and that by reason of such carelessness and negligence an explosion took place causing the death of plaintiff's intestate, will not support the theory of negligence on the part of the company in not providing sufficient doors or brattices for the mine. Cherokee & P. Coal & Min. Co. v. Wilson, 47 Kan. 460, 28 Pac. 178.

So, a complaint in an action against a coal mining company by an employee, alleging that the defendant carelessly, negligently, and wilfully permitted the roofing in the entrance and passageway leading to one of its mines to be and become unsafe and dangerous, and negligently failed to secure said roof by properly propping it, is sufficiently specific to apprise the defendant of the acts of negligence relied on as against a demurrer. If he wished a more specific allegation of the acts of negligence he should have moved to make the complaint more specific. Coal Bluff Min. Co. v. Watts, 6 Ind. App. 347, 33 N. E. 662; Southwest Improvement Co. v. Andrew, 86 Va. 270, 9 S. E. 1015.

And a complaint in an action against a coal company, brought by a coal miner in its employ, charging that the defendant so negligently and carelessly dug, constructed, and kept a gangway leading into its mine by a negligent failure to timber or otherwise secure the sides, roof, walls, and pillars or supports thereof, that the same was dangerous and unsafe, all of which the defendant then knew, warrants proof that the cause of the accident was the stripping of the pillars, which so weakened the support that there was a general crush in part of the mine, which caused plaintiff's injuries. Cunningham v. Union P. R. Co. 4 Utah, 206, 7 Pac. 795.

So, a complaint in an action by an employee against his employer, merely alleging that the employer's superintendent negligently ordered plaintiff to climb upon a plate or chord constituting a part of a building to throw down some boards, and that such superintendent had knowledge that such chord was unsafe, and that plaintiff was injured by its turning and throwing him to the ground, is insufficient on demurrer for want of a positive and direct charge that the chord which turned was unsafe. McElwaine-Richards Co. v. Wall (Ind.) 65 N. E. 753.

See also Wild v. Oregon Short Line & U. N. R. Co. 21 Or. 159, 27 Pac. 954, *infra*, XIV. d, 2.

2. *Averments as to knowledge of employer.*

If a servant claims damages from his master for injuries received on account of defective premises, buildings, or place to work, he must allege and prove that the unfitness or the defect which caused the injury was known to the master, or was such as with reasonable diligence and attention to his business he ought to have known. Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795.

But where a person employed in a coal mine was struck by a piece of loose slate which fell on him from the roof of the mine and cut an artery in his leg, an allegation in a declaration in an action against the owner of the mine therefor that such owner knew of the condition of the roof before the accident, is sufficient it is not necessary to aver the evidentiary fact that a timberman employed in the mine, whose duty it was, when notified, to prop the roof, knew of the defect, for the purpose of showing how the owner knew. Consolidated Coal Co. v. Scheiber, 65 Ill. App. 304.

And personal knowledge is regarded as an ingredient of negligence in an action by an em-

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ployee against an employer for injuries received while in defendant's employment, caused by a defective floor or platform upon which he was at work, under an allegation that the defendant provided the insecure and defective platform negligently; and the complaint is not, therefore, subject to objection for failure to aver knowledge on the part of the defendant. Knaresborough v. Belcher Silver Min. Co. 3 Sawy. 446, Fed. Cas. No. 7,874.

d. *With reference to proper management of work.*

1. *By ordinary employers.*

Where a cause of action by an employee against an employer is based upon a charge of negligence on the part of the employer or of someone to whom he has delegated his authority, in the conduct or management of his work or a part thereof in which the employee is engaged, whereby the employee is injured, negligence in the conduct of the transaction in which the injury happened may be generally stated.

Thus, a complaint alleging that the plaintiff's intestate was lawfully employed on a vessel of the defendant, and by and through the carelessness and negligence of the defendant and its servants and employees in and about loading such vessels such intestate was struck by a barrel of lime which the defendant, its servants and employees, were engaged in loading into a hatchway, and said intestate was precipitated down such hatchway and killed, states a good cause of action, and is not subject to objection for not showing that the defendant failed in the discharge of a duty owed to the deceased. Davies v. Oceanic S. S. Co. 89 Cal. 283, 26 Pac. 827.

So, a complaint in an action by an employee against a city, alleging that in the construction of a bridge about which plaintiff was employed the defendant negligently and unskilfully erected a bent in a trench on blocks, chips, and other rickety substances, without any bracing or support except small pieces of timber resting against it, and that the bent fell and broke his leg, sufficiently charges negligence on the part of the defendant to sustain a demurrer. Lebanon v. McCoy, 12 Ind. App. 500, 40 N. E. 700.

And such a complaint against an employer, substantially alleging that the defendant so carelessly and negligently managed certain apparatus in the performance of the work in which the plaintiff was engaged that a derrick fell against iron frame work causing it to fall and injure the plaintiff, is not subject to objection that because the particular acts of the defendant's workmen which constituted the careless and negligent manner in which they performed the work were not specified in the complaint the allegation of negligence must be deemed to be merely an allegation of a conclusion of law, since any want of clearness in the statement is a defect of form, and not of substance, and is cured by judgment. Bunnell v. Berlin Iron Bridge Co. 66 Conn. 24, 23 Atl. 532.

A declaration in an action by a servant against his master, however, charging that the defendant did not use proper care that the van on which he was required to work should not be overloaded, or that he should be securely carried, in consequence of which the van gave way and broke down, whereby plaintiff was injured, is bad on motion to arrest judgment, since the mere relation of master and servant cannot imply an obligation on the part of the master to take more care of the servant than he might reasonably be expected to do of himself. Priestley v. Fowler, 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987.

And a complaint in an action by an employee against a contractor employing him, for an injury caused by an elevator in the building being erected by the contractor, charging that he was injured, while obeying orders of a foreman whom he was bound to obey, by the elevator, which was negligently, and without notice to plaintiff, permitted to descend upon him, and that the injury was solely on account of the negligence of defendant in failing and omitting to provide suitable and proper rules for the running and management of the elevator, is bad. It is incumbent on the pleader to state also what relation the defendant bore to the elevator, in order that the court could determine whether it was his duty to prescribe rules for its management or not. Troth v. Norcross, 111 Mo. 630, 20 S. W. 297.

2. *By railroad companies.*

The rule as to alleging negligent management of work by an employer or person to whom he has delegated his authority, whereby an employee is injured, is the same whether the employer be an ordinary one or a railway corporation.

Thus, a declaration in an action against a railroad company for negligence, amounting to a charge that the conductor negligently, under the surrounding circumstances, gave an order to slack up the train, and thereby set in operation causes that reasonably might have been foreseen would and actually did result in the death of the deceased, an employee, is sufficient. Chicago, B. & Q. R. Co. v. Blank, 24 Ill. App. 438.

Nor is it necessary, in a complaint founded on Ala. Code, § 2590, subsec. 3, giving a right of action to an injured employee when such injury is caused by reason of the negligence of a person in the service or employment of the master or employer, to whose orders or directions the servant or employee at the time of the injury was bound to conform, and did conform, if such injuries result from having so conformed, to aver in what particular or respect the orders or directions were negligent, though it may be that good pleading requires the name of the person to whose orders the employee was bound to conform to be stated. Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145.

And a complaint in an action under the Alabama employer's liability act to recover damages sustained by the death of the plaintiff's intestate by alleged negligence of the defendant, a railroad company, charging that the engineer in charge of an engine ran it negligently through a cut and around a curve and against the said intestate, and that his death was the result of the negligence of the engineer, is sufficient on demurrer. Louisville & N. R. Co. v. Markee, 103 Ala. 160, 15 So. 511.

So, a petition in an action against a railroad company by a widow of a track walker in its employ, killed by a passenger train, alleging that the deceased was run on and killed by a designated train, and that his death was occasioned by the negligence of the defendant's servants while running and managing a locomotive and train, is good against a demurrer for want of specific acts of negligence, as well as against an objection made to the introduction of any evidence after answer and on the trial of the cause on that ground. Sullivan v. Missouri P. R. Co. 97 Mo. 113, 10 S. W. 852.

And an allegation in a declaration in such an action brought by an employee who was struck from behind by a moving car propelled by a

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locomotive of the defendant while he was walking between its lines of track on his way to its roundhouse, at which place he was employed, that the defendant was negligent in running into him and in not warning him of the approach of the car, is sufficient to support an amendment stating that it was necessary to walk either on or between the defendant's line of railway tracks to reach the roundhouse, and his custom of walking between the lines of tracks was known to and sanctioned by the defendant; and the declaration as amended is not demurrable. Savannah, F. & W. R. Co. v. Chaney, 102 Ga. 814, 30 S. E. 437.

And a petition in such an action charging that the defendant negligently and carelessly caused its engine to be moved without notice to plaintiff, so that he was struck and injured, if defective for failure to advise defendant sufficiently of the particular negligence complained of, may be amended so as to remedy the defect by stating that the negligent direction of the engine's movement by the superintendent of the company was the cause of the accident; and such amendment is not open to objection as alleging a new cause of action. Wills v. Cape Girardeau S. W. R. Co. 44 Mo. App. 51.

So, a defect in a complaint against a railroad company by a laborer in its employ, alleging that the defendant ran one of its locomotives carelessly and negligently and recklessly against and over the plaintiff, thereby injuring him, by way of uncertainty as to what the alleged carelessness and negligence of the defendant in running the locomotive consisted of, should be reached by motion to make the paragraph more specific, and not by demurrer. Ohio & M. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134.

And a petition in such an action charging that the plaintiff, by order of his superior, was under a car making repairs, and that it was the duty of the defendant, by its agents and servants, to prevent the moving of the car, and otherwise to protect the plaintiff from danger while working under said car, and that defendant negligently and wrongfully, by its servants and agents, without any notice to plaintiff, put the car in motion, whereby he was injured, charges negligence in the failure to notify plaintiff of the approaching danger and in the moving of the car without such notice, both of which were operative in causing the injury; and if the purposes of the defendant require that it be more specifically stated on which servant the duty rested of giving the plaintiff notice, application should be made to the court to compel the plaintiff to make the petition definite and certain in that respect. Lake Shore & M. S. R. Co. v. Lavalley, 36 Ohio St. 221.

So, where a complaint by an employee against a railroad company charges negligence in causing and permitting a locomotive to run against a car on which plaintiff was at work, thereby causing his injury, if the defendant desires a more specific statement of the negligence imputed to it, it can attain its object by a motion to make the allegation more specific; but the defect is not fatal to the sufficiency of the complaint as stating a cause of action, the averment being broad enough to admit evidence of all kinds and grades of negligence on the part of the defendant which resulted from causing or permitting the locomotive thus to run, thereby rendering it unsafe and causing the injury, and it would include a failure to provide such rules or to adopt such precautionary regulations as were needful to regulate or oversee the running of locomotives upon the tracks and switches of the yard as would render the place of employment reasonably safe. Wild v. Oregon Short Line & U. N. R. Co. 21 Or. 159, 27 Pac. 954.

And a demurrer to the evidence on the ground of defects in a petition, in an action by an employee against a railroad company for injuries received in a collision while riding in the course of his duty to his work on a construction train, in failing to allege any negligent acts against the defendant, will not be sustained where the allegation of negligence was that the train on which plaintiff was riding, by the carelessness, negligence, and wrongful acts and conduct of the defendant, its agents and servants, was struck by another train and engine on defendant's road, whereby the injury was caused, since the collision was the result of negligence chargeable in general terms, without specifying in what the negligence consisted. Shuler v. Omaha, K. C. & E. R. Co. 87 Mo. App. 618.

But a complaint in an action for damages for alleged negligence of a railroad company, alleging that the plaintiff was employed as a locomotive engineer by the defendant, and that he was ordered to take his train to a designated place regardless of other trains; and that the defendant, notwithstanding such order, permitted another train to start about the same time on the same road in an opposite direction; and that, as a result of such negligence, a collision occurred whereby plaintiff was injured,—is not sufficient to warrant instructions as to the situation of the stations in question and the grade and curve of the road and obstruction to view: and as to whether or not the defendant omitted anything which, had it been done, might have prevented the accident; and as to the duty of the defendant to prescribe a system of rules and regulations for the government and management of its trains and business. Woodward v. Oregon R. & Nav. Co. 18 Or. 289, 22 Pac. 1076.

So, a petition in an action against a railroad company by an employee, alleging that the defendant was guilty of negligence in operating its trains at a rapid rate of speed while plaintiff's intestate was required to make a coupling of its cars in one of such trains, and in running its cars over him, after it was known that he was injured and in a dangerous situation, warrants an instruction with reference to negligently running over him knowing he was injured or in danger, the legal gist of the averment being that after the parties in charge knew that his situation was such that the train should be stopped, they negligently ran over him. Brooke v. Chicago, R. I. & P. R. Co. 81 Iowa, 504, 47 N. W. 74.

And where a complaint in such an action alleges that the plaintiff stepped between a car and engine to make an uncoupling in the line of his duty; and that with due care on the part of the employees having charge of the engine it could have been done with ordinary safety; and that it was the duty of said employees to be watchful of plaintiff while he was exposed to danger in the discharge of such duty, and to obey promptly any signal or direction he might give to stop the engine; and that his leg was caught, and he gave directions to stop the engine, which were unheeded,—the failure of the fireman having charge of the engine to observe the movements of the plaintiff was negligence; and an instruction that the plaintiff is not entitled to recover on the ground that the fireman failed to observe that he went between the engine and car, because plaintiff had not alleged any negligence in that respect, is properly refused. Neville v. Chicago & N. W. R. Co. 79 Iowa, 232, 44 N. W. 367.

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But a complaint in such an action, brought by one employed as a section hand, alleging that while thus employed he was directed by persons standing toward him in the relation of superior, in the employ of the defendant, to go upon a construction train and to act as brakeman upon it, and to couple cars, which were duties with which he was unacquainted; and that there was not the usual and necessary number of brakemen to manage and control the train; and that, while coupling cars, without any fault on his part, but through the negligence of the defendant, and through a defective rail, he was caught and held so that a car ran over his foot,—will be required, on motion, to be made more specific so as to show the position in the service of defendant, and the relation to it and to the plaintiff, occupied by the persons alleged to have given him such orders. Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187.

So, a complaint in an action by a brakeman against a receiver of a railroad employing him, alleging that the car on which the injury was received was negligently loaded, is sufficient without stating the particular circumstances or details going to make up the negligence complained of; the word "negligently" not being a mere conclusion of law, unless accompanied by a statement of the particular acts or omissions which constitute negligence. Rogers v. Truesdale, 37 Minn. 126, 58 N. W. 688.

And an allegation in a declaration in an action against a railroad company brought by the representative of a deceased employee for causing his death, that the defendant did not use its trains and provide servants so as to avoid extraordinary risks to its employees, is not too general on demurrer, where it is alleged in the same count that, by reason of the careless and negligent use of its cars and engine, and by the failure to employ a sufficient number of servants, the extraordinary risk was not avoided by the defendant. Harper v. Norfolk & W. R. Co. 36 Fed. 102.

And a count in a declaration in such an action for damages for causing the death of an employee, charging that, a switch having been misplaced in the nighttime, and by reason of the want of proper signals and a proper signal lamp on said switch, the locomotive on which the deceased was employed ran off its proper track and collided with a car, causing his death, shows an actionable injury, and is good against a demurrer. Deremer v. Delaware, L. & W. R. Co. 54 N. J. L. 407, 24 Atl. 481.

And allegations in a petition in such an action that plaintiff was in the employ of defendant as a section hand, and engaged in such employment in unloading a train, and that the division roadmaster, before the train was entirely unloaded, when he knew, or by the exercise of ordinary care could have known, that the same was not unloaded, negligently ordered plaintiff to board said train, and negligently and carelessly permitted a railroad tie to be unloaded and thrown upon him while he was attempting to comply with the order, plainly import that the negligent order of the roadmaster was the immediate cause of plaintiff's injury, and sufficiently state a cause of action. Foster v. Missouri P. R. Co. 115 Mo. 165, 21 S. W. 916.

And such a declaration by an employee who was riding on a way car with other employees, who were ordered by the conductor to leave the way car and get on to a flat car in front, which they attempted to do, when the conductor ordered the brakeman to uncouple the way car, and the signal was then given to set the air brakes, the effect of which was to cause the slack in the train to be taken up and to permit the way car to go ahead and leave the main track, and the shock came just as the person injured was stepping on to the flat car, so that he was thrown off the end and run over by several cars, charging that the conductor, as agent of the defendant, was negligent in giving the order to the engineer to set the air brakes before he had time to get on the flat car after being ordered to do so, and before he could guard against the danger of being thrown from the car, and that the orders of the conductor were given in a careless and negligent manner, —is broad enough to charge negligence on the part of the conductor in giving the order to uncouple, and that the injury resulted therefrom. Chicago, B. & Q. R. Co. v. Blank, 24 Ill. App. 438.

So, a complaint in an action against a railroad company for damages for negligence causing the death of a carpenter in its employ engaged in repairing one of its cars upon a side track, alleging that the defendant by its negligence, carelessness, and unskilfulness in the management of its engines and cars, and by its failure to provide rules and regulations in running its engines and cars upon its side tracks, so negligently permitted its engines and cars to be run upon the said side track where its employees were working without rules and regulations for their management that the plaintiff's intestate received the injuries complained of resulting in his death, is broad enough to admit evidence of all kinds and grades of negligence on the part of the defendant, the charges being direct charges of negligence against the defendant itself, and not confined to the negligence of its servants in killing a coservant. Hildebrand v. Toledo, W. & W. R. Co. 47 Ind. 399.

But a complaint in such an action alleging no neglect of duty on the part of the defendant to the employee otherwise than in the movement of the cars on the particular occasion does not authorize a consideration of the question of the duty of the defendant to make and promulgate general rules for the conduct of its employees for the protection of coemployees. Connelly v. Minneapolis E. R. Co. 38 Minn. 80, 35 N. W. 582.

And a general averment in a declaration in an action by an employee against an employer for personal injuries inflicted on the employee while engaged in his employment, charging the defendant with negligence in failing to establish general rules for the guidance of its employees or servants in their relation to each other in the defendant's business and in the work being carried on in the operation of its railroad yards, is not a sufficient averment of the element of negligence upon which an action for personal injuries can be based, since the master is not bound to have any such rules, but is entitled to have his liability to the servant for the dangers of the work determined by the application of the general principles of law regulating and governing the relations of master and servant. Voss v. Delaware, L. & W. R. Co. 62 N. J. L. 59, 41 Atl. 224.

So, a petition in an action against a railroad company by an employee, alleging that by reason of the negligence of the defendant plaintiff was run against by the defendant's cars and thrown upon the rail of the track and run over, and that the defendant was negligent in having and using insufficient and defective machinery in running and managing its railroad cars, must be confined to negligence in running the train by which plaintiff was injured, without reference to the condition of the rails of the road, since of that no complaint was made.

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Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514.

And a petition in such an action brought by a watchman on one of defendant's bridges for injuries sustained on such bridge from a passing train, charging that the train was run at a high rate of speed, is defective, and states no cause of action, where it shows no necessary relation between the rate of speed at which the train was running and the injury which plaintiff sustained. Pike v. Chicago & A. R. Co. 39 Fed. 754.

But a petition in such an action averring that it was plaintiff's duty to pass over the bridge from time to time, to inspect it, and that it was the duty of all engineers in charge of locomotives to give timely warning to the watchman at said bridge of their approach, but that, on the occasion in question, the engineer of the train which occasioned the injury negligently failed to sound the whistle and ring the bell, in consequence of which neglect plaintiff was hurt, is good on demurrer. *Ibid.*

And a petition in such an action by a brakeman employed upon a freight train, charging that the defendant was guilty of negligence in failing to properly inspect and examine a bridge and trestle at which an injury occurred on the morning before the injury, and allowed the train on which the plaintiff was at work to go upon the same, is sufficient to justify a charge with reference to the train falling through a washout at the bridge and trestle in question. St. Louis & S. F. R. Co. v. George, 85 Tex. 150, 19 S. W. 1036.

And an allegation in a declaration in such an action, that by reason of the negligence and incompetency of a person in the defendant's employ as a brakeman, and having charge or control of a train, the plaintiff was caught between two moving trains and injured, is not subject to objection that it does not state in what the alleged negligence of the brakeman consisted, when the objection is not specially pointed out as required by Mass. Pub. Stat. chap. 167, § 12, so as to give an opportunity to amend. Steffe v. Old Colony R. Co. 156 Mass. 262, 30 N. E. 1137.

As to allegations of neglect or unskilful operation, together with averments of defective construction or condition, see *infra*, XIV. e, and subdivisions.

e. *With reference to proper structure, machinery, and appliances.*

1. *Averments as to defects in ordinary employment.*

Whatever may be the agent which a master brings into his service, whether animate or inanimate, he is bound to exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers, and the servant has a right to understand that the master will exercise that diligence in protecting him from injury and in selecting the agent from which it might arise. Noyes v. Smith, 28 Vt. 59.

Generally, however, a petition in an action against an employer by an employee who was injured or killed through defective machinery or appliances furnished him, alleging explicitly the manner in which he met his death, or was injured and explicitly charging and averring that it was caused by the negligence of the defendant, is sufficient, and not subject to objection, as vague and showing no cause of action. Helm v. O'Rourke, 46 La. Ann. 178, 15 So. 400.

And a complaint in an action by an employee against his employer, alleging that he was injured through the operation of defective machinery, is not subject to the objection that the allegation should refer specifically to the particular parts of the machinery which were defective, and specify with exactness wherein the machinery was operated carelessly. Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 534, 50 Pac. 834.

Thus, a declaration in an action by an employee against an employer for damages for alleged negligence, alleging that the defendant was in fault in not furnishing to the plaintiff, for the purpose of performing the duties of his employment, certain implements then in the defendant's yard and well known to it, is not defective in failing to state what such implements were; and overruling a motion by the defendant to require the plaintiff to file a bill of particulars under that count is not error. Richmond Locomotive & Mach. Works v. Ford, 94 Va. 627, 27 S. E. 509.

So, a complaint charging generally that the defendant carelessly and negligently permitted its elevator, which the plaintiff in the performance of his duties was required to go upon, to become dangerous, and to be and remain unfit for use, and that the plaintiff, without knowledge of its dangerous condition, while in the course of his employment, was injured thereby, is not demurrable for want of sufficient facts. George H. Hammond & Co. v. Schweitzer, 112 Ind. 246, 13 N. E. 869.

And a complaint in an action for a personal injury, caused by the falling of an elevator, to a person in the employ of the owner, setting forth the duty of the owner to provide safe and suitable appliances, and alleging that he neglected his duty in this behalf, and constructed the elevator in a careless, negligent, and unskilful manner, and with unsuitable material, and that the injury was caused by the elevator breaking from its fastening, sufficiently states a cause of action. McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367.

So, a complaint in an action by an employee against his employer charging that by reason of the carelessness and negligence of the defendant in allowing its machinery to become unsafe and defective, and by reason of the defendant's careless and negligent operation thereof, the plaintiff was thrown down and bruised and severely injured by the violent and sudden stopping of a cage used in the performance of his duties while he was exercising due care and diligence, and under the promise of the defendant that the defects of the machinery would be removed and such negligent operation discontinued, which promise induced plaintiff to continue in the employment, sufficiently states a cause of action. Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 534, 50 Pac. 834.

And a petition in an action by a widow against a coal mining company for killing her husband, an employee, charging that he met his death from injuries received in defendant's mine in the course of his employment, by coming in contact with a mineral car therein, as a result of defendant's failure to furnish its employees with reasonably safe appliances, facilities, and machinery for the purpose of ascending and descending, and that the passageway where the injury occurred was defectively constructed to the knowledge of defendant, and that his death was occasioned by the negligence of the defendant, though somewhat indefinite both in charging the negligence and in connecting it with the injury complained of, is good on objection first made at the trial to evidence offered in its support. Benham v. Taylor, 66 Mo. App. 308.

So, an allegation in a complaint that the

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plaintiff was employed by the defendant, and that while in such employ his hand was caught in a belt and pulley and was crushed, and that such injury was because of the wrong or negligence of the defendant in having and running in his mill, in his business, machines and appliances which were defective, though too general and lacking in averments of facts upon which an issue could be taken to be good at common law, is good under the Alabama system of pleading. Laughran v. Brewer, 113 Ala. 509, 21 So. 415.

And an allegation in a petition in an action for damages for personal injuries, charging that it was negligence on the part of the defendant to construct a shaft in its mill without a covering so as to protect employees from it while the machinery was in operation, and that it was dangerous without the covering, and the danger was known to the defendant, or might have been known, and that plaintiff became tangled in the shaft and pulley attached to it and was injured thereby, sufficiently charges negligence to raise an issue upon which evidence might properly be introduced. Miller v. Itasca Cotton Seed Oil Co. (Tex. Civ. App.) 41 S. W. 366.

And a complaint in an action against an employer by an employee required to place wood on a table connected with a saw to be cut, alleging the duty of the employer to keep the engine and saw in good repair and proper condition, and that while in said employment the plaintiff had several fingers of his right hand badly cut and mutilated, and that said injuries and wrongs were suffered because of the want of due care, and of negligence on the part of the defendant in not keeping the saw in order and in not providing and having competent servants to run the engine, is good on demurrer, and not subject to objection that it fails to point out in what respect the defendant was guilty of any wrong and negligence in running the saw. Hall v. Posey, 79 Ala. 85.

And a complaint founded under Ala. Code, § 2590, subdiv. 1, giving a right of action when an injury is caused by reason of a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer, but providing that the master or employer is not liable unless the defect arose from, or had not been discovered or remedied owing to, his negligence, or that of some person in his service and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in a proper condition, requires no greater degree of particularity in the averment of negligence than is required with respect to any other negligence counted on for a recovery of damages. Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145.

And such a complaint, in the language of the statute, is sufficient on demurrer. Laughran v. Brewer, 113 Ala. 509, 21 So. 415.

A statement in an action by an employee against an employer running a machine shop, however, alleging that the shafting and machinery were, by the negligence of defendant, defectively constructed and unskilfully operated, and of defective material, and in an unsafe condition, and by reason of such neglect plaintiff was caught in the shafting and machinery and injured, alleges nothing but a conclusion, and should be required to be made more specific on rule to show cause. Anderson v. Haig, 12 Pa. Co. Ct. 450.

And a statement in an action by an employee against an employer engaged in the manufacture of rope, alleging that it was the duty of the defendant to maintain sound and suitable machinery, but that defendant failed to do so, and did not use proper care to protect plaintiff from danger from insufficient and imperfect machinery, and that, by reason of said failure of duty and negligence, plaintiff was injured, is indefinite, and should be required to be made more specific on rule to show cause. Costello v. Bailey, 12 Pa. Co. Ct. 442.

And a complaint in an action against the owner of a factory by an employee working at a flax brake therein, charging that the injury sued for was caused by the carelessness and negligence of the defendant in the arranging of the flax brake and machinery without proper safeguards, is too vague and indefinite and uncertain in failing to state wherein the arrangement of the machinery was defective, and what the safeguards and protections were which ought to have been provided; but the proper remedy in such case is by motion to make the complaint more specific and certain. Such a defect cannot be reached by demurrer. Boyce v. Fitzpatrick, 80 Ind. 526.

But a declaration in an action for damages received by an employee of a gas company, from an explosion in a tank while he was at work, charging that the cause of the explosion was some defect in the tank or in the approaches to or connections with the same, is sufficient on demurrer under the rule that no more particularity is required in pleading than the nature of the thing pleaded admits of. Cox v. Providence Gas Co. 17 R. I. 199, 21 Atl. 844.

And a complaint alleging that the plaintiff was employed by defendant to work in a sawmill, and that while engaged in the discharge of his duties boilers connected with the mill exploded, injuring him, and that the explosion occurred by reason of the defective and unsafe condition of the boilers, which were old and rusty and unfit for use, all of which was known to the defendant, who negligently and carelessly used them, is good on demurrer. Deller v. Hofferberth, 127 Ind. 414, 26 N. E. 889.

And where a complaint in an action brought against an employer by the representative of an employee, for the killing of the employee by being struck on the head by a heavy timber which was being hoisted to the top of a building in process of erection by the defendant, about which plaintiff's intestate was employed, which was dropped or permitted to fall upon him by the alleged negligence of the defendant, charges the manner in which the deceased was exposed to the danger, the place where he was directed to work, the defects in certain appliances and the absence of others, refusal to require it to be made more definite and certain so as to show more particularly how deceased was exposed to such danger and wherein defendant failed to furnish proper means of protection and proper apparatus and machinery is not an abuse of discretion, since, in the nature of things, the plaintiff could know nothing as to the circumstances attending the death of her intestate, except from information derived from defendant's employees, and the defendant by its agents and employees was necessarily present at the time and witnessed the accident. Monahan v. Northwestern Contracting Co. 84 Wis. 596, 54 N. W. 1025.

So, an allegation in a complaint for personal injuries that the plaintiff was employed by the defendant to assist about its pile-driver, and that said pile-driver as it was then used and managed was unsafe, defective, and insecure, and that the foreman over the operation of said pile-driver so carelessly, negligently, and unskilfully used and operated it that the weight escaped from its fastening and fell upon the hand and arm of plaintiff seriously injuring

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him, alleges negligence in using machinery defective in the particular that the weight was not securely fastened. Santa Fé, P. & P. R. Co. v. Hurley (Ariz.) 36 Pac. 217.

But a complaint in an action for damages for alleged negligence by an employee against an employer, charging that while plaintiff was engaged in the erection of a tank in the course of his employment, through the negligence and carelessness of the defendant and through the use of defective machinery by the defendant, timbers employed in the erection of the tank fell upon and injured him, charges defective machinery only, and will not support evidence with reference to the character of a team hitched to the end of a rope and used for the purpose of lifting a bent, since the team is in no sense machinery though it performed the office of a machine. McPherson v. Pacific Bridge Co. 20 Or. 486, 26 Pac. 560.

2. *Averments as to defects in railroad employment.*

(a) *In right of way and track.*

The same general rules apply to averments of defective right of way or track in actions for negligence by employees against railroad companies as apply in actions against ordinary employers.

Thus, a general averment in an action against a railroad company for an injury to a brakeman, that the defendant negligently left a silver or splint projecting from a rail on its road, is sufficient. Ohio & M. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479.

And a complaint in an action for negligence causing death, alleging the employment of the deceased by the defendant, that at the time of the accident he was in the discharge of his duty, and that the accident causing his injury occurred in consequence of the negligence of the defendant in failing to keep its track free from obstruction, states facts which present an issue which cannot be met by demurrer on the ground that it does not state facts sufficient to constitute a cause of action. Wilson v. Denver, S. P. & P. R. Co. 7 Colo. 101, 2 Pac. 1.

And an allegation in a complaint for a personal injury against a railroad company that the defendant by its neglect and want of care allowed its roadway to become unsafe, and by reason thereof the plaintiff, while in its employ as a brakeman and in the performance of his duties as such, was violently struck against a projecting rock and thereby suffered the injuries complained of, is certain to a common intent, and a sufficiently specific averment of the defect counted on. Georgia P. R. Co. v. Davis, 92 Ala. 300, 9 So. 252.

So, a declaration in an action by a switchman and car coupler against a railroad company employing him, alleging that he was directed by the yardmaster to make a coupling between a standing car and a switch engine, and that his foot was held fast by the cross-ties or rail of the track, and was run over by a car wheel, necessitating its amputation, and that his injury was caused by the negligence of the company in improperly placing the cross-ties too close together in its yard track, the spaces between them not being filled and the iron of the track being old and worn, states a cause of action. Preston v. Central R. & Bkg. Co. 84 Ga. 588, 11 S. E. 143.

And a count in a complaint in such an action stating that the plaintiff's injuries were caused by reason of defects in the means and appliances for stopping an engine, and defects in a switch and the lever of the switch, and in the track near the switch; and that such defects arose from, or had not been discovered or remedied by reason of, the negligence of the defendant, or some person in the service or employment of the defendant, intrusted by it with the duty of seeing that its ways, works, machinery, and plant were in proper condition,—sufficiently avers negligence to sustain the complaint on demurrer. Mary Lee Coal & R. Co. v. Chambliss, 97 Ala. 171, 11 So. 897.

And an averment in an action for damages for personal injuries alleged to have resulted from defendant's negligence, that a railway switch on the defendant's railroad was negligently allowed to be and remain without a lock, so that a train ran from the main line into a switch or siding, in consequence of which the plaintiff, a conductor in defendant's employ, was thrown off a car and injured, is sufficient to withstand demurrer, and make a question for the jury as to whether or not failure to provide a lock was negligence. Birmingham R. & Electric Co. v. Allen, 99 Ala. 359, 20 L. R. A. 457, 13 So. 8.

So, a declaration in an action against a railroad company for an injury to an employee, whereof he died, alleging that the defendant disregarded its duty in reference to constructing and maintaining its railroad track, and that a designated portion of it was so negligently and defectively constructed, inspected, and maintained that the said track broke and gave way, whereby the injury was done which resulted in the death of plaintiff's intestate, and that the cars attached to the engine on which he was riding were so negligently and defectively constructed and inspected that they broke and thereby caused him to be thrown from the engine causing the injuries complained of, is sufficient on demurrer, though, if such a pleading should embarrass or delay a fair trial, the defendant could have it amended so as to more definitely state in what particular the defects existed. Walsh v. Western R. Co. 34 Fla. 1, 15 So. 686.

But a petition in an action by a brakeman against a railroad company employing him, for an injury received while coupling the front end of the engine on which he was employed to a freight car, charging that the appliances on the engine for coupling were defective and dangerous, and the roadbed and track were rough and uneven, is obnoxious, and will not support a judgment on motion in arrest, in the absence of any averment, direct or inferential, that the defects in the railway or in the appliances furnished for coupling the engine and the car were the proximate cause of the injury received by the plaintiff. Texas & P. R. Co. v. McCoy, 3 Tex. Civ. App. 276, 22 S. W. 926.

See also Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; St. Louis & S. F. R. Co. v. George, 85 Tex. 150, 19 S. W. 1036,—*supra*, XIV. c, 2.

(b) *In rolling stock and appliances.*

Averments as to defects in rolling stock and appliances are also governed by the general rules applicable to employers other than railroads.

Thus, a complaint in an action against a railroad company for damages for the killing of a brakeman in its employ, alleging that the defendant furnished the plaintiff with cars insufficiently, carelessly, and negligently constructed and of unfit material, is not subject to objection in failing to show in what respect the cars were unsafe and unfit for use, and in what manner they were carelessly constructed,

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and the loads in them were improperly secured. Preston v. St. Johnsbury & L. C. R. Co. 64 Vt. 280, 25 Atl. 486.

And a complaint in such an action brought by a brakeman for personal injuries under Ala. Code, § 2590, subsec. 1, alleging defective machinery, and that the defect counted on existed before the injury was inflicted, and that it arose from, or had not been discovered or remedied owing to, defendant's negligence or the negligence of someone intrusted with the duty of seeing that the machinery was in proper condition, in the language of the statute, is sufficient on demurrer. Louisville & N. R. Co. v. Hawkins, 92 Ala. 241, 9 So. 271.

But a petition by an employee of a railroad company in an action against it, stating without any specific facts that the plaintiff was injured in consequence of the negligence of the defendant in using defective machinery and in running and managing its railroad and cars, is fatally defective: and when such general allegations are used in connection with a specific statement of a cause of action they do not enable the plaintiff to recover for any cause of action except that specially stated. Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514.

So, a petition in an action by an employee against a railroad company, charging that on account of gross negligence and the want of proper care of defendant the boiler of its engine at which plaintiff was at work exploded and injured him, will be held on general demurrer to state a cause of action, since such an explosion, of itself, is an act of negligence sufficient to charge the defendant with responsibility. Gulf, W. T. & P. R. Co. v. Montier, 61 Tex. 122.

And a complaint in such an action by a yard master, alleging that the engine provided for making up trains of cars, as the defendant well knew, was defective and dangerous, the defect being such that when the engine was reversed and caused to move backwards it would give a sudden spring, and that the injury to plaintiff resulted from the driving of cars together with great and unusual force while he was attempting to make a coupling, is sufficiently specific, and will not be required on motion to be made more specific by stating the length of time the engine had been defective, and the exact defects in it. Wabash & W. R. Co. v. Morgan, 132 Ind. 430, 31 N. E. 601.

Nor will a complaint in such an action brought by a locomotive fireman, alleging that the locomotive on which he was employed was defective, and that the engineer in charge ran, operated, and managed it and performed his duties in a negligent and unskilful manner, and that, by reason thereof and of the insecurity of the locomotive, the smokestack was choked and stopped up, by reason of which fire, smoke, and steam were violently forced into the cab in which he performed his duties, injuring him —be required, on motion, to be made more specific so as to show in what respect the locomotive was unsafe and defective and in what particular the engineer was negligent or unskilful, since it designated a well-known part of the locomotive as that which became choked, and it cannot be assumed that the fireman could locate defects in the locomotive from the results, or that he would be able to state with exactness the manner in which the engineer so mismanaged his locomotive as to permit it to become dangerous. Orth v. St. Paul, M. & M. R. Co. 43 Minn. 208, 45 N. W. 151.

But a complaint in an action by a locomotive engineer against the railroad company employing him, for injuries suffered by him while in the defendant's employ, alleging that the engine furnished the plaintiff was out of repair, defective, and dangerous, by reason of which plaintiff suffered the injuries complained of, is not sufficient to sustain evidence on the trial that the coal furnished for use upon such engine was of a bad quality and unsafe and unfit for such use. Davis v. New York, L. E. & W. R. Co. 20 Abb. N. C. 230, Affirmed in 110 N. Y. 646, 17 N. E. 738.

And where the negligence charged against a defendant in an action therefor by an employee is the failure to keep in repair an engine used in making up trains, and permitting it to remain out of repair after having knowledge of its defective condition, the particular defects in the engine should be stated if known to the plaintiff; but the necessity of specifically setting out all of such defects is avoided by an averment that there were other defects which were known to the defendant, but were not known to the plaintiff. Wabash & W. R. Co. v. Morgan, 132 Ind. 430, 31 N. E. 601.

So, a count in an action under Ala. Code 1886, § 2590, for injuries received by the plaintiff while in the service of the defendant, alleging that they were caused by a defect in the coupling and appliances used in connecting the cars, through the negligence of the conductor to whose orders the plaintiff was bound to conform and did conform, and that the injury resulted from his having so conformed, avers negligence with sufficient particularity. Georgia P. R. Co. v. Propst, 85 Ala. 203, 4 So. 711.

And an allegation in a petition in an action against a railroad company by an employee for injuries received while attempting to make a coupling between cars, which work was new to him, that the defendant carelessly and negligently failed and omitted to furnish him with a coupling knife or coupling hook, is sufficient as against a general demurrer. Bonner v. Moore, 3 Tex. Civ. App. 416, 22 S. W. 272.

And an allegation in a complaint in such an action that the coupling appliances of the two cars were defective and insufficient and not properly fastened, and, on account thereof, would not remain in their proper places when the cars were driven together, as was usual and necessary in making a coupling, in consequence of which plaintiff was injured, sufficiently states that the drawbars of the two cars were insufficient and defective, and is sufficient on motion to make more definite and certain. Tierney v. Minneapolis & St. L. R. Co. 31 Minn. 234, 17 N. W. 377.

And a complaint in such an action averring that the plaintiff's injury was caused by defendant's negligence in knowingly allowing the car and locomotive about which plaintiff was at work, and the coupling arrangements thereof, to be so improperly constructed and out of repair and order that the car and locomotive could not be coupled without extraordinary risk, and that, by reason of such improper construction and want of repair, the car, locomotive, and coupling appliances were so brought together as to crush the plaintiff's fingers, is sufficient to inform the defendant with reasonable certainty of what plaintiff complains, and will not be stricken out as indefinite and uncertain, or required to be made more definite and certain. Fraker v. St. Paul, M. & M. R. Co. 30 Minn. 103, 14 N. W. 366.

And a complaint in such an action brought by a brakeman in defendant's employ, charging that while ascending a ladder placed for that purpose on the outside of a freight car, and being in the line of his duty and in the exercise of due care, the ladder broke, whereby he was injured, and that such ladder was so negligently and improperly constructed, and

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had become so old, loose, and worn and out of repair, that when said plaintiff, in ascending the same, took hold of one of the steps or rungs thereof, the same immediately gave way, is sufficiently definite, and will not be required to be made more definite and certain as to how and in what respects the steps or ladder of the car were negligently or improperly constructed. Carey v. Chicago & N. W. R. Co. 67 Wis. 608, 31 N. W. 163.

See also Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514, *supra*, XIV. d, 2; Walsh v. Western R. Co. 34 Fla. 1, 15 So. 686; Texas & P. R. Co. v. McCoy, 3 Tex. Civ. App. 276, 22 S. W. 926, *supra*, XIV. e, 2, (a).

8. *Averments as to knowledge of employer.*

If a servant claims damages from his master for injuries received on account of defective structure, machinery, or appliances, he must allege and prove that the unfitness or the defect which caused the injury was known to the master, or was such as, with reasonable diligence and attention to his business, he ought to have known. Evansville & T. H. R. Co. v. Duel, 134 Ind. 156, 33 N. E. 355; Lake Shore & M. S. R. Co. v. Kurtz, 10 Ind. App. 60, 35 N. E 201, 37 N. E. 303; Louisville, E. & St. L. Consol. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; Indianapolis & C. R. Co. v. Love, 10 Ind. 554; Current v. Missouri P. R. Co. 86 Mo. 62; Crane v. Missouri P. R. Co. 87 Mo. 588.

In Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795, *supra;* Cleveland, C. C. & I. R. Co. v. Wynant, 100 Ind. 160, *supra*, X. b, 3, (d), and Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187, *supra*, XIV. d, 2, were distinguished upon the ground that the gravamen of the present action is not alone the negligence of the defendant in connection with the appliances alleged to be defective, but there is added to this a question of the relation of the employer and employee, and the assumption of care by the former and of hazard by the latter.

Thus, a complaint in an action against a railroad company, brought by an employee for personal injuries received while coupling cars in the switch yard of the defendant, alleging that the defendant negligently operated in said switch yard a defective engine in which the throttle valve would suddenly fly open and cause the engine to move suddenly and swiftly, and that, by reason of its so moving, it caused a moving car to come swiftly against a standing car, catching plaintiff's hands while engaged in the duties of his employment and injuring them, is insufficient on demurrer for failure to allege knowledge of the defect by the master. Evansville & T. H. R. Co. v. Duel, 134 Ind. 156, 33 N. E. 355.

So, a charge in a declaration in an action by an employee against a gas company employing him, for injuries caused by an explosion in a tank, that the explosion was due to some defect in the tank of which the defendant well knew, or was bound to know, which defect was caused or occasioned by the negligence of the defendant, is defective in not setting forth how the defendant was bound, the allegation being a mere legal conclusion; the proper allegation in such case is that the defendant knew, or, but for the want of reasonable care and diligence would have known, of the defects. Cox v. Providence Gas Co. 17 R. I. 199, 21 Atl. 344.

It is a master's duty, however, to know the condition of appliances furnished to and used by his employees if such knowledge can be acquired by the exercise of ordinary care on his part, and it is sufficient in a complaint to recover for an alleged neglect of this duty by the master to charge that he had negligently furnished the defective appliances in question, or that he negligently failed to furnish safe and suitable appliances; and an affirmative averment that the employer actually knew of the defective and dangerous condition of the appliances is not necessary. Louisville, E. & St. L. Consol. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881; Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53.

When, in actions by an employee against an employer for injuries caused by furnishing the employee with defective machinery, in which the employer is bound to exercise at least reasonable care and diligence in seeing that it is suitable and safe, it is alleged that he had been careless and negligent in respect thereto, the necessary and legal implication is that he knew, or might by reasonable diligence have known, of the material defects and imperfections that gave rise to the injury complained of, so that it is unnecessary to formally allege notice, the law implying the same from the circumstances and conditions attending the matter alleged. Warner v. Western North Carolina R. Co. 94 N. C. 250.

And an averment in a petition in an action by a servant against his master that the defendant negligently permitted a certain appliance to become defective, and negligently suffered it to remain in a defective condition, implies that the defendant knew, or was culpably ignorant, of the defect, and is not subject to objection that it does not charge the company with actionable negligence, based on the fact that there is no averment that the defendant knew or ought to have known of the defective appliance which was responsible for the injury. Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462; Herbert v. Mound City Boot & Shoe Co. 90 Mo. App. 305.

Thus, a complaint in an action against a railroad company for a personal injury to one of its brakemen resulting in death, alleging the breaking of a coupling-pin, which was so worn by long use, and so weak, rusted, and cracked as to be insecure and unsafe, and that the death of the brakeman was caused solely by the negligence of the defendant in not providing a safe coupling-pin, is not defective because of the failure to allege that the company knew, or had the means or opportunity of knowing, that the coupling-pin was defective, since it is the duty of a master to furnish reasonably safe appliances for use by his employees. Louisville, E. & St. L. Consol. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881.

And a petition in such an action by a person employed by it to couple cars, alleging that the cause of the injury received by him was the carelessness and negligence of the defendant in failing and neglecting to provide him with safe and secure appliances with which to perform duties of his employment, and stating wherein the cars he was required to couple were defective, sufficiently avers, or contains the equivalent of an averment, that the defendant either know, or might by the exercise of ordinary care have known, of the defective and dangerous construction of the cars he was required to couple. Crane v. Missouri P. R. Co. 87 Mo. 588.

And a complaint in such an action for personal injuries to a brakeman in defendant's employ resulting in death, caused by the breaking loose of a car coupled to an engine, by which the brakeman was thrown to the ground, alleging that old, worn-out, and defective cars

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with insecure and defective couplings and appliances were placed in the train by the defendant, and that the bolt or pin used in coupling said cars at the point where they broke in two was made of inferior and unsound iron, is not open to attack on the ground that it does not allege notice or knowledge of the defect in the defendant, but only the conclusion that it might have been known. Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3.

So, a petition in such an action by an employee engaged in switching cars, alleging that the car on which plaintiff was riding was so defectively constructed in its trucks and running gear that it would not turn a curve on the defendant's railroad track, and on account of said defective construction it jumped the track, whereby plaintiff was injured, is not subject to objection on motion to arrest judgment, on the ground that it does not state that the defect in the construction of the running gear and trucks was known to the defendant, or that the defendant had knowledge or notice of the negligence complained of, either actual or constructive, the plaintiff having in general terms averred negligence in the use of the car. O'Connor v. Illinois C. R. Co. 83 Iowa, 105, 48 N. W. 1002.

And a petition in such an action, alleging that defendant carelessly and negligently permitted a loose rail to lie on or near the track, by reason whereof plaintiff was injured, is sufficient without an allegation that defendant had knowledge that the iron rail was lying on or so near the track as to be dangerous, since the defendant's knowledge is substantially embraced in the averment that it carelessly and negligently permitted it to lie there. Hall v. Missouri P. R. Co. 74 Mo. 298.

And though the gravamen of an action against a railroad company by an employee is the negligence of the defendant, in connection with a defective rail, and to constitute negligence in that regard it is essential that the defendant knew, or with reasonable care might have known, of its unsafe condition, still the general averment that defendant negligently left a sliver or splint projecting from the rail, whereby the person injured was caught and held so that a train passed over his foot, is sufficient. Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187.

In Louisville, E. & St. L. Consol. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767, *supra*, however, Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187, *supra*, was said to have been overruled, in effect, by Evansville & T. H. R. Co. v. Duel, 134 Ind. 156, 33 N. E. 355, *supra*.

So, a complaint in an action against a railroad company for damages for injuries sustained by plaintiff's intestate, occasioned by the alleged carelessness and negligence of the defendant in placing the intestate, who was in its employ as engineman, in charge of an unsafe locomotive, which locomotive, by reason of its defects, exploded and killed plaintiff's intestate, is not defective for want of an allegation of notice to the defendant of the defective condition of the locomotive, since knowledge thereof is implied from the circumstances. Warner v. Western North Carolina R. Co. 94 N. C. 250.

And a declaration in such an action charging that the engine was insufficiently stayed and bolted around the fire box, and that it was insufficient and unsafe in other respects, by reason of which it exploded, and that these defects would have been known to the defendant but for want of proper care and diligence on his part, is not subject to objection that it shows no duty owed by the defendant to the plaintiff because it shows no actual notice of defects in the engine, since in such case whatever may be the agent which the master brings into his service, whether animate or inanimate, he is bound to exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers, and the servant has a right to understand that the master will exercise that diligence in protecting him from injury and in selecting the agent from which it may arise. Noyes v. Smith, 28 Vt. 59.

Nor is a petition in such an action by one employed at a railway station whose duty it was to set brakes on cars left by passing trains, alleging that while turning a brake a wire connecting the brake chain with the brake rod broke, precipitating him from the car and injuring him, and that the company had negligently permitted the brake to become and remain out of repair, subject to objection for not stating a cause of action because it does not allege that the defendant knew the brake was out of repair or had been improperly repaired with a wire, since it is the duty of the master at all times to furnish his servants with tools and appliances reasonably safe and suitable for the purposes for which they are designed. Chicago, B. & Q. R. Co. v. Kellogg, 54 Neb. 127, 74 N. W. 454.

In Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462, a rehearing was granted in the above case, in which the same decision was made, but upon a different ground.

So, a complaint in an action against a telegraph company by an employee, charging the duty of the defendant to keep good, sufficient, and safe telegraph poles upon which the employees were required to climb to fix and regulate lines of wire, and a breach of such duty in negligently providing an insufficient and unsound pole, which fell with plaintiff, seriously injuring him, is good, though knowledge of the defendant of the defect is not expressly charged; and such allegation would be sustained by proving the defect in the pole, and that it was known to defendant. Byron v. New York State Printing Teleg. Co. 26 Barb. 39.

f. With relation to competent and careful fellow servants.

1. Averments as to incompetency.

The general rule is that a master is not responsible to his servant for an injury received by him through the negligence of a fellow servant, unless he was negligent in employing careless and incompetent servants, or negligent in retaining such servants after learning of their negligence or incompetency. In an action by a servant against his master for such an injury, therefore, such negligence must be made to appear. And since the employment of careless and unskilful servants is a breach of a duty owed to a coservant, the facts out of which the duty grew must be alleged.

Thus, an allegation in a petition in an action against an employer for the death of an employee that the injury to the employee was caused by the defendant's allowing its employees to neglect their duty is bad on demurrer as stating no facts, but a mere inference. Moss v. Pacific R. Co. 49 Mo. 170, 8 Am. Rep. 126.

And a petition in an action against an employer, brought by the father of a minor employee for alleged negligence causing the employee's death, charging that it was the de-

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fendant's duty to employ careful and skilful servants, and that defendant failed to do this, by reason of which the plaintiff's minor son was wounded and disabled through the want of care and competence of such servants, is defective in failing to allege a want of care and diligence in the selection of servants, and is bad on demurrer. Moss v. Pacific R. Co. 49 Mo. 170, 8 Am. Rep. 126.

And a statement alleging generally that by reason of defendants employing in their mill unskilled and inexperienced workmen, and operating insufficient and dangerous machinery without proper safeguards, and failing to supply necessary light for their employees working at night, plaintiff lost his arm by being caught in the machinery, will be required, on rule to show cause, to be made more specific. Niden v. Wolfenden, 12 Pa. Co. Ct. 398.

So, a complaint in an action against a company engaged in operating a coal mine, brought by a father for the killing of his son, constructed upon the theory that defendant was liable for the death of the son, who was an employee, because such death was occasioned by the negligence of another servant of the defendant, described as its bank or mine boss or superintendent, who was a fellow servant or coemployee engaged in the same general business, is bad on demurrer, in the absence of an allegation that the death of plaintiff's son was caused or occasioned by negligence of the defendant. Brazil & C. Coal Co. v. Cain, 98 Ind. 282.

And a complaint in such an action against a railroad company, alleging that plaintiff's son was killed while riding on a gravel train in the line of his duty, by a collision with another train carelessly, negligently, and recklessly run without giving notice of its approach, is bad on demurrer, since there are no averments in it which will take the case out of the general rule that a principal is not liable to one of his servants for injuries sustained through the negligence of another servant when both are engaged in the same general business. Sullivan v. Toledo, W. & W. R. Co. 58 Ind. 26.

And a complaint in such an action, alleging an injury received while in the discharge of the duties of his employment, through the carelessness and wilful and negligent act of the agent and servant of the defendant in managing a locomotive engine belonging to it, the plaintiff being a brakeman, shows no cause of action, but shows an injury by a fellow servant for which the master is not liable, in the absence of anything to show that the servant was exposed to unusual and unreasonable risks, or that the master, knowing the servant causing the injury was unfit or incompetent, employed him or retained him in the employment. Hagins v. Cape Fear & Y. Valley R. Co. 106 N. C. 537, 11 S. E. 590.

So, a complaint in such an action for causing the death of a brakeman, alleging that the injury was occasioned by the breaking of a switch pin carelessly left out of repair, and that the whole care and management of the switch and everything pertaining to its security were within the duties of the section boss and hands under his control, does not sufficiently state a case of negligence, in the absence of any averment that the defendant was negligent in employing an incompetent section boss. Slattery v. Toledo & W. R. Co. 23 Ind. 81.

And a declaration in such an action averring negligence of an engineer in recklessly, unskilfully, suddenly, and negligently backing one car against another while plaintiff was engaged in coupling the two, in consequence of which his hand was caught and mashed, and that the engineer so causing said injury was plaintiff's superior, will not support a charge with reference to injuries inflicted by a fellow servant selected without care, and retained by the defendant with knowledge of his unfitness. East Tennessee & W. N. C. R. Co. v. Collins, 85 Tenn. 227, 1 S. W. 883.

And a petition in an action by a mother against a railroad company for the killing of her minor son while in defendant's employ upon a freight train, alleging that it was caused by his falling from the train and exposure to cold, which resulted from the defendant allowing its employees to neglect their duties, and to cause the deceased to be thrown from the train, is bad on demurrer where it does not charge any want of care or diligence on the part of the defendant in the performance of its duty to employ careful and skilful servants. Moss v. Pacific R. Co. 49 Mo. 167, 8 Am. Rep. 126.

So, where the complaint in an action for injuries alleged to have been the result of incompetence on the part of the defendant's engineer fails to allege that the defendant had been negligent in ascertaining the habits of the engineer, or that it had failed to avail itself of the means at its command to ascertain such habits, so much of a verdict in the action as finds that the appellant had ample means of knowing such habits must be regarded as a finding outside of the issues, and must be disregarded on appeal. Lake Shore & M. S. R. Co. v. Stupak, 123 Ind. 210, 23 N. E. 246.

And a petition in an action against a railroad company alleging that the plaintiff was a car repairer, and while under a car in the line of his duty, engaged in fastening two cars together, the locomotive engine attached to said cars violently and suddenly started without notice or warning to him, whereby he was injured, and that the injury was caused wholly by the carelessness and negligence of the defendant, its servants and agents, is too general and indefinite, and will be required on motion to be made more specific as to which of the agents of the defendant were chargeable with negligence, and as to what acts or omissions of such servants constituted the negligence complained of. Atchison, T. & S. F. R. Co. v. O'Neill, 49 Kan 367, 30 Pac. 470.

A complaint in an action against a railroad company by an employee, however, charging that a construction train upon which plaintiff was being carried to his work collided with another train, whereby plaintiff was injured, is not subject to objection that it alleges an injury by a fellow servant for which the master is not responsible, since the negligence or misconduct is charged directly upon the defendant. Cramer v. Union P. R. Co. 3 Utah, 504, 24 Pac. 911. And see Ohio & M. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134, *infra*, XIV. f, 2.

And a complaint in such an action for an injury to an employee causing death, alleging that an engine of the defendant was old, and the boiler so worn and defective that it was unsafe, and its use involved great peril to the lives of the employees, of which the defendant had full notice, and that it negligently and carelessly caused such engines to be used in drawing a train, and that by reason of its condition the boiler exploded causing the death of plaintiff's decedent, is good on demurrer, since the negligent acts complained of are imputed to the master, and not to an employee. Columbus & I. C. R. Co. v. Arnold. 31 Ind. 174, 99 Am. Dec. 615.

And a complaint in such an action by a car repairer for an injury received by him because a locomotive ran against a car upon which he

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stood while assisting in unloading it, alleging negligence and carelessness of the defendant in causing and permitting the locomotive to run against such car, causing it to move and to throw him, whereby he was injured, charges that the producing cause of the injury was due to some fault of the master, and not to a servant, and is not subject to the objection that it shows an injury by a fellow servant. Wild v. Oregon Short Line & U. N. R. Co. 21 Or. 159, 27 Pac. 954.

So, a petition in an action against a railroad company, charging the negligence to which plaintiff's injuries are ascribed as the negligence of the defendant, its agents and employees, is sufficient to apprise the defendant of the negligence with which it is charged, in an action by an engineer of another company for injuries received through the alleged violation of orders by the engineer in charge of a train of the defendant company operating upon the same road, though it does not specify the particular agent or employee guilty of the negligence causing the injury or the specific act of negligence complained of, since these are facts peculiarly within the knowledge of the defendant. Texas & P. R. Co. v. Easton, 2 Tex. Civ. App. 378, 21 S. W. 575.

And a complaint against a lumber company in an action by an employee, alleging that the defendant by its servants caused a pile of lumber to be constructed 20 feet high, and provided a means of ascent to the top by extending boards from the pile in the form of steps, and carelessly and negligently used a board for such purpose which was weak and defective, which broke when plaintiff stepped upon it, whereby he was injured, is not subject to objection that the act complained of was the act of a servant in the common employment, since the claim is based upon the ground that the defendant was bound to provide safe steps, and that the men employed to provide them represented the employer, and their negligence was his negligence. Fraser v. Red River Lumber Co. 42 Minn. 520, 44 N. W. 878.

And a complaint in an action against a railroad company by a yard master in its employ, for injuries alleged to have resulted from the use of a defective engine by an incompetent engineer, alleging that the defendant well knew that such engineer was incompetent, neglectful, and careless, and that the injury to plaintiff resulted from the driving of cars together with great and unusual force by such incompetent engineer with such defective engine while plaintiff was attempting to make a coupling between cars, is sufficiently specific, and will not be required, on motion, to be made more specific by stating the length of time the engineer had been negligent, and the particulars constituting his alleged negligence and incompetence. Wabash & W. R. Co. v. Morgan, 132 Ind. 430, 31 N. E. 601.

Nor will general allegations in a complaint as to the incompetency of the defendant's servants, in an action by an employee against an employer for a personal injury caused by such alleged incompetency, be regarded as so indefinite and uncertain that the precise nature of the charge is not apparent, so as to make it subject to motion to require it to be made more definite and certain, where they are limited by subsequent averments to the effect that the servants mentioned were those having immediate supervision and control of the locomotive, car, and appliances by which the injury was inflicted, at the time thereof. Fraker v. St. Paul, M. & M. R. Co. 30 Minn. 103, 14 N. W. 366.

So, the fact that a petition in an action against a railroad company, under Ky. Gen. Stat. chap. 57, § 3, providing for a recovery for the death of one whose life is alleged to have been lost by the wilful neglect of the defendant, fails to state that the deceased was not an employee of the defendant, does not render the petition defective, since the plaintiff has the right to recover for either wilful or ordinary neglect, where the deceased was not an employee; and therefore the plaintiff has the right to sue for the higher degree, and if the proof fails to establish that degree, but establishes a lower degree, to recover therefor. Louisville & N. R. Co. v. Smith, 87 Ky. 501, 9 S. W. 493.

See also Lyon v. Union P. R. Co. 35 Fed. 111, *supra*, XII. b, 2, (b); Hall v. Posey, 79 Ala. 85, *supra*, XIV. e, 1.

2. *Averments as to knowledge of employer.*

Where a master is charged with damages for an injury to a servant by the negligence of a fellow servant, the same rule applies as to notice as that required in case of defective machinery; and in such case the master is not liable unless he had been guilty of negligence in the employment of, or after notice continuing in his employment, the negligent or incompetent employee through whose negligence the injury was caused. And where no such negligence is imputed or charged against the defendant in such a case, the complaint is defective as failing to state a cause of action. Evansville & T. H. R. Co. v. Duel, 134 Ind. 156, 33 N. E. 355.

But a complaint in an action against a railroad company by a person employed by it as a laborer upon its track, alleging that the defendant ran one of its locomotives carelessly, negligently, and recklessly against, upon, and over him, charges the negligence by which the plaintiff was injured directly upon the defendant itself, and not merely upon its employees, and is broad enough to admit evidence that the defendant knowingly ran the locomotive by the agency of careless and incompetent persons, and is good upon demurrer for want of sufficient facts. Ohio & M. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134.

And an averment in an action by a servant against his master that the defendant failed to exercise reasonable care in selecting coservants of the plaintiff, and knowingly employed incompetent, careless, and inefficient coservants, and that, as such, they negligently performed their duty in such employment, whereby the plaintiff was injured, presents a good cause of action, and sufficiently sets forth the element of negligence. Voss v. Delaware, L. & W. R. Co. 62 N. J. L. 59, 41 Atl. 224; Flynn v. International Power Co. (R. I.) 52 Atl. 1087.

And a complaint in an action against a railroad company by an employee, alleging that he was injured by a sudden movement of an engine upon which he was engaged in making repairs, and that such sudden movement was the result of defects in the engine and its improper and unskilful management by defendant's incompetent servants, and that such incompetency was known to defendant but unknown to plaintiff, sufficiently alleges that the servants in charge of the engine causing the injury were incompetent, so as to warrant proof of such incompetency and untrustworthiness. Lyons v. New York C. & H. R. R. Co. 39 Hun, 385.

So, a complaint in an action against a railroad company alleging the incompetence of one of its engineers, and that it carelessly and negligently retained said engineer in its employ-

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ment as such long after receiving notice of his incompetency and until the happening of the injury sued for, will not be required, on motion, to be made more specific by stating the name or names of all officers and agents of the defendant through whom the plaintiff expected to bring notice to the defendant, or, if such names could not be ascertained, by stating what official position such officers or agents held, or in what manner they were employed. Lake Shore & M. S. R. Co. v. Stupak, 123 Ind. 210, 23 N. E. 246.

3. *Averments showing responsibility for fellow servant's act.*

Where a recovery is sought by a servant from his master for an injury caused by the negligent act of a fellow servant, it must be made to appear in pleading the injury that it was inflicted in the performance of an act authorized by the master, and for which he was responsible.

Thus a complaint alleging that the plaintiff was in the employment of the defendant and engaged in handling logs in and about defendant's mill, and, while so engaged, another employee of defendant, not engaged in the same line of employment, negligently permitted a log then in said mill to roll against plaintiff, injuring him, is insufficient to show a cause of action, even before a justice of the peace, in not showing anything to connect the defendant with the act of the employee other than that he was an employee. Helfrich v. Williams, 84 Ind. 553.

So, an allegation in a declaration in an action for a negligent injury, against a corporation, that the corporation threw, or caused to be thrown, a box, whereby plaintiff was injured, is defective in the absence of anything to show the relation to the corporation of the person who threw the box or caused it to be thrown, since, as a corporation can act only through a servant, the allegation is in effect one that the box was thrown or caused to be thrown by a servant of the corporation, and shows an injury by a fellow servant for which the corporation, prima facie at least, was not liable. Di Marcho v. Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

And an allegation in a complaint for a personal injury brought by an employee against his employer, that the injury was the result of the omission of the engineer in charge of the engine driving the machinery by which he was injured to obey the rules and regulations of the defendant, does not set forth any cause of action under Ala. Code, § 2590, subdiv. 4, since the provisions of that subdivision are, in substance, that the act or omission of the employee complained of, for which the employer can be held, must be done or made in obedience to the rules of the master. Laughran v. Brewer, 113 Ala. 509, 21 So. 415.

And where a plaintiff in an action for a personal injury causing death claims that the injury to her intestate was caused by the negligence of a fellow servant, a fireman, whom he alleged to be in charge of a locomotive by which the injury was done, since it is not a universal duty of a fireman to have charge of a locomotive, but is dependent upon particular facts, in order to make out a case under Ala. Code, § 2590, subdiv. 5, as for the wrong of a person in the employment of the defendant who had charge or control of a locomotive, etc., the existence of such particular facts is essential to investing the fireman with the responsibility of a person in charge, and the facts themselves must appear in the complaint, or the conclusion from them, that such was the duty of the fireman in the particular case, must be therein averred. Brown v. Louisville & N. R. Co. 111 Ala. 275, 19 So. 1001.

So, an averment by an employee against his employer, that the plaintiff was injured by the carelessness of another employee of the defendant, not a fellow workman with plaintiff; that such other employee, while carrying material, carelessly and negligently knocked against a car post upon which plaintiff's hands were resting as a necessity in the working of the post, in a woodcutting machine,—is demurrable for want of an averment of a duty on the part of the defendant, the violation of which constituted the negligence complained of. Middleton v. Philadelphia Traction Co. 21 W. N. C. 528.

An averment in a complaint in an action for damages for causing the death of plaintiff's intestate, a fireman in the employ of the defendant in the boiler room of his distillery, however, that defendant's engineer so recklessly, negligently, and unskilfully managed the engine and boilers that one of the boilers exploded, and the intestate was thereby killed, is sufficient on demurrer, though, if the plaintiff had any more specific information on the subject, perhaps he might be required to make his complaint in that respect more definite and certain. Fitts v. Waldeck, 51 Wis. 567, 8 N. W. 363.

g. *Negativing employee's knowledge of defects or incompetency.*

It is not necessary in a suit for damages for negligence to aver in the complaint facts showing affirmatively that the plaintiff, who was an employee of the defendant, had no means of ascertaining the defect by which the injury to him was caused. Ohio & M. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479.

Nor is it necessary to allege ignorance of defects in machinery or appliances furnished by the employer to the employee by which injury is caused. Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53. *Contra* Flynn v. International Power Co. (R. I.) 52 Atl. 1089.

And an allegation in a complaint in an action by an employee against his employer for an injury alleged to have been caused by the negligence of another employee, charging knowledge of the other employee's unfitness by the defendants, their agents and servants, is not equivalent to an averment that the employee injured had such knowledge because he was one of such servants. Fitts v. Waldeck, 51 Wis. 567, 8 N. W. 363.

So, a complaint in an action against a railroad company for a personal injury to a brakeman upon one of its trains resulting in death, alleging that the brakeman was killed by reason of the defectiveness and unsafe condition of a brake and appliances thereof on one of defendant's cars which he was required in his employment to use, and that defendant negligently and carelessly used it in its business on the day of the injury and for many days previous thereto, is not subject to objection on the ground that it is not alleged that the defendant had knowledge of the defect by which the injury was caused, or that the deceased did not have the same means of knowledge as to the defects as the defendant had, since the brakeman was not bound to search for defects, or to test the machinery in advance before using it. Ohio & M. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479.

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XV. *Application of rules to breach of official duty.*

Where an action is based upon a negligent breach of official duty the general rule applies, that the pleader must specifically and definitely show such duty by alleging the facts out of which it grew.

Thus, a declaration in an action against a public officer, not based upon negligent acts committed by him in the performance of official duty, but upon an omission to perform duties imposed upon him by statute, is demurrable unless the obligation to perform such duties is shown to be absolute, specific, and imperative. Weise v. Tate, 45 Ill. App. 626.

And a complaint in an action against a sheriff for failure of duty with reference to the collection of an execution, which fails to allege that he neglected or refused to demand the property or its value from the claimants who executed the undertaking, does not state sufficient facts to constitute a cause of action, since it does not charge upon the defendant a neglect or failure to perform an official duty, his duty being to make the demand after receiving the execution, and, if the same is not complied with, to return into court a full statement of all his proceedings. Kohn v. Hinshaw, 17 Or. 308, 20 Pac. 629.

So, a charge in an action against trustees for carrying into execution the provisions of a statute for the better preservation of a harbor, that because of the defendants' improperly suffering and permitting rubbish to accumulate therein contrary to their duty, whereby it became unsafe, the plaintiff's vessel, being lawfully therein, was damaged, is bad for want of an allegation of facts which would cast the duty of cleaning out the harbor on the defendants. Metcalfe v. Hetherington, 11 Exch. 257, 25 L. J. Exch. N. S. 314.

And a declaration in an action by the owner of a schooner against one authorized by statute to maintain a drawbridge across a river, alleging that the plaintiff's vessel, having occasion to use the defendant's drawbridge, by some negligence or accident got her stern caught underneath the drawbridge, which was closed, and as the tide was rising she was thereby sunk; and that the master requested the superintendent to open the draw and he refused,—is insufficient where it does not allege that it was the duty of the superintendent to comply with the request, or show in any way that the demand was made at a time when the owner of the vessel had a right to have the draw open. Jennings v. Fitchburg R. Co. 146 Mass. 621, 16 N. E. 468.

But a complaint alleging that the plaintiff was poor and diseased and rightfully committed to the county hospital and lawfully an inmate thereof, and as such was entitled to proper care, treatment, food, and medicine; and that the defendant, as superintendent of the poor of such hospital, had full charge, control, and management of the hospital, and was furnished with necessary assistance, help, food, medicine, and supplies; and that he failed to perform such duty so far as plaintiff was concerned, in consequence whereof plaintiff's sickness was augmented and prolonged,—states a good cause of action. Drefahl v. Connell, 85 Wis. 109, 55 N. W. 160.

See also Bartlett v. Crozier, 17 Johns. 439, 8 Am. Dec. 428, *supra*, XIII. c.

XVI. *Application of rules to improper performance of professional duty.*

A breach of professional duty would appear to be sufficiently shown by an allegation of negligence and unskilfulness in the performance of the professional act in question.

Thus, a complaint by a client against an attorney, alleging that he undertook to conduct a replevin action for her, but so negligently and ignorantly conducted the proceedings that the action was dismissed on appeal for the reason that he had negligently and unskilfully drawn the replevin bond, is sufficient after verdict where it was not assailed either by demurrer or by motion in the court below. Jones v. White, 90 Ind. 255.

So, a declaration in an action against a physician for alleged negligence and unskilfulness in setting a broken limb of plaintiff, charging that the defendant was a physician and surgeon, and as such was employed by the plaintiff to set her broken limb and give her the necessary care and treatment, is sufficiently specific in the averment of the duty owed by the defendant to the plaintiff. Hanselman v. Carstens, 60 Mich. 187, 27 N. W. 18.

And such a petition, charging that the defendant so negligently and unskilfully treated and managed such an injury that the fractured bones were not set in place and caused to remain in their proper positions, sets forth a good cause of action, within the rule that the acts of negligence must be alleged, but not the facts constituting the negligence. Carpenter v. McDavitt, 53 Mo. App. 393.

But a bare allegation that the defendant in an action against a physician for malpractice conducted himself in an ignorant and unskilful and negligent manner in tending the plaintiff, not coupled with any statement of facts showing wherein he acted ignorantly, unskilfully, or negligently, is simply a statement of a conclusion, and such statement is not excepted from the established rules of pleading in general, requiring that facts, not conclusions, be stated. Hawley v. Williams, 90 Ind. 160.

And a complaint in such an action for damages for alleged malpractice in and about caring for and setting certain fractured bones, charging that the defendant so negligently and unskilfully conducted himself in the care, treatment, and management of plaintiff's fractures and injuries that he entirely failed and neglected to set or properly dress them, by reason of which the plaintiff was permanently injured, is intended to charge the defendant with negligence in dressing and caring for the fractures after the reduction and setting in the first instance, and should be required, on motion, to be made more definite and certain by stating the particular acts of negligence of the defendant in the care and treatment of the plaintiff's injuries subsequent to such reduction and setting of his fractured bones. Young v. Lynch, 66 Wis. 514, 29 N. W. 224.

So, an averment in a petition that the defendant by his agent negligently put up and sold a poisonous drug instead of a harmless medicine called for, by which the injury in question was caused, is sufficient to authorize proof that such drug was not labeled "poison" as required by statute. Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350.

XVII. *Application of rules to breach of contractual duty.*

When an action for damages is predicated upon a negligent failure to properly perform a duty growing out of a contract to perform it, it is usually sufficient to allege the contract and its negligent nonperformance.

Thus, a complaint alleging generally that work was done carelessly and negligently by the defendant is sufficient to raise an issue on

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the question of defendant's negligence. Fraser v. Red River Lumber Co. 42 Minn. 520, 44 N. W. 878.

And an allegation in a complaint that work done under a contract by one person to put a window in a storehouse for another was done in a negligent and unskilful manner, so that the rain came in through the window and damaged certain property therein, is not subject to demurrer on the ground that it fails to set out wherein the work was defective. Krebs Mfg. Co. v. Brown, 108 Ala. 508, 18 So. 659.

And a statement in an action by the owner of a schooner against a company hired to pump sand out of her, charging that the defendant disregarded its duty in the premises and failed and neglected to use due care and diligence, to employ competent servants, and to use proper and efficient means in performing its contract, whereby the schooner was injured, will not be required to be made more specific by stating the particular acts of negligence, and the time, place, and nature of the neglect; such a statement being evidence. Fender v. Mason Wrecking Co. 28 W. N. C. 93.

And an affidavit of defense in an action on a book account for horseshoeing and other blacksmith work, alleging that the plaintiff promised and agreed to perform his work in a skilful manner, but failed and neglected to do so, and that the horseshoeing was done so carelessly and negligently that defendant was deprived of the use of his horses for a designated period, presents a sufficient defense against the plaintiff's claim for horseshoeing upon the ground that the plaintiff cannot recover for unskilful and worthless performance of his work; but it is insufficient to prevent judgment for the balance of his claim for other work, where it does not allege that the horses were permanently injured and rendered less valuable to the amount of the offset claimed. Weston v. Killeen, 11 Pa. Co. Ct. 412.

So, a complaint charging that the defendant obtained from the plaintiff a sum of money which he agreed to loan for her on good security, and that he negligently loaned it to an insolvent person without security, falsely representing that he had taken real-estate security, states a valid cause of action, and is not subject to objection that it cannot be told from the averment upon what theory recovery is sought, or that there is no averment that the defendant agreed to become responsible personally, such an averment not being necessary. Bronnenburg v. Rinker, 2 Ind. App. 391, 28 N. E. 568.

And an allegation in a complaint that the defendants agreed to act as agents for the plaintiffs, and to receive consignments of cotton in Liverpool and sell the cotton as such agents, but that said defendants, not regarding their duty in the premises, negligently and carelessly failed to receive a quantity of cotton, and that by reason of the negligence and want of care and attention of said defendants such cotton was totally lost to the plaintiffs, is good on demurrer, and not subject to objection as not showing a cause of action in the plaintiffs against the defendants. Leach v. Bush, 57 Ala. 145.

So, a declaration in an action against an owner of pasture land charging that the defendant negligently omitted to surround the pasture with a proper fence, and negligently permitted the fence to remain out of repair so that plaintiff's horse escaped and was killed, is good, the words "so that" being in a legal sense equivalent to "because of which negligence" or "by reason whereof." Lucia v. Meech, 68 Vt. 175, 34 Atl. 695.

And a complaint in an action against a bailee for hire of a colt which was to be delivered to the plaintiff, alleging that the defendant turned the colt into a lot with other horses and in so doing was guilty of gross negligence, and while in such lot the colt was kicked by the other horses and so injured that it died, contains a sufficient averment of negligence under the rule of pleading which permits of a general statement of the act claimed to have been negligent, and does not require that the particular facts constituting the negligence be averred. Duffy v. Howard, 77 Ind. 182.

And an averment in a complaint by the owner of a mare against the owner of a stallion that the defendant, who had duly undertaken to have his stallion serve the mare, so negligently performed his said undertaking that said stallion in the effort to serve said mare, and because of the negligence of the defendant in managing and controlling him in that respect, so injured said mare that she died, shows a substantial cause of action for negligence, since a material issue in law or in fact could be taken thereon by the adverse party. Jones v. Darden, 90 Ala. 372, 7 So. 923.

And a complaint alleging negligence on the part of the defendants in breeding the mare of the plaintiff, causing her death, will not be required, on motion, to be made more specific by stating how and in what manner the defendants were negligent, and in what manner and to what extent the mare was injured, since it is not necessary to state the particular things done or omitted, and the extent of the injury is shown by the allegation that it caused the mare's death. Scott v. Hogan, 72 Iowa, 614, 34 N. W. 444.

So, a petition declaring against the defendant upon a contract made by him with a city for keeping certain public lamp posts in repair, asking for damages which the plaintiff is alleged to have sustained through a negligent breach by the defendant of his contract, states a good cause of action, since the contract raises upon the part of the defendant a public duty to be performed for the benefit of the inhabitants of the city, for the negligent nonperformance of which an action will lie. Lampert v. Laclede Gaslight Co. 14 Mo. App. 376.

And a complaint in an action against a turnpike company averring that the defendant neglected to repair its road, and negligently permitted and suffered the same to remain out of repair for a long time although it had notice of its condition, is sufficient, either on demurrer or motion in arrest of judgment, and is not subject to the objection that it does not aver negligence, though if the defendant wishes to have the averments more definite and certain in regard to the charge of negligence, it would be competent for it to move the court for an order requiring the plaintiff to make the complaint more specific in that particular. Brookville & C. Turnp. Co. v. Pumphrey, 59 Ind. 78, 26 Am. Rep. 76.

But an averment in an affidavit of defense that a party was damaged in a certain amount by the failure of another to perform work in a skilful manner as he had contracted to do is a conclusion involving both matters of fact and of law, and all of the facts necessary to the conclusion should be stated, since otherwise the court would have no means of knowing whether the defendant estimated his damages by a legal standard or not. Weston v. Killeen, 11 Pa. Co. Ct. 412.

And an allegation in an action by the owner of a vessel against the charterer that the defendant negligently and carelessly handed over to the plaintiff's agent copies of six out of

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eight bills of lading as and for the whole cargo, it being required that a consular manifest should be made at the place of shipment containing an accurate account of the goods on board, and, by reason of having a part only of the bills of lading, an imperfect manifest was drawn up, and the owner of the vessel was subjected to fines and expenses at the end of the voyage, alleges no cause of action, since it does not show that there was any duty upon the part of the charterer to deliver up copies of all the bills. Dutton v. Powles, 31 L. J. Q. B. N. S. 191, 2 Best & S. 191, Affirming 2 Best & S. 174, 30 L. J. Q. B. N. S. 169, 7 Jur. N. S. 725.

And a count in a complaint in an action by a country against an exposition company to recover for alleged injuries to certain property by fire while within defendant's exposition charging that after the exposition had closed, and while plaintiff's goods were still in said building, a fire occurred, and the goods were damaged or destroyed by fire and water, and that after the exposition had closed the defendant negligently removed from such building the appliances formerly connected with it for putting out fires, is insufficient to state a cause of action, and bad even after verdict, in the absence of any issuable averment of facts and circumstances to the point that at and immediately before the time of the alleged loss by fire the construction, surroundings, occupancy, or contents of the building wherein the loss occurred were of such a character, with reference to the possibility and probability of accidental fire, as raised the duty upon the part of the defendant to provide and keep at hand and in readiness for use means and appliances for extinguishing such fires. World's Columbian Exposition Co. v. Republic of France, 33 C. C. A. 333, 62 U. S. App. 704, 91 Fed. 64.

XVIII. *Application of rules to maintenance of public nuisance.*

The negligent maintenance of a public nuisance may be alleged in an action for damages therefor in general terms.

Thus, a declaration in effect averring that the plaintiff was lawfully using a certain road, and that the defendant did an act which rendered it impossible for him to use it without encountering peril, and that the defendant did this negligently and improperly, is good on motion to arrest judgment on the ground that it does not show that the obstruction complained of was erected without the permission of the owners of the soil, that allegation not being necessary. Corby v. Hill, 4 C. B. N. S. 556, 27 L. J. C. P. N. S. 318, 4 Jur. N. S. 512, 6 Week. Rep. 575.

And an allegation in a complaint that the defendant carelessly and negligently left the body of his dead cow lying in a public highway, whereby plaintiff's horse became frightened and ran away and caused the injuries complained of, while plaintiff was traveling on said highway, though in general terms, is sufficient on demurrer in an action therefor. Hindman v. Timme, 8 Ind. App. 416, 35 N. E. 1046.

And a complaint in an action for damages sustained by plaintiff by driving into a barb-wire fence located by defendant across a highway on which he was traveling in the night, alleging that the defendant negligently built and left unguarded a barb-wire fence across the highway, which had been in use for many years, and was much traveled by the public, sufficiently shows negligence on the part of the defendant. Blue v. Briggs, 12 Ind. App. 105, 39 N. E. 885.

And a general allegation of the defendant's negligence in leaving an excavation exposed, and the subjection of a city to damages in consequence thereof, is sufficient in an action on the case to recover from a property owner the amount of the judgment which had been recovered against the city for an injury sustained by a person passing along a sidewalk in the city by falling into the excavation by the side of the street left open by the defendant on his own land; and the fact that a general duty on the part of the city to protect the sidewalk by a railing had been alleged does not render it necessary to allege a particular duty upon the part of the landowner to erect such a railing. Norwich v. Breed, 30 Conn. 535.

So, a petition in an action for damages alleging that plaintiff fell into a coal hole through the sidewalk on defendant's premises, which hole had been carelessly and negligently left open by defendant's agent, is not subject to objection for insufficiency, on the ground that it fails to state that the injuries were caused by the negligence of defendant's agent while employed as such and pertaining to the particular duties of that employment, when the objection is first made to the introduction of evidence thereunder. Todd v. Havlin, 72 Mo. App. 565.

And a complaint in an action against a coal company alleging that in getting out coal at a certain shaft a large amount of slack, dirt, small coal, and other refuse was negligently and carelessly piled by the defendant along and into a public highway, and that the nature of said slack, coal, dirt, and refuse is to take fire and burn at or near the bottom and along the sides of the heap, and after so burning large portions will slide down the side, raising smoke and making a peculiar and frightful noise, all of which was known to defendant; and that, as plaintiff was driving along the highway at that point, a large amount of said slack, coal dirt, and refuse, by reason of burning, came rushing down the side of the heap, enveloping plaintiff and his horse in ashes and smoke, and making a frightful noise, which frightened said horse beyond control, whereby plaintiff was injured,—is not subject to objection on demurrer that there is a want of connection between the act alleged to have been negligent and the fright of the horse. Island Coal Co. v. Clemmitt, 19 Ind. App. 21, 49 N. E. 38.

So, the gravamen of an allegation in a declaration in an action against an electric light company charging that a specified electric arc light and lamp and the poles and rods and pulleys by means of which it was hung and suspended were negligently permitted to become and remain rotten, weak, insufficient, and defective, by reason of which the lamp fell upon plaintiff's horse and frightened it, causing plaintiff to be thrown from his wagon and injured, is that the manner in which the lamp was suspended over the street made it unsafe, whereby it fell, and the clamps and wires are included within the terms of the declaration as well as pulleys and ropes, and an instruction with reference thereto is sustained by the declaration, since, if there was any imperfection in the declaration in that respect, it was removable by amendment. Excelsior Electric Co. v. Sweet, 57 N. J. L. 224, 30 Atl. 553.

And a complaint alleging that, as plaintiff was lawfully on the public highway, he was injured by being hit by some object thrown from defendant's premises by an explosion of gas thereon, which explosion was caused by the negligence of the defendant, will not be required, on motion, to be made more definite and certain by setting forth what act or neglect, if any,

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on the part of the defendant is claimed to have caused the explosion, the remedy being, if a proper case is made out, to restrict the general allegations of the complaint by a bill of particulars, in which the plaintiff might be compelled to state the particular acts of negligence which he would offer to prove on the trial. Jackman v. Lord, 56 Hun, 192, 9 N. Y. Supp. 200.

It must be made to appear, however, that the nuisance was a public one, or that the person injured was rightfully in the place where the injury occurred, and that the other party had become responsible for his safety.

Thus, a petition in an action against a company owning a bridge, for the death of a little girl who, while crossing the bridge, fell from it into the water below and was drowned, alleging that in consequence of the wilful neglect of the said defendant, its agents, servants, and employees, in and about the management and control of the bridge, the life of plaintiff's intestate was lost and destroyed, is insufficient unless it also appears that the bridge was a part of a public thoroughfare under the control of the defendant, or, if a private bridge, that the plaintiff's intestate had been licensed to travel over it. Louisville & P. Canal Co. v. Murphy, 9 Bush, 522.

So, a declaration in an action against a telegraph company averring that a pole of the defendant was put within the chartered right of way of a turnpike, with which plaintiff came in collision in the nighttime, resulting in injury, is bad on demurrer for want of facts. It is essential that it should aver some fact or facts showing carelessness, wilfulness, negligence, or unlawfulness, thus advising the defendant and the court of the grounds of complaint, since the pole might have been placed within the right of way and still not be a nuisance. Cumberland Teleph. & Teleg. Co. v. Cook, 103 Tenn. 730, 55 S. W. 152.

And a declaration charging the defendant with negligence in leaving a hole or excavation within the limits of a highway in such a condition that it was unsafe for any person entering therein by reason of the liability of the covering of the hole to fall in, and that plaintiff's son entered into said hole, he then having a lawful right to do so, and the earth covering the same fell upon him and killed him, is fatally defective in the absence of anything showing that the excavation was made within the traveled track or so near to it that it rendered the highway unsafe, or anything else to show that the defendant owed any duty to the deceased to protect him against such an accident. Fay v. Kent, 55 Vt. 557.

And a petition in an action for injuries sustained by negligence of the defendant in placing obstacles in or near a passway, whereby the plaintiff's horse was frightened and caused to run away and throw plaintiff from her buggy, must state facts showing the right of the plaintiff to pass along or use the route traveled, and that the thing which caused the horse's fright was so near the passway as to import negligence. Clark v. Hart, 98 Ky. 31, 32 S. W. 216.

And a petition in such case alleging that the plaintiff had a right to use a certain passway, and that defendant placed a wagon bed so near the passway as to frighten plaintiff's horse, states nothing but conclusions of the pleader, which are not sufficient to sustain an action for the injury. *Ibid.*

So, a declaration in an action for a personal injury alleging that the defendants permitted others to cut an excavation in a lot across which persons were in the habit of passing, and left it in a condition dangerous to persons crossing along the highway, is defective in not stating the method by which the defendant permitted such excavation to be made, since mere permission to make the excavation, by silence and failure to interfere, would not be sufficient, without more, to render the defendant liable. Maenner v. Carroll, 46 Md. 193.

And a charge that the defendant owned and possessed a barge which foundered and sunk in a navigable river, which was a public highway, and that other vessels were accustomed to navigate and pass therein without obstruction, and that vessels passing would necessarily be in danger of striking against such barge; and that it thereupon became the duty of the defendant, while his barge remained there, to take proper precautions to guard against such danger; but that he omitted and neglected to give notice or take precautions to prevent such danger; and that the vessel of plaintiff was damaged by striking against the barge,—is defective and insufficient in failing to show that at the time of the accident the defendant had possession and control of the barge, since, without such possession and control, he was not in a position to control its movements. Brown v. Mallett, 5 C. B. 599, 17 L. J. C. P. N. S. 227, 12 Jur. 204.

XIX. *Application of rules to maintenance of defective or unsafe premises or structures.*

When defective or unsafe premises or structures are maintained on private property a mere general allegation of negligence in such maintenance is not sufficient in an action for an injury caused thereby. It is also necessary to show a duty on the part of the owner of such property, or the persons maintaining such dangerous premises or structure, toward the person injured to protect him from injury.

Thus, an allegation charging in effect that there was a pit or quarry upon a waste between two public roads, not so near to either as to constitute a public nuisance, but so near as to be dangerous, not to persons going along either of the ways, but to persons who might accidentally deviate and stray, or who might have occasion to cross over the waste for the purpose of passing from one road to the other, by reason of which plaintiff was injured, states no cause of action. Hounsell v. Smyth, 7 C. B. N. S. 731, 29 L. J. C. P. N. S. 303, 6 Jur. N. S. 897, 8 Week. Rep. 277.

And an allegation in a declaration that the defendant was the owner of an uninclosed lot of ground in a city, and that persons were in the habit of passing over it, and that the defendant cut, in an exposed portion thereof, a deep excavation and left it in a dangerous condition, and that the plaintiff, while passing over said lot, fell therein and was injured, is bad on demurrer. Maenner v. Carroll, 46 Md. 193.

It has been held, however, that a complaint in an action for damages for injuries causing the death of the infant son of the plaintiff, alleging ownership and possession of a certain town lot in the defendant, upon which a well was situated, and that through the carelessness and negligence of the defendant said well was left open, and that the deceased, without negligence or fault on his part, fell therein and was instantly killed, though in some respects indefinite and ambiguous, states a cause of action. Holt v. Spokane & P. R. Co. (Idaho) 35 Pac. 39.

So, an allegation in a declaration in an action for a personal injury that an open space or area opening into the cellar or basement of a building in the possession and control of the defendants, of a depth of several feet below the

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surface of the street, existed, which area it was the duty of the defendants to have guarded or provided with a barrier, but that they negligently permitted said area to remain without a safeguard, by reason of which the plaintiff fell off the sidewalk into it and was injured, is bad for want of facts stated showing the duty. Thamm v. Lahey, 59 Ill. App. 73.

But a complaint in an action by a father for the killing of his child, alleging that the defendant, being the owner of a lot adjacent to a public street, made a deep excavation upon it, which filled with standing water and was enticing to young children, who were, to the knowledge of defendant, accustomed to go there to play, and left it unguarded, whereby the injury was caused, alleging such acts and omissions to have been negligently done, is not demurrable for want of facts, on the theory that the question of defendant's negligence was a question of law, since, while it might become a question of law after plaintiff had introduced all his evidence, it could not become so before. Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899.

And a petition in an action against a railroad company, alleging that there was a hole in the platform connected with the defendant's depot, and that the opening and its dangerous character were known to the defendant, but it negligently failed to repair it, and that, while moving a box of freight from said depot, the plaintiff fell into said hole and suffered an injury,—sufficiently alleges the negligence of the defendant. Louisville & N. R. Co. v. Wolfe, 80 Ky. 82.

And a declaration charging that the surface of the defendant's land had been artificially raised by earth placed thereon, by reason of which rain water falling thereon made its way through defendant's wall into the adjoining house of the plaintiff, damaging him, is good on demurrer, and discloses a good cause of action. Hurdman v. North Eastern R. Co. L. R. 3 C. P. Div. 168, 47 L. J. C. P. N. S. 368, 38 L. T. N. S. 339, 26 Week. Rep. 489.

But a declaration in an action for personal injury causing death, alleging that such death was caused wholly and solely by reason of the negligence and want of care on the part of the defendant through the falling of a wall which had been negligently suffered to remain standing, which struck a post a few feet therefrom, breaking it, the part broken off striking decedent and inflicting a fatal blow, does not show a cause of action, there being nothing to show a duty owed by defendant to plaintiff. Funk v. Piper, 50 Ill. App. 163.

And a declaration charging that while the defendant was engaged in removing the brick walls of a schoolhouse building plaintiff's son was prudently sitting near such walls in a public park, and that it was the duty of the defendant to see that his servants and agents removed the same in a careful and prudent manner, but that, disregarding such duty, they permitted the walls to remain without props or protection, and negligently managed the tearing down so that they fell upon plaintiff's said son, is defective in not showing the facts out of which the duty grew, and that defendant had knowledge of the presence of plaintiff's son. Kennedy v. Morgan, 57 Vt. 46.

A complaint alleging the negligent maintenance of a building that was improperly constructed, however, is not insufficient on demurrer because it fails to state specifically in what respect it was negligently constructed, or in what respect the materials used were insufficient for such structure. Waterhouse v. Joseph Schlitz Brewing Co. 12 S. D. 397, 48 L. R. A. 137, 81 N. W. 725.

59 L. R. A.

But a complaint alleging that the defendants made an excavation for a cellar in lots belonging to them adjoining plaintiff's lot in a careless and negligent manner, so that portions of the soil of plaintiff's lot were caused to become detached and fall, greatly undermining and weakening the foundations supporting plaintiff's house, but making no claim that it was the duty of the defendants to excavate and wall up in sections, will not support evidence that it was usual, under like circumstances, to do so. Obert v. Dunn, 140 Mo. 476, 41 S. W. 901.

So, a complaint alleging that the defendant invited the public to visit his house for the purpose of trade, and that it was a place of public resort for such purpose, and that the plaintiff fell through a hatchway located in that part of the storeroom used as a walkway, where the customers naturally went in trading and inspecting the goods, is bad on demurrer, where it does not show that the plaintiff was one of the class of persons so invited to visit the premises, and therefore that the defendant owed him any duty which he failed to perform. Thiele v. McManus, 3 Ind. App. 132, 28 N. E. 327.

And a declaration stating that the defendant had a theater in which he hired the plaintiff to perform, and that on part of the premises there was a hole in the floor along which the plaintiff had to pass in the discharge of his duty as a performer, and that it was the duty of the defendant to light the floor sufficiently to prevent accidents to those who had to pass along it, and that by reason of failure so to do plaintiff fell into the hole and was injured, is insufficient for want of a statement of the facts from which the duty to light the floor or otherwise protect people from falling into the hole arose. Seymour v. Maddox, 16 Q. B. 326, 5 Eng. L. & Eq. 265, 15 Jur. 723, 20 L. J. Q. B. N. S. 327.

But an allegation in a complaint by a person injured upon the premises of another by falling through a place where the flooring had been removed, into a cellar, that he was at the place where the accident occurred to do business with and at the invitation of the defendant, is sufficient to show the duty on the part of the defendant, as between the parties, of keeping the premises in a safe condition. Schmidt v. Bauer, 80 Cal. 565, 5 L. R. A. 580, 22 Pac. 256.

And an allegation in a complaint that the plaintiff was injured through the negligence of the defendant in leaving unguarded in its yard a receptacle for boiling water, into which plaintiff fell while lawfully on the premises by invitation of the defendant, having been invited to obtain employment, will not be required on motion to be made more definite and certain by stating how and when such invitation was extended and the name or occupation of the person or agent who extended it. Lee v. Minneapolis & St. L. R. Co. 34 Minn. 225, 25 N. W. 399.

A declaration charging that the defendant negligently and improperly hung a chandelier in a public house, however, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that unless it was properly hung it was likely to fall upon and injure him, and that, the plaintiff being lawfully therein, the chandelier fell upon and injured him, is insufficient on demurrer for not disclosing any duty of the defendant toward the plaintiff, for a breach of which the action could be maintained. Collis v. Selden, L. R. 3 C. P. 495, 37 L. J. C. P. N. S. 233.

But a complaint alleging negligence by de-

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fendants' insufficiently building a dam across a water course, or carelessness or mismanagement on their part, whereby the dam broke and injured mining claims of plaintiffs below, is good on demurrer; and whether the negligence arose from the want of care in constructing the dam, or in letting off water, is not sufficiently material, under the California system of pleading, to require separate counts. Hoffman v. Tuolumne County Water Co. 10 Cal. 413.

So, an allegation in a complaint against a landlord for an injury to a tenant from the falling down of a back stoop and stairs of a leased building, that the defendant as owner was bound to keep the premises in good condition and repair, and had neglected and refused to do so, is bad on demurrer; the averment that the defendant was bound to repair being the averment of a conclusion of law, and no facts being stated from which the court can say that the obligation to repair resulted. Casey v. Mann, 5 Abb. Pr. 91.

And it is not enough, in such an action for damages for an injury caused by a fall of plaster from a ceiling, to make a general allegation of negligence on the part of the landlord as the cause of the injuries of which the plaintiff complains. She should go further and charge that the defendant knew, or had reason to know, that the ceiling was unsafe or dangerous, and failed to disclose that fact, or that she had agreed to repair it or make it safe, and omitted to do so. Franz v. Mulligan, 18 Misc. 411, 42 N. Y. Supp. 509.

Nor can a landlord be held liable to a tenant for injuries to his daughter caused by the unsafe and unguarded and dangerous condition of a platform in front of his rooms at the time of the letting, in an action therefor, where it is not charged therein that the defendant knew, or had reason to know, that the platform would be dangerous for any use for which it was let, and failed to disclose its condition, or that he agreed to repair it or make it safe, and omitted to do so. Donner v. Ogilvie, 49 Hun, 229, 1 N. Y. Supp. 633.

And a declaration in an action against a landlord by his tenant's housekeeper, averring that the landlord was bound in law under his agreement with the lessee to keep the premises in repair and in a safe condition, and that he so negligently and unskilfully constructed a mantlepiece therein, and so negligently suffered it to remain out of repair, that it fell against plaintiff while performing the duties of her employment and injured her, is insufficient in the statement of the duty of the landlord, the rule being that on demise of a house there is no condition implied that the premises shall be fit and suitable for the use for which the lessee requires them. Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767.

So, a declaration alleging that plaintiff, while a guest at a resort owned by the defendant, was placed in a room in a cottage some distance from the main hotel which contained the dining room, and that by reason of the negligence of the defendant in failing to surround the gallery of the cottage with a railing, and to provide sufficient lights about the cottage, she fell from the end of the gallery while returning from the dining room and was injured, is insufficient on demurrer, since the possibility that someone might fall off of the gallery was not sufficient to suggest that a railing should be put there, or to place the proprietor under obligation to have a railing or lights. Sneed v. Moorehead, 70 Miss. 690, 13 So. 235.

And a petition in an action by a husband and wife for the alleged negligent killing of their child, averring that the defendant, a distilling company, maintained a pipe upon its premises through which from time to time it blew off and discharged hot water, *débris*, and steam from its boilers, and that it left the same unguarded, and that, without having given any signal of any kind, it blew out hot water, which ran through said pipe into a depression or hole in the ground at the end of the pipe, and the plaintiff's said child fell into it and was scalded and burned to death,—is insufficient to sustain a judgment, in the absence of anything to show that the place was attractive to children, or that children were in the habit of resorting there to play or to witness the escape of water and steam, or of something going to show that the defendant was not properly exercising dominion over its own property, though it was alleged generally that the death of the said child was caused by the wrongful acts, neglect, and fault of the defendant. Schmidt v. Kansas City Distilling Co. 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417.

Nor does a declaration alleging that the defendant did not properly construct his planer, and it being a dangerous instrument, did not surround it with proper safeguards, and that plaintiff was injured thereby while lawfully upon the premises engaged in a proper pursuit, present a cause of action, since it shows that he was a mere licensee; and there is no legal principle that imposes a duty upon a property owner to protect a mere licensee. Mathews v. Bensel, 51 N. J. L. 30, 16 Atl. 195.

But a complaint in an action against the owner of a sawmill for erecting a boom in the river by which the plaintiff's bridge below was destroyed, alleging that the defendant's piers, booms, and piling were so negligently placed in the river as to unreasonably and almost entirely obstruct navigation therein, and that, by reason of such obstruction, plaintiff's injury was caused, is sufficient,—especially as against an objection first made on trial. Kretzschmar v. Meehan, 81 Minn. 432, 84 N. W. 220.

And a petition alleging that the defendant negligently and carelessly permitted a steam engine to cast out fire into combustible material adjoining a mill in which the engine was, and set fire thereto, which spread to and over plaintiff's land and burned up and destroyed his property, though not a model, is sufficient to sustain a verdict against the defendant for the loss. Jewett v. Osborne, 33 Neb. 24, 49 N. W. 774.

So, if it is the duty of one employing another to wash windows to keep, or exercise reasonable care to keep, them in such condition that a man may stand on the outside and avoid falling by holding on to them, the special circumstances upon which that duty arises should be so stated in the declaration, in an action for an injury to one so employed, caused by falling, that the law will imply the duty without an averment of it. Chicago Consol. Bottling Co. v. Mitton, 41 Ill. App. 154.

On this subject, see also Rathburn v. Burlington & M. River R. Co. 16 Neb. 441, 20 N. W. 390; Washburn v. Chicago & N. W. R. Co. 68 Wis. 474, 32 N. W. 234; Lehnertz v. Minneapolis & St. L. R. Co. 31 Minn. 219, 17 N. W. 376; East Line & R. River R. Co. v. Brinker, 68 Tex. 502, 3 S. W. 99; Cheney v. Chicago, M. & N. R. Co. 75 Wis. 223, 43 N. W. 1152; Ekman v. Minneapolis Street R. Co. 34 Minn. 24, 24 N. W. 291; Rockford City R. Co. v. Matthews, 50 Ill. App. 267,—*supra*, X. b, 4.

XX. *Application of rules to keeping dangerous animals.*

In this class of actions a general allegation

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of negligence in keeping the animal doing the injury in question is not sufficient unless it appears that the owner had knowledge of its nature and dangerous character.

Thus, a declaration stating that the defendant possessed a wild, vicious, and mischievous horse, and that he wrongfully permitted and suffered the horse to be at large on the public highway, where the plaintiff lawfully was, and that said horse ran at and jumped upon plaintiff and injured him, is bad on demurrer for want of a showing that the defendant knew that the horse was subject to such infirmity of temper. Chase v. McDonald, 25 U. C. C. P. 129.

But a declaration charging that the defendant wrongfully kept a certain horse, which was used and accustomed to attack and bite mankind, and that the defendant had knowledge of such custom, is not defective on motion to arrest judgment for failure to allege that the horse attacked and bit plaintiff by reason of the defendant's having wrongfully and injuriously kept him, since the gist of the action is the keeping of the animal after having knowledge of its mischievous propensities. Popplewell v. Pierce, 10 Cush. 509.

And a complaint alleging that the defendant wrongfully kept a certain ram, knowing that it was accustomed to attack and butt mankind, and that, in consequence of such propensity, it attacked the son of the plaintiff and inflicted serious injuries on him, is good on demurrer as against the objection that it does not allege that the animal was vicious or dangerous. Graham v. Payne, 122 Ind. 403, 24 N. E. 216.

And a complaint alleging that the defendant kept a dog which he knew was of a fierce and dangerous nature and improper to go at large, and accustomed to attack and bite mankind, and that he wrongfully and negligently allowed said dog to go at large without being properly secured, and that he attacked and wounded plaintiff, is sufficient to avoid the objection that it does not specifically allege that the defendant at the time of the injury was permitting his dog to run at large knowing his vicious disposition. Clanin v. Fagan, 124 Ind. 304, 24 N. E. 1044.

A complaint alleging that the defendant negligently permitted his cow, which was unruly and dangerous, however, to trespass and unlawfully be upon the premises of plaintiff, and that while so trespassing she inflicted injuries upon plaintiff, is good, though it does not allege that the owner had knowledge of the vicious propensity of the animal. Mosier v. Beale, 43 Fed. 358.

So, in Brooks v. Taylor, 65 Mich. 208, 31 N. W. 837, it was held that allegations in an action for a personal injury, that the defendant wrongfully and injuriously kept a bull, well knowing that said bull was used and accustomed to attack, gore, and injure mankind, whereby plaintiff was injured, sufficiently alleges negligence on the part of the defendant without any direct averment thereof.

XXII. *Application to breaches of other duties in general.*

a. *In the management of carriages in highways.*

A simple allegation of the negligent performance of an act constituting a breach of the law of the road seems to be all that is necessary to sustain an action for an injury caused by the negligent management of a carriage in a highway.

Thus, a complaint alleging that, as the plaintiff was passing on the foot crossing of a street, the defendant, without negligence on the part of the plaintiff, carelessly and negligently drove his wagon along the street against the plaintiff and thereby injured him, states a cause of action with sufficient particularity. Kessler v. Leeds, 51 Ind. 212.

And a complaint in an action for damages, alleging that the plaintiff's child was run over and injured by the team of horses and wagon of the defendant, driven by the defendant's servant at an unlawful rate of speed and in violation of a city ordinance, is not subject to objection, after verdict, that it does not state facts sufficient to constitute a cause of action, no demurrer having been filed. Higgins v. Deeney, 78 Cal. 578, 21 Pac. 428.

And a complaint alleging that the defendants, who were operating a hospital ambulance, ran it at a high and dangerous rate of speed along the streets without a brake or other contrivance for controlling its speed; and that they kept in their service reckless, unskilful, and incompetent servants, who took said ambulance on the streets in a dangerous and defective condition, and who indiscriminately took one side of the street and then the other; and that by reason of the careless and negligent manner of operating it they ran the same and the horse attached thereto against and over the plaintiff, who was thereby injured; and that such injuries were wholly occasioned by the fault and negligence of the defendant,—is not subject to objection that the negligent and careless acts charged are not stated with sufficient certainty. Green v. Eden, 24 Ind. App. 583, 56 N. E. 240.

So, in Stevens v. Kelley, 66 Conn. 570, 34 Atl. 502, it was held that a complaint alleging that the plaintiff, while crossing a highway at a designated place, was injured by the defendant, who was driving at a rapid pace and racing on said highway contrary to the statute, and that by reason of the careless and negligent driving the plaintiff was thrown to the ground and injured, sets forth a common-law action to recover damages for negligence; but the question in the case was as to whether or not it sets forth an action under the statute giving treble damages against one who injures another by neglecting to conform to the law of the road.

Likewise, an averment in a declaration that the defendant drove a team of horses with a carriage attached wrongfully and negligently in the center of a traveled track in the highway, by reason of which the plaintiff, who was driving along such highway in an opposite direction, was forced against an embankment, upsetting her carriage and injuring her, though bad on demurrer in not alleging a failure of the defendant to turn to the right of the center of the road, is sufficient after verdict. Barker v. Koozier, 80 Ill. 207.

And a writ alleging, in substance, that the plaintiff, without fault, while lawfully traveling in the highway, was injured by the defendant's horse, which had been so negligently hitched by his servant that it broke away and ran into the wagon in which plaintiff was riding, states a good cause of action, the question in such case being, not whether the defendant knew that the horse had a propensity to break his fastenings, but whether the servant, under the circumstances, exercised the care of a prudent man in hitching the horse. Rumsey v. Nelson, 58 Vt. 590, 3 Atl. 484.

So, a complaint charging, in substance, that the defendant drove his team at a great rate of speed along a highway, and came up behind the plaintiff's vehicle and negligently ran into it, though, perhaps, not a model of pleading, tells a plain story, and is entirely sufficient, on mo-

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tion to require it to be made more definite and certain. Hanson v. Anderson, 90 Wis. 105, 62 N. W. 1055.

But a complaint alleging that an agent of the defendant negligently drove the defendant's carriage across the street directly in front of the carriage of plaintiff, at the same time snapping and shaking his reins, causing a collision and rendering it necessary for plaintiff's servant to turn to the right and drive down a street, and while doing so plaintiff's carriage was upset, is insufficient in the absence of anything to show that the defendant was the cause of the upset. Lee v. Emery, 10 Minn. 187, Gil. 151.

b. *In the management of vessels.*

In case of negligence in the management of vessels, by reason of which a collision ensues, it is not enough to state that the party having the boat in charge was negligent. The facts must be alleged.

Thus, a libel for damages by a collision between vessels resulting from alleged carelessness should state wherein the carelessness, negligence, unskilfulness, and recklessness consisted. To state that the navigation of the colliding vessels was careless, negligent, unskilful, or reckless, without stating wherein the carelessness consisted, is stating a mere conclusion. The H. P. Baldwin, 2 Abb. (U. S.) 257, Fed. Cas. No. 6811; Jacobsen v. Dalles, P. & A. Nav. Co. 93 Fed. 975.

It is not enough, in such cases, to allege generally that the defendants were guilty of negligence; the facts showing the negligence must be alleged. Jacobsen v. Dalles, P. & A. Nav. Co. 93 Fed. 975.

But a declaration charging that the defendant's servants so negligently and carelessly managed and navigated defendant's steamer that it ran upon and sank a vessel of the plaintiff's testator sufficiently states a cause of action. Parker v. Providence & S. S. B. Co. 17 R. I. 376, 14 L. R. A. 414, 22 Atl. 284, 23 Atl. 102.

So, a complaint in an action against the owner of a steamboat, alleging that plaintiff attempted to place his boat to the stern of another boat being towed by defendant's steamer for the purpose of being towed, and in consequence of the negligent and unskilful management of the defendant and its agents plaintiff was prevented from carrying out the directions given, and his boat was sunk, and the cargo entirely lost, and that said loss was caused by the negligent and improper conduct of the defendant and its agents and servants running the steamboat, causing the other sloop to strike plaintiff's boat, sets forth a good cause of action. Ross v. Charleston M. & S. Transp. Co. 42 S. C. 447, 20 S. E. 285.

And since, in case of a collision between two boats, neither party to an action for damages therefor can be expected or required to state in what particular way the other party's servants on board the other boat were negligent, it is enough to state facts which naturally or necessarily raise a presumption of negligence. Parker v. Providence & S. S. B Co. 17 R. I. 376, 14 L. R. A. 414, 22 Atl. 284, 23 Atl. 102.

In the above case, Woodward v. Oregon R. & Nav. Co. 18 Or. 289, 22 Pac. 1076, *supra*, XIV. d, 2, was distinguished upon the ground that in that case the plaintiff was employed by the defendant as a locomotive engineer, and sued for injuries sustained by a collision. And in such a case it would be necessary to set forth in what the defendant's breach of duty consisted, since no presumption of negligence on the part of the defendant, so far as the plaintiff was concerned, would naturally or necessarily arise from the fact of a collision.

c. *In other miscellaneous matters.*

The same general rules apply in all cases of neglect of duty arising from the relationship of the parties or the character of the act performed, or arising from any other circumstance, whatever the case may be.

Thus, a declaration in an action against a gas company for negligently constructing its pipes and mains so as to permit gas to escape into plaintiff's dwelling, by which it was set on fire, is not demurrable for not showing how the gas was conducted from a leak in the main to the house, though it might be required to be made more specific on motion. Mississinewa Min. Co. v. Patton, 129 Ind. 472, 28 N. E. 1113.

And a complaint in an action by a husband against an electric light company, alleging that the defendant negligently permitted its plant, wires, and other conductors of the electric current, and appurtenances used in furnishing light to plaintiff, to become and remain out of repair and without sufficient insulation, so that the current escaped and became grounded and liable to be communicated to persons using lamps, and that, through such negligence, the current became grounded and passed through the body of his wife, whereby she was killed while attemping to use one of the lights, states a cause of action with sufficient certainty. Alton R. & Illuminating Co. v. Foulds, 81 Ill. App. 322.

And the absence of an allegation in an action for an injury causing death, caused by a current of electricity sent over the wires of the defendant by reason of their lack of proper insulation, that the primary and secondary wires at the transformer came in contact with each other where the insulation was gone, does not render the declaration defective, since that is only a matter of evidence. *Ibid.*

But a complaint charging a gas company with negligence in failing to cut off the supply of gas from a building in which there was a defective pipe is insufficient to show that the negligence of such company was the efficient cause of an injury to the owner of the building from an explosion, since an explosion would be impossible without some agency acting upon the gas. McGahan v. Indianapolis Natural Gas Co. 140 Ind. 335, 29 L. R. A. 355, 37 N. E. 601.

So, a petition charging that the defendant stored gunpowder in violation of an ordinance, and that by defendant's negligence and such unlawful storage there occurred an explosion by which plaintiff was injured, is defective in failing to positively aver the existence of an ordinance forbidding the storage of gunpowder in such quantities, and in neither directly charging defendant with negligence, nor stating in what the negligence consisted; and such defects may be reached by motion for a peremptory instruction at the close of the evidence, as well as by demurrer or request that plaintiff be required to plead more particularly, and, where such motion is made, the defects are not cured by verdict. Hazard Powder Co. v. Volger, 3 Wyo. 189, 18 Pac. 636.

But a complaint alleging that the defendant by himself and his servants negligently set fire to and burned a stack of straw in the vicinity of plaintiff's premises, and so negligently watched and tended the fire that it came upon plaintiff's premises and consumed his hay, states a cause of action which is good on demurrer, and warrants the introduction of evidence thereof on the trial. Keating v. Brown, 30 Minn. 9, 13 N. W. 909.

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Nor is a complaint charging that the defendant intentionally, negligently, and carelessly kindled a fire on his land, near plaintiff's farm, and allowed the same to burn continuously, which fire spread therefrom, burning over several hundred acres of prairie and destroying and consuming plaintiff's sheep, subject to objection that evidence thereunder should be excluded because it contains no allegation that the defendant negligently allowed the fire to burn continuously, or to spread therefrom, since the term "intentionally, negligently, and carelessly" may properly be held to apply to the spreading of the fire, as well as to the kindling the same. Kelley v. Anderson (S. D.) 87 N. W. 578.

But a complaint in an action for damages, alleging that the defendant carelessly rode his bicycle at the rate of 15 miles per hour up to within 25 feet of the faces of the horses drawing the carriage in which plaintiff was seated, whereby the horses became frightened and unmanageable, should be required to be made more specific on motion therefor by showing how and in what manner the defendant rode and used his bicycle negligently, and in what the alleged negligence consisted. Holland v. Bartch, 120 Ind. 46, 22 N. E. 83.

And a complaint alleging that defendant, sliding in the street with boisterous demeanor, contrary to the city ordinance, frightened plaintiff's horses, is bad on demurrer, in the absence of allegations as to whether or not the ordinance prohibited sliding in the street altogether, or only in a particular manner, or of anything to show that it was defendant's negligence which frightened the horses, or that plaintiff was in the exercise of proper care himself. Jackson v. Castle, 82 Me. 579, 20 Atl. 237.

So, a declaration charging that the defendant's horse, being unlawfully at large, broke and entered the plaintiff's close, and injured plaintiff's horse, which was there peaceably and of right depasturing, is sufficient to sustain a verdict for the injury. Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99.

But a declaration merely charging that the defendant wrongfully put his horse into the plaintiff's stable where plaintiff's horse was confined, and so carelessly and negligently conducted himself that plaintiff's said horse was then and there kicked and injured, is bad on demurrer for failure to show how or by what she was kicked. Strain v. Strain, 14 Ill. 368.

And a declaration in an action against persons conducting a public exhibition of horse racing, stating an invitation to the public, and that a spectator, while at the place set apart for such persons, and without fault on his part, was struck and injured by a runaway horse, without further allegations as to the place of the injury or as to defendant's control over the immediate cause of it, does not sufficiently allege negligence of the defendant in conducting the exhibition. Hart v. Washington Park Club, 157 Ill. 9, 29 L. R. A. 492, 41 N. E. 620.

Likewise, a complaint alleging that the defendant wrongfully delivered to plaintiff clothing impregnated with disease, and directed her to wash and launder it, and that she, being ignorant of its condition, became infected, contaminated, and diseased, will be required, on motion, to be made more definite and certain by alleging the name, nature, character, or other description of the disease claimed to have been contracted by her. Hattermann v. Siemann, 1 App. Div. 486, 37 N. Y. Supp. 405.

And a compiaint in an action by a father for the loss of services of his minor son resulting from his death, alleging that the minor, who appeared to be of years of discretion, purchased of the defendant two ounces of chloroform in violation of the statute, and thereafter took said poison and died, presents no cause of action, in the absence of an averment that the minor was inexperienced in the use of chloroform, or that there was anything in his character or disposition that rendered it dangerous to put chloroform in his hands. Meyer v. King, 72 Miss. 1, 35 L. R. A. 474, 16 So. 245.

So, a complaint in an action by a city to recover against a contractor for the construction of a street, for damages to which the city had been subjected in consequence of an excavation having been left unguarded by the contractor, so that a third party fell in and was injured, which, instead of stating facts and circumstances to show that it was the duty of the defendant to erect and keep up lights, guards, and barriers while the excavation remained open, assumes that such was the duty, and proceeds at once to allege a breach of such duty, without any statement of facts from which it arises, is defective and bad on demurrer. Buffalo v. Holloway, 7 N. Y. 493, 57 Am. Dec. 550, Affirming 14 Barb. 101.

And a petition averring that the persons engaged in the prosecution of work for a city acted so recklessly, carelessly, and wantonly, and with such indifference to the rights of others, and especially plaintiff's son, that a stone was thrown up by blasting with gunpowder with such force against such lad that he was instantly killed by it, is not sufficient to warrant a recovery of punitive damages for wilful neglect, under Ky. Stat. 1854, § 3, providing that if the life of any person is lost or destroyed by the wilful neglect of another, then the personal representatives of the deceased shall have a right to sue such other and recover punitive damages therefor, since "wanton" is not "wilful." Lexington v. Lewis, 10 Bush, 677.

And a petition in an action for causing the death of plaintiff's intestate alleging that such intestate was of feeble mind and without will power to control his appetite for liquor, and that defendant knew this and carelessly and with wilful neglect furnished and gave it to him, and tempted, induced, and caused him to drink to such excess as to die therefrom, does not set forth a cause of action under the statute recited in the above case, since it could not be reasonably apprehended that even the immoderate use of liquor would result in death. Rogers v. Hughes, 87 Ky. 185, 8 S. W. 16.

XXII. *The rule as to pleading. Contributory negligence.*

In many of the states a showing of freedom from contributory negligence is a part of the plaintiff's case, and in others the defendant in an action for damages for negligence may show contributory negligence under the general plea or a general denial of the negligence charged. In states of these classes, no direct plea of contributory negligence is required. In some of the states, however, contributory negligence is regarded as a matter of defense, and, while the authorities are few, in such states the rule as to charging it in an answer or plea appears to be the same as that applicable to a charge of negligence in a petition, declaration, or complaint. Price v. Atchison Water Co. 58 Kan. 551, 50 Pac. 450; Neier v. Missouri P. R. Co. (Mo.) 1 S. W. 387.

The principle that it is not sufficient to aver mere conclusions of law, but that the facts must be averred from which the conclusion of negligence is deducible, applies precisely the same to averments of negligence, whether urged by way of defense or in maintenance of an action.

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Phœnix Ins. Co. v. Moog, 78 Ala. 285, 56 Am. Rep. 31.

If a defendant in an action for negligence intends to avail himself of the defense of contributory negligence on the part of the plaintiff, notwithstanding that negligence may be proved against h'm, he must state the facts upon which he relies from which contributory negligence can be inferred. McInerney v. Virginia-Carolina Chemical Co. 118 Fed. 653.

And an answer of a defendant in an action for damages for alleged negligence, alleging that any damages sustained by the plaintiff were the result of his own negligent and careless acts and conduct and want of proper care and prudence directly contributing to produce the same, is insufficient in the absence of a statement of the facts constituting such contributory negligence. Harrison v. Missouri P. R. Co. 74 Mo. 364, 41 Am. Rep. 318; Murray v. Gulf, C. & S. F. R. Co. 73 Tex. 2, 11 S. W. 125.

Such a plea would be required on motion under the rules of Code pleading requiring the pleader to state the facts relied on in a clear and concise manner, to be made more definite and certain. McInerney v. Virginia-Carolina Chemical Co. 118 Fed. 653.

And such an allegation may be stricken out. Harrison v. Missouri P. R. Co. 74 Mo. 364, 41 Am. Rep. 318.

And no evidence can properly be admitted under it. Murray v. Gulf, C. & S. F. R. Co. 73 Tex. 2, 11 S. W. 125.

Thus, an allegation in an answer in an action against a railroad company under the Alabama employers' liability act for injuries causing death, that the plaintiff's intestate was himself guilty of negligence which proximately contributed to his alleged injury, is demurrable upon the ground that it does not state definitely in what the contributory negligence consisted. Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451, 14 So. 287; Louisville & N. R. Co. v. Markee, 103 Ala. 160, 15 So. 511.

And an allegation in an answer in an action against a railroad company for causing a fire on its right of way which was communicated to property of the plaintiff on adjoining lands, that the plaintiff was guilty of negligence, contributing to the injuries complained of, by permitting rubbish to accumulate on his own land adjoining defendant's right of way, by which the fire was communicated to his property, is bad on demurrer, since it is no defense that plaintiff had on his land something that fire would burn. Pittsburgh, C. & St. L. R. Co. v. Hixon, 79 Ind. 111.

And a plea by the defendant in an action on an insurance policy issued on a cargo of merchandise shipped by the plaintiff, which was lost, that the loss of the goods was occasioned by the fault of the assured himself, is demurrable for not stating the facts constituting the fault therein charged. Phœnix Ins. Co. v. Moog, 78 Ala. 285, 56 Am. Rep. 31.

And a plea of contributory negligence in an action by a father for the loss of his son, occasioned by the alleged negligent maintenance by the defendant of a reservoir, and its negligence in permitting plaintiff's son to have access thereto, that if the plaintiff suffered any damage it was through and by reason of his own negligence in the premises and that of the son, is defective, and should be required to be made more definite and certain on motion. Price v. Atchison Water Co. 58 Kan. 551, 50 Pac. 450.

The claim that a plea of contributory negligence is too general, however, and that the particular facts constituting such negligence should have been alleged, should be made in the trial court, and it is too late when first made on appeal. Haynes v. Trenton, 123 Mo. 326, 27 S. W. 622.

And it has been held in a Missouri case growing out of an attempt by the plaintiff to drive across the defendant's railroad track in front of an approaching train, that a plea in an answer in an action for alleged negligence that any damage suffered by the plaintiff was brought upon herself, either in whole or in part, by her own negligence, contributing directly thereto, is sufficient. Neier v. Missouri P. R. Co. (Mo.) 1 S. W. 387.

But see Harrison v. Missouri P. R. Co. 74 Mo. 364, 41 Am. Rep. 318, and Haynes v. Trenton, 123 Mo. 326, 27 S. W. 622, *supra*.

And Kentucky seems to have adopted the more liberal rule to the effect that an answer alleging that the plaintiff by his own negligence contributed to the injury complained of, and therefore he alone is responsible for his misfortune, is sufficient. Louisville & N. R. Co. v. Wolfe, 80 Ky. 82.

And Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359, holds that a general averment in an answer charging contributory negligence on the part of the plaintiff is good in an action for negligence, unless assailed by a motion to make it more definite and certain; and a plea in an action against a railroad company for negligently causing the death of an employee, that the negligence of plaintiff's intestate contributed to the injury, is good as against a demurrer.

And in Dazal v. Haaren, 20 Abb. N. C. 235n., it was held that where the gravamen of an action is negligence, and the answer sets up contributory negligence on the part of the plaintiff, the defendant will not be compelled, on motion, to serve a bill of particulars as to such contributory negligence.

XXIII. *Conclusion.*

While the above note is a long one, a statement of the general rule that it is sufficient in an action for negligence to state the act by which the injury was caused, and that it was negligently done, is nearly a complete summary. This rule is varied and controlled, however, to some extent by the method by which the question is raised, and by the character, and relationship of the parties to the action, and the circumstances which give rise to it. When the question arises on general demurrer, it is one as to whether or not such a method of statement shows a cause of action according to general rules of pleading, and the rule is universal, except as influenced by peculiar circumstances or relationship of the parties, that it does.

When the question arises on motion to make the pleading more definite and certain, however, the opposing party is entitled to a more definite statement of the acts causing the injury whenever in the nature of the case it is within the power of the pleader to make such a statement. The party alleged to have been negligent is entitled to a pleading which intelligibly apprises him of the case to be made against him, whenever the facts are within the knowledge of the pleader, and not more peculiarly within his own. But it is only when the precise nature of the charge is not apparent that the application is proper. Under the practice provisions of some of the states a special demurrer for uncertainty, or an application for a bill of particulars, performs the office of a motion to make more definite and certain.

When the question is raised for the first time after issue is joined, all defects not absolutely fatal to the pleading as stating a cause of action are regarded as waived, the rule in such

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case appearing to be that no defect can be objected to after issue joined if it is one that might have been cured by amendment.

Where a general allegation of negligence is accompanied by a specific averment of facts, however, many of the cases have limited the pleader to the specific facts averred. But the rule that a specific allegation of facts will not control or supersede a general allegation of negligence, unless it affirmatively shows that there was no cause of action, is well supported, and seems to be founded on reason.

The above rules are particularly applicable to actions against railroads, street railroads, and carriers in general, since, except, perhaps, as against trespassers, a very high degree of care is required, the mere fact of injury raising an inference to some extent, at least, of negligence, and as a general rule the facts and circumstances of the injury are more within the knowledge of the carrier than that of the person injured. The very act which caused the injury, however, must be stated, it being insufficient, for example, in an action against a railroad company for setting fire to property on neighboring premises, to allege negligence in setting fire on a right of way, since the gist of the action in such case would be negligence in permitting it to escape to the premises of others.

The same general rules apply to pleading negligence on the part of municipal corporations, though as a general rule in such cases notice or knowledge of the defect causing the injury must be alleged.

The peculiar rules of law governing the relationship of master and servant, however, have effected some modification in the general rules of pleading negligence with reference to a negligent injury to an employee or servant. While as a general rule it is sufficient to aver the act causing the injury, and state that it was negligently done, the relationship of the parties must also be made to appear so as to show a duty on the part of the master to the servant. And if the negligence consisted in a failure to supply the servant with a proper place to work, or with proper surroundings, or with proper tools, machinery, or appliances, it must also appear, as a general rule, that the master had, or should have had, knowledge of the defects, though many of the cases hold that where the fault consisted of originally supplying the servant with a defective place to work, or with defective tools, machinery, or appliances as distinguished from keeping them in condition after having supplied proper ones, no allegation of notice or knowledge is necessary, since it was the employer's duty to furnish safe ones. And if the negligence consisted of employing or retaining incompetent or negligent fellow servants whereby a servant was injured, it must be made to appear that the master either negligently employed such incompetent or negligent fellow servants, or negligently retained them after becoming informed of their incompetency or negligence, and that the act of the fellow servant which caused the injury was one done in the performance of his duty to the master and for which the master was responsible.

Where an injury grows out of a negligent breach of official duty the facts out of which the duty grew must be averred, but a professional or contractual duty and its breach sufficiently appears in an allegation of the negligent performance of the professional act or of the contract in question, and a general averment of the act causing the injury, and that it was negligently done, is usually sufficient where the action grows out of a breach of the general duty of everyone to so use his own as not to injure another, though, if the mere averment of the negligent performance of the act in question does not show the existence of the duty, facts showing it must be alleged.

In jurisdictions in which contributory negligence is regarded as matter of defense the general, though not universal, requirement seems to be that the act by which the injured party is alleged to have caused his own injury must be stated. F. H. B.

KENTUCKY COURT OF APPEALS.

Forest S. BURK, *Appt.*,
v.
J. C. B. FOSTER.

(.....Ky.....)

1. **The skill required of a physician** in treating a dislocated and broken bone is not limited to that of ordinarily skilful and prudent physicians of the vicinity, if that does not equal the skill and prudence possessed by physicians in similar communities.
2. **A physician is not absolved from liability for failure to exercise proper skill** in a particular case by the fact that the result is as good as is usually obtained in like cases.

(October 21, 1902.)

APPEAL by plaintiff from a judgment of the Circuit Court for Owen County in favor of defendant in an action brought to recover damages for malpractice in the treatment of plaintiff's broken and dislocated arm. *Reversed.*

The facts are stated in the opinion.

Messrs. **W. W. Dickerson** and **J. W. Cammack** for appellant.

Messrs. **Moody & Bourne** and **Lindsay & Botts** for appellee.

O'Rear, J., delivered the opinion of the court:

Appellant brought this suit against appellee, a physician and surgeon, to recover damages for the alleged careless and negligent treatment of appellant's broken and dislocated arm. The original injury was caused by the overturning of appellant's wagon, the team becoming frightened, running away with the wagon, and dragging appellant over frozen and rough ground for quite a distance, fracturing his arm in one or more places between the elbow and shoulder, and dislocating the arm at the shoulder joint. The bone broken was the humerus. The dislocation was the slipping, pushing, or wrenching the head of the

NOTE.—As to degree of care or skill which a physician or surgeon must exercise, see also Whitesell v. Hill (Iowa) 37 L. R. A. 830, and *note*.

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humerus from the glenoid cavity. Within an hour after the accident appellee was called in to attend the injuries. It is charged that he failed to discover the dislocation, and therefore failed to treat it. The consequence was, as alleged, that the muscles of this arm have atrophied, the shoulder joint is stiffened, and this arm is now practically useless. All agree that, when discovered, some months later, it was too late to remedy the matter. It is charged that appellee's failure to discover and treat the dislocation was because of his negligence and lack of proper care and diligence. Appellant and appellee each lived in the vicinity of Monterey, in Owen county. Monterey is a village on the Kentucky river, but not on any railroad line. It is not claimed that the fractures were not properly treated. They have healed, and apparently in good condition. The whole case turns upon the nature of the examination given appellant by appellee, and appellant's duties in that respect. That appellee did not discover the dislocation is admitted, as it is, of course, that he did not treat it. That it could have been discovered by an ordinary examination does not seem to admit of doubt. As to the manner of treatment that should have been given to it, there is some conflict in the evidence. The circuit court gave the jury the following instructions as embracing the law of this case: "(1) The court instructs the jury that if they believe from all the evidence in this case that the defendant, in setting, dressing and treating the plaintiffs arm, did not exercise that degree of skill, care, and attention which ordinarily skilful and prudent physicians and surgeons in the vicinity would have used in a like injury, then the jury should find for the plaintiff such damages as they believe from the evidence he has sustained, if any, not to exceed $10,000, the amount claimed in the petition, and in estimating the damage the jury should consider the physical pain suffered by the plaintiff on account of such unskilful and careless services, and the impairment of his ability to earn money on account thereof. (2) The court instructs the jury that if they believe from all the evidence in this case that the defendant, in setting, dressing plaintiff's arm, used and exercised that degree of skill, care, and attention that ordinarily skilful and prudent physicians and surgeons in the vicinity would use in setting, dressing, and treating a like injury, then the jury should find for the defendant. (3) The court instructs the jury that, although they may believe from all the evidence in this case that the defendant failed to exercise that degree of skill, care, and attention in setting, dressing, and treating plaintiff's arm which an ordinarily prudent and skilful physician and surgeon in that vicinity would have exercised in treating a like injury, yet if the jury further believes from the evidence that the result is as good as is usually obtained in like cases similarly situated, then the jury cannot find for the plaintiff any sum whatever on account of his permanent injury, if there is any." Under these instructions the jury found for the defendant.

For appellee it is claimed that this court approved this set of instructions (though this fact is not to be gathered from the opinion) in *Alexander* v. *Menefee*, 23 Ky. L. Rep. 1151, 64 S. W. 855. In that action the patient had recovered a judgment against the physician under the instructions referred to, and the latter had appealed, claiming that these instructions were prejudicial to him, in not being sufficiently liberal. The case was affirmed, this court holding that the instructions were as favorable to the defendant as he was entitled to. This is by no means an approval of the instructions. It leaves the question open so far as they affect the rights of the other party. In *Hickerson* v. *Neely*, 21 Ky. L. Rep. 1257, 54 S. W. 842, this question was not involved in the decision. As has been stated, Monterey is a village, somewhat isolated, and in a rural community. The number of physicians residing and practising in that "vicinity" is not shown, but presumably they are not numerous. It will be observed that the court, by the instructions given the jury, restricted the skill, attention, and prudence required of the physician in this case to such as was exercised by "ordinarily skilful and prudent physicians and surgeons in that vicinity in treating a like injury." There are some cases which limit the physician's liabilities by this standard. So far as this state is concerned, we are not aware of any reported case where we have approved of this doctrine. It may be that in any given community—a rural one, sparsely inhabited—there may be only one or two physicians, and they may each be utterly incompetent, and be what is popularly termed a "quack." Should the law permit such a one to hold himself out as a member of this learned profession, and invite the confidence and reliance of those suffering from serious injuries and ailments, so as to engage his services, and then, though he is a mere bungler and an ignoramus, an empiric of the lowest degree, allow him to escape liability for his negligence and lack of skill upon the plea that he and his associates in the profession in that community are all of a kind, and none of them have either sense, care, or capacity? The mere statement of the proposition would seem to carry with it its answer. In *Gramm* v. *Boener*, 56 Ind. 497, it was said: "It will not do, as we think, to say that, if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practises, it will be sufficient. There might be but few practising in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them; and it would not do to say that, because one possessed and exercised as much skill as the other, he could not be chargeable with the want of reasonable skill." See, too, *Kelsey* v. *Hay*, 84 Ind. 189, and *Smothers* v. *Hanks*, 34 Iowa, 286,

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11 Am. Rep. 141. On the other hand, it must be recognized that the most efficient and talented in the profession generally, and very naturally, seek better and more lucrative fields for employment; that those living in a sparsely settled neighborhood will not have, in any probability, the experience, the opportunity for acquiring skill by practice in such cases, that comes to the practitioner of medicine and surgery in the city. It generally follows, then, that the practitioners in rural localities have not the same high degree of skill, or knowledge, or education that may be found in large cities and populous communities. As the physician engages to bring to bear upon the case only such skill and care as is ordinarily practised by others of the same profession in like situation, his liability should be measured by that standard. We think the sounder rule is, not that the physician's skill and degree of attention should be measured by those of his community, but by such as is exercised generally by physicians of ordinary care and skill in similar communities. As said in *Small* v. *Howard*, 128 Mass. 131, 35 Am. Rep. 363: "He was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess."

The third instruction given is also erroneous. In addition to the criticism already discussed, to which it, too, is subject, it precludes a recovery, whatever the defendant's negligence or lack of skill, "if the result is as good as is usually obtained in like cases similarly situated." It is known of all men that many cases of injury or illness are recovered from without any medical attention, while many others of the same kind do not recover, although apparently the best medical attention is given. What the proportions are might be impossible to determine. It is equally well known that two or more cases of apparent similarity, treated by the same treatment, and, indeed, by the same physician, may, and often do, have directly opposite results as to recovery. We think, when a physician undertakes to give his attention, care, and skill to a given case of injury or disease, the patient is entitled to the chance for the better results that are supposed to come from such treatment, and are accorded by the science of his profession to a proper treatment. That the patient might have died in spite of the treatment, or that "ordinarily" they did die in such cases (as formerly in cases of cholera, smallpox, etc.), is no excuse to the physician who neglects to give his patient the benefit of the chance involved in a proper treatment of his case. That no treatment would avail, or that ordinarily careful treatment would not, might be shown, if the case so warranted. In this case the patient was entitled to an ordinarily careful and thorough examination of his injuries, such as the circumstances attending their infliction, the condition of the patient, and the surgeon's opportunities for proper examination suggested and allowed. If the dislocation was discoverable by such examination, and if the physician felt that because of lack of appliances or lack of experience he was unable to treat any peculiar feature of the injury, it was at least the right of the injured man to be apprised of his condition, that he might call in more skilled attention if he desired.

Whether the verdict is sustained by the evidence need not be discussed in view of the conclusions to which we have arrived on other points of the case.

Judgment reversed, and remanded for a new trial under proceedings not inconsistent herewith.

Rehearing denied.

MAINE SUPREME JUDICIAL COURT.

Joseph B. PEAKS
v.
Melvin D. HUTCHINSON.

(96 Me. 530.)

1. **A married woman may contract to permit her husband to erect a building on her land,** which shall remain his property, under a statute empowering her to make any and all contracts "in her own name for any lawful purpose," and to contract with her husband equally as with anyone else.
2. **A building erected on stone posts set in the ground on another's land,** under a parol agreement that it shall remain the property of the builder, does not pass by a conveyance of the land to a bona fide purchaser for value and without notice of the agreement.

(August 29, 1902.)

NOTE.—As to right of husband to crops raised by him on wife's land under agreement with her that he may till the land for his own benefit, see, in this series, Plaisted v. Hair (Mass.) 5 L. R. A. 664.

For a case in this series holding that a barn placed by the owner on his own land, though supported by stones resting on the surface, becomes a part of the real estate, see Leonard v. Clough (N. Y.) 16 L. R. A. 305.

For house erected on mud sills resting upon soil as fixture, see Miller v. Waddingham (Cal.) 11 L. R. A. 510.

As to effect of agreement to prevent fixtures from becoming part of realty, see McFadden v. Allen (N. Y.) 19 L. R. A. 446; Muir v. Jones (Or.) 19 L. R. A. 441, and *note;* German Sav. & L. Soc. v. Weber (Wash.) 38 L. R. A. 267; Fuller-Warren Co. v. Harter (Wis.) 53 L. R. A. 603; Anderson v. Creamery Package Mfg. Co. (Idaho) 56 L. R. A. 555; and Schellenberg v. Detroit Heating & Lighting Co. (Mich.) 57 L. R. A. 632.

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REPORT by the Supreme Judicial Court for Piscataquis County for the opinion of the full bench of a suit to obtain possession of a stable. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. **J. B. Peaks** for plaintiff.

Messrs. **Henry Hudson** and **Frank E. Guernsey** for defendant.

Whitehouse, J., delivered the opinion of the court:

This is a process of forcible entry and detainer, commenced by the plaintiff against the defendant as a disseisor to obtain possession of "a certain stable" situated on land therein described, and alleged to be a part of the realty. The defendant pleads the general issue, and for a brief statement of his defense says that the stable in question was erected by him with his own means upon the lot described in the plaintiff's declaration, with the knowledge and consent of his wife, Susie M. Hutchinson, who had title to the lot, with the dwelling house thereon, before her marriage. The plaintiff claims title by virtue of a conveyance from Susie M. Hutchinson of the real estate on which the stable is standing. The case comes to this court on report.

It appears from the facts admitted that Susie M. Hutchinson, the wife of the defendant, commenced a libel for divorce against him on the 30th day of September, 1898; that the plaintiff acted as her attorney in the prosecution of the libel, and continued to act as her attorney until October 3, 1899, when she gave him a deed of the land described in this complaint, "with all the buildings situated on said lot;" and the following day the plaintiff commenced this process of forcible entry and detainer.

It appears from the uncontroverted testimony of the defendant that in 1892, when he and his wife were occupying the house on the lot in question, it was agreed between them that he should build a stable on the lot at his own expense, and that the stable should be and remain his property. In pursuance of this agreement, the defendant erected the stable in question, 32 feet long and 28 feet wide, paying for all the labor and materials with his own money. The stable was supported by 24 granite posts set in the ground, and was situated about 25 feet from the house. The next year after the erection of the stable a shed was constructed to fill the space between the stable and the ell of the house, but without joining the sills. A serviceable connection was thus made between the shed and stable.

Upon these facts the plaintiff contends, in the first place, that the agreement, between the defendant and his wife with respect to the stable was not a contract which a married woman had authority to make; but he further contends that, if this contract is held to be a valid one as between the parties, he was an innocent purchaser of the real estate for value, without notice of any agreement that the stable should remain personal property, and that, in any event, it passed to him as a part of the real estate under his deed of October 3, 1899.

In support of his first proposition the plaintiff cites *Doak* v. *Wiswell,* 38 Me. 569, in which it was held that a married woman was not competent to restrict or enlarge the rights of her husband over her property, or to contract with him in reference to it; that the husband's interest in the real estate of his wife was acquired by operation of law, and not by contract; and that her consent to the erection of buildings on her land by her husband was of no effect. But an examination of the facts upon which that decision rests clearly shows that it is not an authority in the present case. In that case the parties were married in 1831, and the buildings in question were erected by the husband on the land of his wife in 1839, long prior to the passage of the most important legislative enactments in this state enlarging the rights of married women.

In *Blake* v. *Blake,* 64 Me. 177, the parties were married in 1869, and the building there in question was erected by the husband on the land of his wife in the year 1870. Between 1839 and 1870 there had been twelve different enactments of the legislature, including the broad and comprehensive one of 1866, all designed to enlarge a married woman's powers respecting the preservation and protection of her separate property and personal rights. The act of 1866 (chap. 52) was as follows: "The contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced, in the same manner as if she were sole." The provisions of all these enactments appear in a condensed form in chapter 61 of the Revised Statutes.

It was accordingly held in that case that a man who had built an addition to the stable, and made valuable improvements on the house, standing on the land of his wife, under her promise to pay for them, was entitled, after a dissolution of the marriage by divorce, to recover for such improvements and expenditures. Quoting the first four sections of chapter 61 of the Revised Statutes of 1871, the court says in the opinion: "If the wife can convey to her husband, she may be bound by the covenants of her deed. If the husband is liable for the rent of his wife's estate to her, she is none the less bound to the faithful performance of the covenants contained in such lease. . . .

"The result is that the wife, having the general and unrestricted power of making any and all contracts in relation to her estate, its sale, lease, improvement, with the further right to make contracts for any lawful purpose, may contract with whomsoever she may choose. She may contract, with her husband equally as with anyone else." See also *Wentworth* v. *Wentworth,* 69 Me. 247.

It is true that in *Haggett* v. *Hurley,* 91 Me. 542, 41 L. R. A. 362, 40 Atl. 561, it was held that the disabilities of the wife have not been so far removed by our enabling statutes as to empower her to form a busi-

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ness partnership with her husband, and thereby subject her separate estate to debts contracted by the partnership. Among the reasons assigned in the opinion for this conclusion is the fact that in the revision of the statutes (chap. 61, § 4, Rev. Stat. 1871 and 1883) a married woman is made liable only for debts contracted "in her own name." It is suggested that these words, which do not appear in the original act of 1866, seem to limit her power to contract to such contracts as she may make "in her own name," and not in a partnership name. But referring to *Blake* v. *Blake*, 64 Me. 177, and *Wentworth* v. *Wentworth*, 69 Me. 247, the court add: "We make no decision here inconsistent with those decisions or opinions. We do not decide that a wife may not make a valid contract with her husband, nor that she may not join with her husband in contracts with other parties, nor that she may not become a surety for her husband, nor that she may not make contracts through him as her agent. All these might be contracts 'in her own name.'"

So, also, in *Pinkham* v. *Pinkham*, 95 Me. 71, 49 Atl. 48, it was held that a wife cannot bar her right and interest by descent in her husband's real estate by a release to him during coverture. But the legislature had previously specified the methods by which dower might be barred (Rev. Stat. chap. 61, § 6, chap. 103, §§ 7–9); and it was considered that such important provisions of existing law, designed expressly for the protection of the rights of the wife in the estate of her husband, ought not to be declared abrogated or superseded by subsequent enactments, without a more definite expression of the legislative purpose.

An agreement by the wife that a stable erected on her land by her husband, with his money, shall remain his property, is readily distinguishable from those in the cases last cited, and is not open to the objections which there prevailed. Our enabling statutes during the last sixty years were obviously intended to confer upon a married woman important rights and powers not previously enjoyed, and it is not the province or the duty of the court to nullify these statutes, and defeat the obvious purpose of them, by excluding from the operation of their general terms each particular contract that may arise on the ground that it is not within the intendment of any of the acts. If a married woman is empowered to convey, lease, and manage her real estate, to make any and all contracts "in her own name for any lawful purpose," and "may contract with her husband equally as with anyone else," there seems to be no substantial reason why the agreement in question, which had the effect to confer upon her property a benefit without a burden, does not easily fall within the manifest purpose as well as the comprehensive language of the statutes. It is difficult to conceive of any contract which a married woman could more appropriately be deemed authorized to make respecting the management of her real estate. It is accordingly the opinion of the court that the plaintiff's grantor was empowered to make the agreement in question with her husband that the stable should remain his property.

But the plaintiff still insists that, as a bona fide purchaser of the real estate without notice of the defendant's claim to the stable, he ought not to be affected by it even if it is held valid as between the original parties.

The case discloses no evidence respecting the consideration of the conveyance to the plaintiff except that imported by the seal and the recital in the deed that it was "in consideration of $1,000 paid" by the plaintiff. It has been seen that the plaintiff was acting as attorney for his grantor at the time of this conveyance to him, and commenced this process the next day after he received the deed. The defendant contends that the court would be authorized to infer from these circumstances that, as the wife could not maintain an action against her husband in her own name, the conveyance was made to the plaintiff, her attorney, for the sole purpose of instituting this process, and that he must have had notice of the controversy in regard to the stable.

If it be assumed, however, that the plaintiff was a bona fide purchaser for value, without notice, his contention that the stable passed to him as a part of the realty is not supported by the rule of law which has hitherto prevailed in this state in this class of cases. *Russell* v. *Richards*, 10 Me. 429, 25 Am. Dec. 254; *Hilborne* v. *Brown*, 12 Me. 162, and *Tapley* v. *Smith*, 18 Me. 12, established the principle that a building erected by one man on the land of another, by his permission, remains the personal property of him who erects it, and does not pass by a conveyance of the land to a third person, although from its character, purpose, and mode of use it appears to be a part of the realty, and the conveyance is to a bona fide purchaser without notice. These decisions have never been overruled in this state, although it must be admitted that they have been somewhat discredited by the comments of our own court in more recent decisions, and the rule established by them is undoubtedly contrary to the great weight of authority relating to this question. In *Fifield* v. *Maine C. R. Co.* 62 Me. 77, the court says: "The case of *Russell* v. *Richards*, 10 Me. 429, 25 Am. Dec. 254, and subsequent cases, establish the doctrine here that bona fide purchasers, who, even without notice, acquire title to land, are not entitled to claim such structures as a house, store, or mill standing on the land at the time of purchase, if such buildings were at such time the property of a third person, although from their situation upon the land they had the appearance of being a part of the realty. The case of *Russell* v. *Richards* does not accord with the adjudged cases in Massachusetts and New Hampshire in this respect, and the general course of decisions is rather opposed to it. See enumeration of cases compared in the ex-

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tensive notes to the case of *Elwes* v. *Maw*, 2 Smith, Lead. Cas. 99."

Again, in *Dustin* v. *Crosby*, 75 Me. 75, the court says: "*Russell* v. *Richards*, 10 Me. 429, 25 Am. Dec. 254, is not an opposing authority. That case was decided upon the ground of estoppel, and even that case has been a good deal criticised by other courts. Certainly its doctrine is not to be extended."

With respect to the effect of such an agreement as against third persons, the American & English Encyclopedia of Law says: "The weight of authority is to the effect that a subsequent purchaser or mortgagee of the land without notice of the agreement is not affected thereby. But in Alabama, Maine, and New York the rule appears to be otherwise, and a subsequent purchaser or mortgagee cannot claim the chattels, though ignorant of the agreement by which they were to retain their personal character." Vol. 13, 2d ed. p. 628, title, *Fixtures*. And the numerous authorities there cited appear to warrant the statements in the text. See also *Fuller-Warren Co.* v. *Harter*, 110 Wis. 80, 53 L. R. A. 603, 85 N. W. 698, and elaborate note in 84 Am. St. Rep. 867.

In view of the general policy of our law to constitute the registry of deeds the true source of information respecting titles to real estate, it may seem that the Maine rule has no stronger support in equity than in authority, since under its operation an innocent purchaser of land may find encumbrances upon it against which no ordinary care or vigilance on his part would afford any safeguard or protection. But if it be deemed more reasonable and just that such an agreement should not be effectual against any person except the original parties thereto and those having actual notice thereof, unless it is in writing and recorded in the registry of deeds, the legislature can appropriately so declare.

Judgment for the defendant.

MARYLAND COURT OF APPEALS.

Frank C. BOSTOCK *et al.*, *Appts.*,
v.
Conway W. SAMS *et al.*

(.....Md.....)

1. **Charter authority to make regulations to guard against construction of buildings so as to be unsafe** or inflammable, or offensive or deleterious to health, or dangerous to life, limb, or property, does not cover an ordinance authorizing the refusal of permits for the erection of buildings unless they are to conform in size, general character, and appearance to those previously erected in the same locality, and to be such as will not tend to depreciate the value of surrounding improved or unimproved property; nor does the grant of general police power, and power to provide for the general welfare, authorize such ordinance.

2. **Invalid ordinances are not ratified** by a provision in a new municipal charter preserving and continuing in force ordinances which had been adopted under the old charter.

3. **One seeking a mandamus to compel the issuance of a permit** to erect a building on a city lot must show his right to build there, in order to show that the petition is bona fide and founded on substantial right.

4. **An ordinance providing for the granting of building permits is not rendered void in toto** by the invalidity of a provision that no permit shall be granted unless, in the judgment of the proper officers, the size, general character, or appearance of the building will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding property.

(June 19, 1902.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas in favor of defendants in a mandamus proceeding to compel defendants to issue a building permit. *Reversed.*

The facts are stated in the opinion.

Messrs. **Gans & Haman** and **William J. O'Brien, Jr.**, for appellants:

Whenever the absolute dominion of an owner over his property is restricted by ordinance, there should be a uniform rule of action provided, and it should not be left to the arbitrary will of the governing authorities.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Baltimore* v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239; *State* v. *Tenant*, 110 N. C. 609, 15 L. R. A.

NOTE.—As to validity of ordinance requiring permit for erection of building or addition thereto, to be obtained from aldermen or building inspector, see, in this series, State v. Tenant (N. C.) 15 L. R. A. 423, and Sioux Falls v. Kirby (S. D.) 25 L. R. A. 621.

As to constitutionality of police regulations concerning buildings, see Com. v. Roberts (Mass.) 16 L. R. A. 400, and *note;* and New York Health Department v. Trinity Church (N. Y.) 27 L. R. A. 710.

As to municipal control over erection of buildings generally, see *notes* to Olympia v. Mann (Wash.) 12 L. R. A. 150; and Mt. Vernon First Nat. Bank v. Sarlls (Ind.) 13 L. R. A. 481; also Smith v. Milwaukee Builders' & T. Exchange (Wis.) 30 L. R. A. 504.

As to validity of ordinance establishing building line, see St. Louis v. Hill (Mo.) 21 L. R. A. 226.

For municipal control over buildings as nuisances, see Evansville v. Miller (Ind.) 38 L. R. A. 161, and *note;* and cases in *note* to Hagerstown v. Witmer (Md.) 39 L. R. A. 662.

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423, 14 S. E. 387; *Newton* v. *Belger*, 143 Mass. 598, 10 N. E. 464; *Richmond* v. *Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 N. E. 312; *May* v. *People*, 1 Colo. App. 157, 27 Pac. 1010; *Anderson* v. *Wellington*, 40 Kan. 173, 2 L. R. A. 110, 19 Pac. 719; *Re Frazee*, 63 Mich. 396, 30 N. W. 72; *Barthet* v. *New Orleans*, 24 Fed. 564; *Sioux Falls* v. *Kirby*, 6 S. D. 62, 25 L. R. A. 621, 60 N. W. 156; *Winthrop* v. *New England Chocolate Co.* 180 Mass. 464, 62 N. E. 969; *Atty. Gen.* v. *Williams*, 174 Mass. 476, *sub nom. Knowlton* v. *Williams*, 47 L. R. A. 316, 55 N. E. 77; *St. Louis* v. *Hill*, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861.

Whether a certain use of property is a nuisance or not is a question of law which the owner of property always has the right to have decided by the judicial authority. Certainly, the mere declaration of a local municipal board could never be allowed to preclude a judicial investigation as to an alleged nuisance.

State v. *Mott*, 61 Md. 306, 48 Am. Rep. 105; 1 Dill. Mun. Corp. §§ 308–374; *Yates* v. *Milwaukee*, 10 Wall. 505, 19 L. ed. 986; *Evansville* v. *Miller*, 146 Ind. 613, 38 L. R. A. 161, 45 N. E. 1054.

Mr. **William Pinkney Whyte** for appellees.

Jones, J., delivered the opinion of the court:

This case originated in a petition for a mandamus filed in the court of common pleas of Baltimore city by the appellants against the appellees to compel the latter to issue to the former a permit to erect a building upon a lot situated at the northeast corner of Mt. Royal and Maryland avenues, in the city of Baltimore. The case will turn upon the powers and duties of the appellees, composing the appeal tax court, —a subdepartment of the municipal government of Baltimore city, under the provisions of its charter,—in respect to the issuing of a permit of the kind applied for. These powers and duties are defined in the following provisions of the ordinances of the city, now codified and appearing in the City Code, in article 50, as §§ 24, 25, 27, and 28, and which read as follows:

"Sec. 24. It shall not be lawful for any person, without a permit from the appeal tax court, to erect within the limits of the city any building upon a new foundation, whether in connection with an existing building or not, or to pull down any old building or part of a building to the ground, and build upon the old foundation, or to put an additional story upon any building or part of a building by increasing the height of the walls; and any person or persons who may build within the city of Baltimore shall be required to take out a permit for each and every house he or they may propose to build.

"Sec. 25. All persons receiving permission for the erection of any special improvements from the city council shall, before commencing the erection of the same, obtain the indorsement of the appeal tax court on said permit."

"Sec. 27. Whenever application accompanied by the payment of the cost of the advertisement provided for in § 28 is made to the judges of the appeal tax court for a permit or permits to erect any new building or buildings on any street or avenue of the width of 50 feet or more, the person or persons making such application shall be required, before such permit or permits shall be granted, to file with the appeal tax court a plat accurately describing the piece or parcel of ground to be improved, giving the front, and depth thereof, its distance from the nearest established corner of a street, lane, or alley, and the number of improvements (if more than one) proposed to be erected thereon; also an accurate description of the frontage, height, depth, material to be used in the proposed building or buildings and the general appearance and cost of same.

"Sec. 28. It shall be the duty of the judges of the appeal tax court to grant such permits on application, without charge, except as hereinbefore provided, and to keep a record of all permits issued: provided, that no such permit shall be granted unless in the judgment of the said judges of the appeal tax court, or a majority of them, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property; and provided further that before any such permit shall be granted, at least ten days' notice by advertisement inserted in some daily newspaper shall be given by the appeal tax court that application for such permit has been made. And before any permit shall be granted to erect any building or buildings within the limits of the city of Baltimore, the applicant shall first satisfactorily prove to the judges of the appeal tax court that provision has been made for such drainage as the topography of the ground requires."

The petition for mandamus filed by the appellants alleged that the appellant Frank C. Bostock had leased, for a valuable consideration, from a certain William P. Harvey, who was the owner thereof, the lot of ground which has been referred to, and was in possession thereof, with authority from the owner to erect thereon the building for the erection of which a permit was applied for, and that he had entered into an agreement with the appellant Edgar M. Noel to erect, for a consideration, a building on the said lot, and that for the purpose of executing this agreement the said Noel had duly applied to the appeal tax court for a permit to erect said building. The petition then sets out the provisions of the ordinances of the city regulating the application for and the granting of permits for the erection of buildings within the city, and shows upon its face that all of the requirements of the said provisions were complied

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with by the appellants in making application for the permit which they seek to have granted in this case. The petition then shows that the appellees, composing the appeal tax court, refused the application of the appellants for a permit to erect the building therein indicated, and passed an order to that effect, in which they assigned as reasons for their refusal that the plans and specifications for the proposed building "presented to the inspector of buildings, and examined by the appeal tax court," did not, in their opinion, "conform to the general character of the buildings in the said locality," and that the use of the building proposed to be erected "will be for the purposes of a 'zoo,'" among which purposes was "to show wild animals, in reality conducting a continuous circus upon one of the most beautiful streets in the city of Baltimore." It also appeared from the petition that Mt. Royal avenue, the street upon which the building was proposed to be erected, was more than 50 feet in width. The appellees in their answer admit all the allegations of fact of the petition, except those contained in the first paragraph thereof, which were that the appellant Bostock had leased and was tenant in possession of the lot upon which the building for the erection of which the permit was applied for was to be erected, and had entered into an agreement with the appellant Noel to construct a building thereon. These allegations they refused to admit, and called for proof of the same. The defense made by the answer was, in substance and effect, that the appellees had a discretion as to the granting or refusing of the permit, and were justified in their refusal thereof because the building for which the permit was applied for "would not conform to the general character of the buildings previously erected in the same locality, and would tend materially to depreciate the value of the surrounding improved or unimproved property." The answer was demurred to, and the demurrer was overruled. The petitioners then joined issue upon that part of the answer which did not admit the allegations of the petition contained in the first paragraph thereof, and demurred to all other parts thereof, which demurrer being overruled, the petitioners joined issue thereon "as far as said answer in any way denies the averments of facts contained in the petition." The case was then tried before the court without a jury. Testimony was taken, and there was proof on the part of the appellants going to show that the appellant Bostock had, with the owner of the lot upon which the proposed building was to be erected, a contract, founded upon a valuable consideration, which gave him the right to erect a building upon said lot, and that said Bostock had possession of the lot for that purpose, if a permit could be obtained, and that he had entered into an agreement with the appellant Noel, for a consideration, to have a building erected thereon. At the conclusion of the testimony the petitioners offered a prayer to the effect that if the court should find from the evidence (1) "that on the 22d day of October, 1901, the petitioner Frank C. Bostock was, and now still is, the tenant in possession of the lot of ground mentioned in the petition, with authority from the owner thereof to erect thereon the building mentioned in said petition;" (2) "and that on said day the petitioner Edgar M. Noel, as agent and builder for the petitioner Frank C. Bostock, applied for the permit mentioned in said petition;" (3) "that then, under the pleading in this case, the verdict must be for the petitioners." This prayer was refused by the court, to which refusal the petitioners excepted. The court ordered that the writ of mandamus be refused, and the petition therefor be dismissed. From this order the petitioners have appealed.

It will be seen from the course of the pleading and the nature of the defense relied upon by the appellees that the most important and the substantial inquiry involved in the case before us is as to what lawful discretion is given to the appellees to withhold a permit, upon application made, by virtue of the proviso in the ordinance of the city regulating the issuing of permits, which is embodied in § 28 of the City Code, and which reads as follows: "Provided, that no such permit shall be granted unless in the judgment of the said judges of the appeal tax court, or a majority of them, the size, general character, and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property." Treating this proviso as not being contained in the provisions of the ordinances relating to the granting of permits that have been recited, and assuming the allegations of the petition for mandamus in respect to the tenancy and possession of the appellant Bostock of the lot of ground mentioned in the petition as the site of the proposed building to have been sufficiently proved, it having been admitted on the face of the pleadings that all the requisites and formalities prescribed by the ordinance to accompany an application for a permit to build had been complied with, it became the duty, by the very terms of the ordinance, of the appeal tax court to issue the permit upon the application of the appellants as made. What remained to be done, therefore, by the appellees, would, upon the hypothesis stated, have become a plain duty, and a mere ministerial act, which they could not arbitrarily refuse to perform; and, upon such refusal, mandamus would lie to compel the performance of the duty. *Brayshaw* v. *Ridout*, 79 Md. 454, 29 Atl. 515.

Taking up now for consideration the defense set up by the appellees, based upon the discretion with which they claim to be invested perforce the proviso which has been recited, the fundamental question to

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be determined is whether this proviso is a valid part of the ordinance under which the appellees were called upon to act; and as to this the first inquiry is, Was the corporation, the mayor and city council of Baltimore, empowered by any provision of its charter to prescribe the conditions contained in the proviso, in the connection in which it occurs? As a guide to this inquiry, we may aptly quote from what was said by Mr. Dillon in his admirable work on Municipal Corporations in relation to the construction of the powers of such corporations: "The fundamental and universal rule, which is as reasonable as it is necessary, is that while the construction is to be just, seeking first of all for the legislative intent, in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the state's grantee." Then, after saying that this is not so directly applicable to municipal as to private corporations, he proceeds as follows: "But it is equally applicable to grants of power to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant." 1 Dill. Mun. Corp. 4th ed. § 91, p. 148. Again, at page 394, § 317, of the same work, it is said: "Since all the powers of a corporation are derived from the law and its charter, it is evident that no ordinance or by-law of a corporation can enlarge, diminish, or vary its powers." The foregoing citations are made as a clear and terse statement of the rules and principles of law applicable to the case at bar, and not because we think there is need that they should be fortified by citing authority. Now, undoubtedly, the proviso in the ordinance here under consideration attempts to confer powers that affect the citizen in his right of property and his common-law right. It cannot be pretended that the citizen has not the common-law right to acquire title to a lot of land, qualified or absolute, in a city, as elsewhere, and to build upon and improve it as his taste, his convenience, or his interest may suggest, or as his means may justify, without taking into consideration whether his buildings and improvements will conform in "size, general character, and appearance" to the "general character of the buildings previously erected in the same locality," even though there might be those in whose "judgment" his so building might in some way "tend to depreciate the value of surrounding improved or unimproved property." Notwithstanding the delicate power conferred by the proviso in question,—a power to control the citizen in the exercise of important and valuable rights of property,—the power is conferred in the most vague and general terms, and an unlimited and unregulated discretion is given to an agency of the city government thereunder No standard is set up according to which the judgment is to be exercised, nor means provided by which it is to be instructed or controlled, and the citizen is left helpless to question its exercise in any particular case. What is meant by the "general character of the buildings previously erected?" And what is there to define and fix this? What is to determine the locality within the bounds of which the conformity of building provided for by the ordinance is to be required? What is to be its extent, and what its limits? What is the depreciation of property against which the ordinance seeks to guard? Is it a present and immediate depreciation or it is to be a depreciation which may, in the judgment or opinion of the appeal tax court, occur some time, in either a near or a remote future, and which in fact may never occur? A right to create power so vague and undefined in its scope, so entirely unrestricted in its exercise, and so essentially arbitrary in its character, designed to abridge important and valuable property rights of the citizen, if it can be conferred at all upon a municipal corporation, ought to be found to be so conferred in very clear terms, or by some necessary implication. Nowhere in the charter of the city of Baltimore can it be found that there is conferred upon the corporation, by any express legislative provision, the power implied in the ordinance under consideration. Nor can such power be deduced by any reasonable implication from any of the specific or general powers enumerated and granted in the charter. The general powers are found enumerated in § 6 of the charter, as enacted by Acts 1898, chap. 123. Without undertaking to quote at large this enumeration of powers granted, it may be affirmed of them that those which are therein contained to authorize the regulation of building within the city look to regulations to guard against dangers to arise from an unsafe construction of buildings, or from constructing them of inflammable materials, or in such manner as might prove offensive, or deleterious to health, or in a way to involve danger to other property, or to life or limb. In other words, they are powers which fall within the purview of what is known as the "police power." The proviso under consideration has no reference to any of the objects specified or provided for in the authority given the corporation to make regulations as to buildings. It contains no suggestion that it was intended to provide for the public safety, nor to safeguard the health or morals of the community, nor to preserve public order, nor in any way to be promotive of any object which calls for the exercise of the police power. Under subtitle "Police Power" of § 6 of the charter, this power is conferred: That the city may "pass ordinances for preserving order, and securing property and persons from violence, danger, and destruction, protecting the public and city property, rights and privileges from waste or encroachment, and for promoting the great interests and insuring the good government of the city."

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While thus a broad discretion is given the corporation to use the police power, the nature of the power is clearly indicated in the terms and in the connection in which it is granted, and the nature of the objects and purposes for which it is to be used is pointed out. None of these objects or purposes can be subserved by compelling the citizen to conform a building which he may desire to erect to the "general character" of the building which his neighbor may previously have erected, nor to take into consideration whether, however lawful the character of his structure, or the use for which it is intended, may be, its erection will, in the uncontrolled opinion of a designated agency of the corporation, "in any way tend" to depreciate the value of property in an undefined locality. It is further provided in § 6 of the charter subtitle "Welfare and Other Powers" that the city may pass "such ordinances as it may deem expedient in maintaining the peace, good government, health and welfare of the city of Baltimore." This, in effect, is but a repetition of the grant of the general power which has just been referred to as contained in subtitle "Police Power" of this same section, and does not further enlarge the scope of the powers of the corporation. Under this general power the municipality, acting within the limits of legitimate corporate authority, and to carry out and make effective its lawful powers, may pass ordinances prescribing general regulations applicable alike to all citizens, and by which each may regulate his conduct, and know his rights and his duty as a member of the corporation; but it is not consistent with any express or implied power that is to be found in the municipal charter that any individual or any agency of the corporation should be invested with the unrestrained and unregulated power and authority to say in each particular case, as it arises, what the good government and welfare of the community may demand, when dealing with and undertaking the control of the rights of the citizen in respect to the enjoyment and use of his property, as has been done by the provision in the ordinances of the city here brought under consideration, if the same is to be held valid. The right of the corporation to confer such a power cannot, therefore, be derived from any implication. Since we can find no legislative grant of authority to the city of Baltimore, under its charter, to enact the provision of municipal legislation upon which we have here to pass, either express, or to be implied from any of the legitimate and recognized powers of the corporation, we are constrained to hold the same *ultra vires* and void.

The case at bar bears a strong analogy to the case of *Baltimore* v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239, in which the question was as to the validity of a provision in an ordinance giving to the mayor of the city the power to revoke permits that had been granted for the use of steam engines within the limits of the city. This court found that ample power had been granted to the city to regulate the use of steam engines within the limits thereof, but that the character of power attempted to be exercised in enacting the provision of municipal legislation there drawn in question was not appropriate or legitimate to be implied for carrying the granted power into effect; and the provision referred to was pronounced inoperative and void because it committed the doing of an act affecting valuable rights of the citizen "to the unrestrained will of a single public officer," and laid down "no rules by which its impartial execution" could be secured, or "partiality or oppression prevented;" the court saying that, if the officer chose to act only in particular cases, there was nothing "in the ordinance to guide or control him." The characterization of the power attempted to be exercised in that case, and the reasoning of the court in regard thereto, apply with force and pertinency in the case at bar. The case of *Baltimore* v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239, and the case at bar differ from the case of *Easton* v. *Covey*, 74 Md. 262, 22 Atl. 266, much relied upon by the appellees, in that the ordinance drawn in question in that case was one regulating the erection of new buildings within the town of Easton, and the permit that had been refused was applied for to authorize the erection of a frame stable. There the ordinance looked to guarding the public safety, and was held to come within the police power which had been conferred upon the corporation enacting the ordinance, and to be in consonance with the general powers and purposes of the corporation.

It is argued that, though the authority to enact the proviso of the ordinance here in question was not originally given by the legislature, yet it was ratified and made effective by the 3d section of the Acts of 1898, chap. 123. This does not result from a proper construction of the section of the act of 1898 referred to. In the first place, only such ordinances as were not inconsistent with the act were ratified, and if this ordinance contained provisions that implied powers conferred upon the corporation which the act did not intend to grant, but withheld, then the ordinance was plainly inconsistent with the act. But the provision of the act of 1898 which is here invoked as ratifying the ordinance in question has no reference to validating invalid ordinances, and was not intended to have such operation and effect. It was merely intended to preserve the municipal status as to all laws and ordinances that might be in force at the date of the adoption of the charter provided by the Acts of 1898, chap. 123, and to continue them in force, in the passing of the corporation from the control of the old charter to that of the new, with the same effect, and no more, as if the change in the charter had not been made.

We have not thought it necessary to notice specially the ground of the refusal of the appellees to grant the permit applied for by the appellants, based upon the alleged

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use which the building proposed to be erected was intended for. The ordinance in question does not profess to give the appeal tax court the right or power to go into such an inquiry upon application being made for these permits, and no such inquiry is within the scope of their duty or their powers in that connection. If the building which the appellants propose to erect shall be put to the use it is alleged to be intended for, and a question shall then be raised as to the legality of that use, such question will then become one of interest to the community, and of more serious import to those owning and making use of the property in question; but it has no place in this discussion.

We may take up now the action of the trial court upon the pleadings and upon the appellants' exception. The demurrer to the whole answer of the appellees was properly overruled. The petition, in its first paragraph, alleged matters of fact, which the answer did not admit; and it was proper these allegations as to the tenancy and possession of the property, and the right of the appellants to build thereon, should be sustained by proof, in order to show that the petition for mandamus was bona fide and founded upon substantial right. The second demurrer to all that part of the answer not embraced in the denial it made of the facts alleged in the first paragraph of the petition ought to have been sustained, for reasons appearing in the foregoing expression of views. The prayer of the appellants ought to have been granted. All the facts of the case, except those set out in the prayer, had been admitted; and, upon a finding by the court of the only facts in issue, the appellants were entitled to a finding in their favor. The proof showed that they had acquired, for a valuable consideration, a right to build upon the lot described in their application for a permit, and had authority from the owner of the lot so to do, and were in possession of the same for the purpose of building upon it; and this was sufficient to entitle them to the permit. In holding that part of the ordinance of the city upon which the appellees relied for their defense, and which was specifically quoted in stating this defense, void, the rest of the ordinance is not affected thereby, since it can have full effect as to its general objects and purposes with this provision stricken out. In the case of *Baltimore* v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239, as also in the case of *Vansant* v. *Harlem Stage Co.* 59 Md. 330, the ordinances drawn in question were only avoided in part.

It follows from the views expressed in the foregoing opinion of the court that the order of the court below refusing the mandamus in this case must be reversed.

Order reversed and cause remanded, with costs to the appellants.

MICHIGAN SUPREME COURT.

Lucy STICKLEY
v.
SODUS TOWNSHIP, *Plff. in Err.*

(.....Mich.....)

A private way does not become a public one by user, under a statute providing that roads that have been used as such for ten years or more shall be deemed public highways, where it was built for private gain, from a public highway to a private wharf and ferry landing, and has always been maintained by private enterprise, the township having in no way indicated an intention to accept it, while the ferry license was granted on the express condition that the licensee should maintain the way, although no objection has ever been made to its use by anyone.

(October 7, 1902.)

ERROR to the Circuit Court for Berrien County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

NOTE.—For public user as acceptance of highway, see also, in this series, Southern P. R. Co. v. Ferris (Cal.) 18 L. R. A. 510, and *note;* and Downend v. Kansas City (Mo.) 51 L. R. A. 170.

59 L. R. A.

Statement by **Grant, J.:**

Plaintiff was driving with a horse and buggy down a roadway leading from the top of the bluff along the east bank of the St. Joseph river, in the defendant township, to what is known as "King's Landing." The bank is high and steep. She was precipitated over the bank and injured. The negligence alleged is the failure to erect suitable barriers along the side of the road. The principal defense is that the road is not a public highway, but a private road, and that the defendant was under no obligation to keep it in repair. The sole question presented for determination is, Was this road a public highway? If it was, defendant is liable; if it was not, the defendant is not liable. It is conceded that the owners of the land never dedicated this road to the public for a highway; that no proceedings were ever instituted to lay it out as a highway; that it was originally a private road; and that the township authorities never exercised any control over it, and never accepted it as a public highway, unless the use of it by travelers without objection amounted to such control and acceptance. Plaintiff bases her right to recover entirely upon the theory that this road has become a public highway by user alone, under the statute (Comp. Laws, §

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4061), which reads: "All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, . . . shall be deemed public highways." The facts are not in doubt. The townships of Sodus and Royalton, in Berrien county, constitute township 5, S., range 18 W. The St. Joseph river, a crooked, navigable stream, divides township 5, range 18, into about two equal parts; one being Sodus, the other Royalton. On the Royalton side of the St. Joseph river, near where this injury occurred, the land is bottom land, and but little higher than the bed of the river. On the Sodus side the land is many feet above the river bed, and in the vicinity where the accident occurred it is about 55 feet higher. On account of the bluffs on the east side of the river, there has never been a bridge erected across the river between the city of St. Joseph and Berrien Springs, a distance by water of 25 miles, until within the last three or four years, when a railroad and carriage bridge was built by the railroad company at Somerleyton, a few miles to the north and west of the place where this injury happened. St. Joseph river has always been navigable for flat-bottomed boats, scows, rafts, and the like. In the early days of the county, between 1850 and 1870, when lands were being cleared in Sodus and vicinity, it was necessary that logs, wood, and other forest products be put into the river and floated down to St. Joseph, at the mouth of the river. Sawmills were built in Sodus township, and lumber manufactured and transported down the river on rafts, boats, and scows. The township authorities of Sodus township never laid out and established any highway running down to the river. They had laid out and established certain highways running east and west and north and south, and had laid out and established a highway running in a northerly and southerly direction near the bluff of the river, which is called in these proceedings the "River road." In some places this River road is quite close to the bluff of the river; in other places quite a distance away from the river. The township had also, among other roads, laid out and established a road on the section line between sections 10, 11, and 12 on the north and 15, 14, and 13 on the south. This road is called in these proceedings the "Sodus road," and extends no farther west than the River road. Some time between 1850 and 1860 one Golden owned the land upon which the roadway in question is now situate. Owners of land along the river at that time received pay for banking forest products upon their land. Golden, seeing that he had a better place than some of his neighbors, commenced to build this road for his own gain. About 1865 Golden sold the land, including this roadway, to one Versaw, who continued to own it until about 1885, when he sold to one Gunther. It is now owned by several parties. Versaw, after he became the owner, completed the road. A roadway of some kind had existed there for at least thirty-five years before the injury. It was also conceded that the records of the township do not say anything at all about this roadway, and fail to disclose any action by the authorities concerning it. It commenced at the intersection of the Sodus and River roads, and terminated at the ferry beyond the Graham landing, and is about 900 feet in length. Its narrowest width is 7 feet, its greatest width 14 feet. The left side of the road, in going down the bluff, is principally clay. At the foot of the hill there is about a quarter of an acre of nearly level area. A shanty or boat dock is here operated by Graham. A small steamboat, called the "May Graham," lands there. Beyond the shanty is the ferry dock. Both docks and the ferry are private property. There has never been a railing or barrier of any kind along this roadway. At the place where plaintiff went over the embankment the roadway was wider than at any other portion, and the distance from the roadway at that point to the river was from 25 to 30 feet. On the Royalton side of the river a highway was laid out on the section line between sections 9 and 16, running to the river itself If this were ever established by the authorities, it would appear that the last quarter of a mile of it was never in fact used by anyone. The record discloses that this section-line highway was properly established and worked until it reaches the 35-acre tract now owned by Frank Steimle, and that it there stops. Forty or more years ago one Polly Wood owned the Steimle place, and had logs and forest products banked on her place, for which she made a charge. Her dock or landing was called "Polly Wood's landing," and is directly opposite the so-called "King's landing." In order to get to her landing, people drove over her land from the public highway. No town work was ever done on the roadway running through her land to the river. Frank Steimle bought her place about twenty-seven years ago, and the roadway through his land still exists as it did when Polly Wood owned it. No public work has been done on that roadway since Steimle owned the land. Many years before a ferry was put in there, people having milling to do used this Polly Wood roadway to get to the river, and then in the summer time took their grain across the river in boats, and had it carted up the King's landing road, or, in the winter time, crossed on the ice. About twenty-four years ago one Deaner put in a ferry connecting the Steimle or Polly Wood's landing and King's landing. This ferry was operated one or two years. At the time Deaner operated this ferry a part of the roadway in question slid down, and Deaner fixed it at his own expense. About twenty-two years ago Steimle began operating a ferry between these two landings. In 1892 he petitioned the board of supervisors for a license to operate a ferry

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across the river at this point. It was granted upon condition that he "construct and maintain all roads and approaches to the said ferry at his own expense." Steimle, a witness for plaintiff, testified as follows: "The reason I worked on the King's landing road was because of this license, and also to keep the road straight, so teams could go up and down, and I could make more money with my ferry." The owner of the land across which this road runs and those who used it did all the work that was ever done upon it, except a trifling amount, which the overseer of highways did in 1897 or 1898 and 1899,—two or three years before this suit was commenced. This is so trifling and so recent that the learned counsel for plaintiff do not mention it in their brief, and evidently do not consider it of any importance. Neither do we. Plaintiff recovered verdict and judgment.

Messrs. **Lawrence C. Fyfe** and **O'Hara & O'Hara,** for plaintiff in error:

Where the statute declares what shall constitute a highway it governs, and a way not answering to the requirements of the statute cannot be rightfully regarded as a highway.

15 Am. & Eng. Enc. Law, 2d ed. p. 359; Elliott, Roads & Streets, p. 2.

A public park is a public highway.

15 Am. & Eng. Enc. Law, 2d ed. p. 350; *State* v. *Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560; *Pomeroy* v. *Mills*, 3 Vt. 279, 23 Am. Dec. 207.

So is a public alley a public highway; but, under the statute allowing recovery for injuries sustained on public highways, neither a public park, nor a public alley, is considered a public highway.

Face v. *Ionia*, 96 Mich. 104, 51 N. W. 184.

The mere fact that a portion of the public travel over a roadway for ten years or more cannot make such roadway a highway.

Green v. *Belitz*, 34 Mich. 512; *Speir* v. *New Utrecht*, 121 N. Y. 429, 24 N. E. 692; *Shellhouse* v. *State*, 110 Ind. 509, 11 N. E. 484; *Lewis* v. *New York, L. E. & W. R. Co.* 123 N. Y. 502, 26 N. E. 357; *People* v. *Underhill*, 144 N. Y. 316, 39 N. E. 333; *Palmer* v. *Palmer*, 150 N. Y. 139, 44 N. E. 966; *Stewart* v. *Frink*, 94 N. C. 487, 55 Am. Rep. 618; *Riley* v. *Brodie*, 22 Misc. 374, 50 N. Y. Supp. 347; *State* v. *McDaniel*, 53 N. C. (8 Jones L.) 284; *Stacey* v. *Miller*, 14 Mo. 478, 55 Am. Dec. 112; *Irving* v. *Ford*, 65 Mich. 250, 32 N. W. 601; *Alton* v. *Meeuwenberg*, 108 Mich. 629, 66 N. W. 571.

A township cannot, without the consent of its authorities, by the acts of private persons merely, have a highway thrust upon it, and thus become liable for not keeping the same in repair.

9 Am. & Eng. Enc. Law, 2d ed. p. 46; *Oswego* v. *Oswego Canal Co.* 6 N. Y. 263; *Speir* v. *New Utrecht*, 121 N. Y. 429, 24 N. E. 692; *Parsons* v. *Atlanta University*, 44 Ga. 529; Elliott, Roads & Streets, pp. 86, 87; *Mayberry* v. *Standish*, 56 Me. 342; *Dorcnend* v. *Kansas City*, 156 Mo. 60, 51 L. R. A. 170, 56 S. W. 902; 2 Dill. Mun. Corp. 4th ed. § 642; *State use of James* v. *Kent County*, 83 Md. 377, 33 L. R. A. 293, 35 Atl. 62; *Diamond Match Co.* v. *Ontonagon*, 72 Mich. 263, 40 N. W. 448; *Conkling* v. *Mackinaw City*, 120 Mich. 77, 79 N. W. 6; *Wayne County* v. *Miller*, 31 Mich. 450.

The roadway in question was opened as a private way, and has always continued to be a private way.

Ayres v. *Richards*, 41 Mich. 680, 3 N. W. 179; Elliott, Roads & Streets, p. 3.

When a way is opened as a private passway, and that fact clearly appears, it cannot be converted into a public highway by the mere use thereof, no matter how long that use may be continued.

Hall v. *McLeod*, 2 Met. 98, 74 Am. Dec. 400; *Sargent* v. *Ballard*, 9 Pick. 251; *Durgin* v. *Lowell*, 3 Allen, 398; *Stewart* v. *Frink*, 94 N. C. 487, 55 Am. Rep. 619; *Root* v. *Com.* 98 Pa. 170, 42 Am. Rep. 614; *Slater* v. *Gunn*, 170 Mass. 509, 41 L. R. A. 268, 49 N. E. 1018; *District of Columbia* v. *Robinson*, 14 App. D. C. 512, Affirmed in 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283; *Pentland* v. *Keep*, 41 Wis. 501; *Sprow* v. *Boston & A. R. Co.* 163 Mass. 330, 39 N. E. 1024; *Lewis* v. *Lincoln*, 55 Neb. 1, 75 N. W. 155; *Lanier* v. *Booth*, 50 Miss. 410; *Irwin* v. *Dixion*, 9 How. 10, 13 L. ed. 25; *Blanchard* v. *Moulton*, 63 Me. 437; *Cyr* v. *Madore*, 73 Me. 53; *State* v. *Green*, 41 Iowa, 693; *Engle* v. *Hunt*, 50 Neb. 358, 69 N. W. 970; 19 Am. & Eng. Enc. Law, p. 107; Elliott, Roads & Streets, 2d ed. § 25; *White* v. *Bradley*, 66 Me. 258; Washb. Easements & Servitudes, 2d ed. 184; *Frye* v. *Highland*, 109 Wis. 292, 85 N. W. 351; *Chicago* v. *Borden*, 190 Ill. 430, 60 N. E. 915; *Illinois Ins. Co.* v. *Littlefield*, 67 Ill. 368; *Dexter* v. *Tree*, 117 Ill. 532, 6 N. E. 506; *Shellhouse* v. *State*, 110 Ind. 512, 11 N. E. 484; *O'Connell* v. *Chicago Terminal Transfer R. Co.* 184 Ill. 308, 56 N. E. 355; *Toof* v. *Decatur*, 19 Ill. App. 207; *Chicago* v. *Chicago, R. I. & P. R. Co.* 152 Ill. 561, 38 N. E. 768; 1 Am. & Eng. Enc. Law, 2d ed. p. 794; *Homer Twp. Highway Comrs.* v. *Riker*, 79 Mich. 551, 44 N. W. 955; *St. Joseph* v. *Seel*, 122 Mich. 70, 80 N. W. 987; *Wesson* v. *Tolsma*, 117 Mich. 384, 75 N. W. 941.

It is not the duty of the town to point out private ways.

The town cannot stop the private way, or prevent any person, who will, from traveling there, however dangerous it may be. If he will go there voluntarily, he goes at his own risk.

Chapman v. *Cook*, 10 R. I. 304, 14 Am. Rep. 686.

Even if the roadway in question was a public highway for any purpose, it was not such a public highway as is contemplated by act 264, Laws 1887.

McKeller v. *Monitor Twp.* 78 Mich. 485, 44 N. W. 412; *Fuller* v. *Jackson*, 92 Mich. 197, 52 N. W. 1075.

Messrs. **Gore & Harvey,** for defendant in error:

This road is a public highway.

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Comp. Laws 1897, § 4061; *Bumpus* v. *Miller*, 4 Mich. 159; *Ellsworth* v. *Grand Rapids*, 27 Mich. 250; *Campau* v. *Detroit*, 104 Mich. 560, 62 N. W. 718.

Highways become such by public user alone.

Adams v. *Iron Cliffs Co.* 78 Mich. 283, 44 N. W. 270; *Detroit* v. *Detroit & M. R. Co.* 23 Mich. 209; *Wicks* v. *Ross*, 37 Mich. 466; *Peninsula Iron & Lumber Co.* v. *Crystal Falls Twp.* 60 Mich. 523, 27 N. W. 666.

The public had acquired, at least, the land used.

Wayne County Sav. Bank v. *Stockwell*, 84 Mich. 590, 48 N. W. 174; *Scheimer* v. *Price*, 65 Mich. 638, 32 N. W. 873; *Coleman* v. *Flint & P. M. R. Co.* 64 Mich. 163, 31 N. W. 47.

The way in question is shown to have been traveled by all who had occasion to use it; and such use is the public use contemplated by the statute.

Grandville v. *Jenison*, 84 Mich. 68, 47 N. W. 600.

The evidence does not show that any sign, or fence, or that anything, was located along this highway, during thirty years, to indicate that this use was permissive. The owner and the township officials were fully cognizant of the extent and character of its use and the presumption therefore is that the owner intended to throw the highway open to the public.

Elliott, Roads & Streets, 2d ed. §§ 162, 166.

Grant, J., delivered the opinion of the court:

Plaintiff claims that this private road has been converted into a public highway. She bases her claim solely upon the statute above cited, and insists that user alone by those having occasion to travel over it is sufficient to convert it into a public highway. The question, therefore, is, Under what circumstances does a private road become a public highway by user, as provided by the statute? This road was originally built for private gain, over private grounds, and to a private dock and ferry. The record is absolutely barren of any testimony tending to show that the original owners of the land and the builders of this road intended to make it a public highway. At what period and by what acts was its private character changed into a public one? It is true that for nearly thirty-five years everyone who had occasion to pass that way walked or drove over it without objection from the owners of the land. Not only that, but those who built it and their successors invited every member of the public to use it, for every member of the public paid them for the use of the dock and ferry at its terminus. It is also true that for the same length of time the township authorities took no action, either in writing or by act, to indicate that the township ever intended to establish or accept this road as a highway, or that they considered the township liable in any way for its condition, or that they were under any obligation to keep it in repair. Its use by the public has been no other or different during the past thirty years than it was the first year after its construction. There has been no change in the character of the travel. The relations between the owners and the public have never changed. Neither has done anything to indicate to the other that they understood that its original character had been changed. The learned counsel for plaintiff seem to be of the opinion that when one opens a private road it becomes his duty to put up some notice to show that it is not a public, but a private, way. They say, in their brief: "The record does not show that the owners of the land over which the road passed ever did a thing to show that they considered it other than a public highway; that no one who desired to use it was ever turned back, or his right to use it questioned; and that it was used as uninterruptedly by the public as Woodward avenue, in Detroit." It would certainly be a strange rule which would require the original constructors of this road to turn people back, or question the right of any traveler to use it, when the traveler was invited to use it, and its use required the payment of toll at the dock or ferry at its terminus. The above statement made by counsel is undoubtedly true, for, the greater the travel, the more money for the owners of the dock and ferry. A private way is just as much open for use by those who have occasion to use it as is a public way. If Woodward avenue, in Detroit, which extends to the water line of the river, and was so established originally, had been laid out and constructed to within only 200 feet of the river, and the owner of the land between the foot of the street and the river had opened it for his own dockage and ferry purposes, had paved it, kept it in repair, and had not only permitted, but invited, the public to pass over it for ferriage to Windsor, Belle Isle park, and other places upon the river, would such use for ten or one hundred years make it a public highway, take exceedingly valuable property from the owner for a public use, and impose heavy burdens upon the city of Detroit for neglect to keep it in repair? If this be so, then every owner of land along the river front in the city of Detroit and elsewhere, who builds a private dock or establishes a ferry, and opens a road from the public highway to such dock or ferry, loses the title to his land by such use. No case cited maintains such a doctrine. The defendant township had constructed and maintained the river road and the Sodus road for the public use. There is nothing to indicate that its public authorities ever intended to adopt this road along the side of this steep bank as a part of its system of highways. A farmer may open a private road from one public highway to another across his farm, which will accommodate, not only himself, but all who choose to travel that way. His permission to the general public to travel that way is not an act hostile to his title or to his right to close the road at any time. So a manu-

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facturer may establish his plant in the center of his lands, and open a road to the public highway upon either side, and permit the public to use it, and merchants and peddlers to travel it, carrying their goods for sale to the houses owned by him and occupied by his employees and tenants. But such use is permissive, and gives the public no permanent rights in it as a highway. So a mining corporation, as is often the case, constructs roads from the public highways in, over, and around its mine, built and kept in repair by the company, and permits the public the free use of them. But this does not make them public highways within the meaning of the statute. Such permissive or invited use is not that use contemplated by the statute which will convert a private road into a public highway. The use required by the statute is one accompanied by some act on the part of the township authorities open, notorious, and hostile to the private ownership; some act which gives the original owner notice that his title is denied. *Alton* v. *Meeuwenberg*, 108 Mich. 629, 66 N. W. 571; *Diamond Match Co.* v. *Ontonagon*, 72 Mich. 249, 40 N. W. 448. Mr. Elliott says, it "must appear that the owner fully consented to the change, or there must be some element of estoppel to deprive him of his rights as the owner of the fee. Where a way is laid out and used as a private way, the mere fact that the public also makes use of it without objection from the owner will not make it a public way." 1 Elliott, Roads & Streets, p. 3. This doctrine applies with special force to those roads built in a new country, and for such purposes as was the road in question. The mere use, however long, is not sufficient to effect the change. *District of Columbia* v. *Robinson*, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283; *Lewis* v. *Lincoln*, 55 Neb. 1, 75 N. W. 155; *Speir* v. *New Utrecht*, 121 N. Y. 429, 24 N. E. 692; *Lewis* v. *New York, L. E. & W. R. Co.* 123 N. Y. 502, 26 N. E. 357; *Downend* v. *Kansas City*, 156 Mo. 60, 51 L. R. A. 170, 56 S. W. 902; *Stewart* v. *Frink*, 94 N. C. 487, 55 Am. Rep. 619; *Root* v. *Com.* 98 Pa. 170, 42 Am. Rep. 614. In *Speir* v. *New Utrecht* it is said: "The mere fact that a portion of the public travel over a road for twenty years cannot make it a highway, and the burden of making highways and sustaining bridges cannot be imposed upon the public in that way. There must be more. The user must be like that of highways generally. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. . . . A private way, opened by the owners of the land through which it passes for their own uses, does not become a public highway merely because the public are also permitted for many years to travel over it." In *Stewart* v. *Frink* it is said: "It would be unjust as well as ungracious to take advantage of his [the landowner's] generous permission to use his land for public convenience, and the law will not allow this to be done." This statute was not passed with the view to convert private roads into public ways. It was designed to remedy defects in establishing and recording highways. *Green* v. *Belitz*, 34 Mich. 512. Among the cases cited by counsel for plaintiff as conclusive of their position is *Ellsworth* v. *Grand Rapids*, 27 Mich. 250. That case well illustrates the purpose of this statute and its necessity. The road there in dispute was originally laid out by the commissioner of highways, but there was a mistake in the survey or in recording it. It formed one of the principal thoroughfares in and out of the city of Grand Rapids. Immediately after it was laid out, it was worked by the city authorities, and continued to be worked and maintained solely by them. The language relied upon in that case has no application to a case like the one now before us. In all the cases cited the municipal authorities had taken some action hostile to the claim of the landowner that it was a private road, and by failing to assert his rights he was estopped after ten years from setting them up. The action of the board of supervisors in establishing a ferry has no significance. It does not even tend to show that the supervisors considered the road a public one. But, even if they did, they could not bind the township. The river was navigable, and under the statute the board of supervisors had control over bridges and ferries across it, and, under the police power, were authorized to license private ferries and establish requirements for their management.

The judgment is reversed, and a new trial ordered.

Long, J., did not sit. The other Justices concur.

NEBRASKA SUPREME COURT.

Margaret E. OYSTER, *Plff. in Err.*,
v.
BURLINGTON RELIEF DEPARTMENT of the Chicago, Burlington, & Quincy Railroad Company *et al.*

(.....Neb.....)

***1. Terms in a benefit certificate** of the Burlington Voluntary Relief Department of the Chicago, Burlington, & Quincy Railroad Company, providing that, where members of that department shall elect to accept the benefits provided by the certificate, they must waive all right of action against the railroad company for the injury received, examined, and *held* valid.

2. The election of the widow of a member of the Voluntary Relief De-

*Headnotes by OLDHAM, C.

NOTE.—For other cases in this series as to contracts of railroad relief associations, see also 59 L. R. A. Owens v. Baltimore & O. R. Co. (C. C. S. D. Ohio) 1 L. R. A. 75, and *note;* Baltimore & O

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partment of the Chicago, Burlington, & Quincy Railroad Company to accept the provisions of a relief certificate in which she is the beneficiary does not bar an action by the personal representative of the deceased against the railroad company, under the provisions of Neb. Comp. Stat. chap. 21, § 2, for the benefit of the minor children of the deceased.

3. **A judgment recovered by an administrator** under the provisions of Neb. Comp. Stat. chap. 21, § 2, is for the exclusive benefit of the widow and the next of kin of such deceased person, and the fact that the administrator, in his petition for damages, fails to name all the legal beneficiaries provided for in this act, will not bar any legal distributee not named in his petition from receiving his distributive share of the judgment recovered.

4. **Where the full penalty prescribed by statute has been recovered** from the Chicago, Burlington, & Quincy Railroad Company for the unlawful killing of one of its employees who is a member of the voluntary relief department of such company, the beneficiary named in the certificate of such employee cannot maintain a cause of action against the railroad company on such benefit certificate.

(September 18, 1902.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendants in an action brought to enforce the amount alleged to be due on a benefit certificate. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. **A. W. Lane,** for plaintiff in error:

A suit prosecuted on behalf of the children constitutes no bar to an action by the widow, in her individual capacity, to recover the benefits provided for and guaranteed to her by the certificate.

Burlington Voluntary Relief Department v. *White*, 41 Neb. 547, 561, 59 N. W. 747, 751; *Chicago, B. & Q. R. Co.* v. *Bell*, 44 Neb. 51, 62 N. W. 314; *Chicago, B. & Q. R. Co.* v. *Curtis*, 51 Neb. 442, 71 N. W. 42; *Chicago, B. & Q. R. Co.* v. *Wymore*, 40 Neb. 645, 58 N. W. 1120; *Clinton* v. *Chicago, B. & Q. R. Co.* 60 Neb. 692, 84 N. W. 90.

The beneficiary never intended to waive her right under the certificate, and she has not done so.

28 Am. & Eng. Enc. Law, p. 528; *Diehl* v. *Adams County Mut. Ins. Co.* 58 Pa. 443, 98 Am. Dec. 302; *Farlow* v. *Ellis*, 15 Gray, 231.

Messrs. **J. W. Deweese** and **Frank E. Bishop,** for defendants in error:

The administratrix is the nominal party to prosecute the action as trustee for all the beneficiaries, and the widow and the next of kin are the real parties in interest as beneficiaries, and ought all to be represented in the administrator's action.

This court held that there was no error in showing the pecuniary loss to the widow, in permitting the recovery on her account, and sustained the judgment in her favor.

Chicago, B. & Q. R. Co. v. *Oyster*, 58 Neb. 5, 78 N. W. 359.

The administratrix sued and recovered for the widow as well as the children, and the matter is so adjudicated.

Huntingdon & B. T. R. & Coal Co. v. *Decker*, 84 Pa. 425.

The administrator sues strictly as a trustee, and must recover the whole fund in one suit.

Union P. R. Co. v. *Dunden*, 37 Kan. 1, 14 Pac. 501; *Perry* v. *St. Joseph & W. R. Co.* 29 Kan. 420; *Deford* v. *State use of Keyser*, 30 Md. 208; *Collins* v. *East Tennessee, V. & G. R. Co.* 9 Heisk. 849; *Hartigan* v. *Southern P. Co.* 86 Cal. 142, 24 Pac. 851; *Hecht* v. *Ohio & M. R. Co.* 132 Ind. 507, 32 N. E. 302.

The plaintiff, having recovered damages for the injury sustained, could not also demand the benefits of the relief contract, which by its terms did not permit such double recovery.

Clinton v. *Chicago, B. & Q. R. Co.* 60 Neb. 692, 84 N. W. 90; *Donald* v. *Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. 971; *Maine* v. *Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Pittsburg, C. C. & St. L. R. Co.* v. *Cox*, 55 Ohio St. 497, 35 L. R. A. 507, 45 N. E. 641; *Pittsburgh, C. C. & St. L. R. Co.* v. *Moore*, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290; *Shaver* v. *Pennsylvania Co.* 71 Fed. 931; *Lease* v. *Pennsylvania Co.* 10 Ind. App. 47, 37 N. E. 423; *Ringle* v. *Pennsylvania R. Co.* 164 Pa. 529, 30 Atl. 492; *Johnson* v. *Philadelphia & R. R. Co.* 163 Pa. 127, 29 Atl. 854.

Oldham, C., filed the following opinion:

This was an action brought in the district court of Lancaster county to recover on a beneficiary certificate issued to one Granville R. Oyster by the Voluntary Relief Department of the Chicago, Burlington, & Quincy Railroad Company, and payable in case of his death to his wife, the plaintiff herein. The certificate was issued April 6, 1891, and Granville R. Oyster was killed in a railroad accident on the 31st day of July, 1894, while in the employ of the Chicago, Burlington, & Quincy Railroad Company, and also while a member in good standing in the relief department of said company. There is no disputed question of fact in the record. The case was tried, without the intervention of a jury, to the court, and judgment was rendered for the defendant, and plaintiff brings error to this court.

After the death of Granville R. Oyster, Margaret Oyster, wife of the deceased, pro-

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Employees' Relief Asso. v. Post (Pa.) 2 L. R. A. 44; Donald v. Chicago, B. & Q. R. Co. (Iowa) 33 L. R. A. 493; Pittsburg, C. C. & St. L. R. Co. v. Cox (Ohio) 35 L. R. A. 507; Kinney v. Baltimore & O. Employee's Relief Asso. (W. Va.) 15 L. R. A. 144; Eckman v. Chicago, B. & Q. R. Co. (Ill.) 38 L. R. A. 750; Pittsburg, C. C. & St. L. R. Co. v. Moore (Ind.) 44 L. R. A. 638; Johnson v. Charleston & S. R. Co. (S. C.) 44 L. R. A. 645; and Baltimore & O. R. Co. v. Stankard (Ohio) 49 L. R. A. 381.

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cured letters of administration on his estate, and prosecuted a cause of action against the Chicago, Burlington, & Quincy Railroad Company for negligently causing his death, under the provisions of chapter 21 of the Compiled Statutes of Nebraska, and recovered a judgment against the company for $5,000, the full amount allowed by statute. In this suit the plaintiff, as administratrix, sought to recover damages for the benefit of the minor children of the deceased alone, and did not name his widow as one of the beneficiaries. This judgment was reviewed by this court in the case of *Chicago, B. & Q. R. Co.* v. *Oyster*, 58 Neb. 1, 78 N. W. 359, and affirmed, and the damages were paid in full by the defendant railroad company before the trial of the case at bar in the district court. The provisions of the benefit certificate under which defendant claims exemption from liability are, in substance, that the acceptance of the benefit from the relief department was to operate as a release and satisfaction of all claims for damages against the railroad company for such injury, and that, if suit was brought against the company, no payment would be made from the relief fund on account of the injuries until the said suit was discontinued, and, if the suit should proceed to judgment, or be compromised, all claims upon the relief fund were to be precluded. The question of the validity of the foregoing conditions in similar certificates of this relief department has been before this court, fully discussed, and fully upheld in the cases of *Chicago, B. & Q. R. Co.* v. *Bell*, 44 Neb. 44, 62 N. W. 314; *Chicago, B. & Q. R. Co.* v. *Curtis*, 51 Neb. 442, 71 N. W. 47; *Clinton* v. *Chicago, B. & Q. R. Co.* 60 Neb. 692, 84 N. W. 90. It is urged, however. by counsel for plaintiff, that the beneficiary in the relief certificate has never prosecuted any action on her own behalf and for her own benefit against the railroad company for damages on account of the death of her husband, but that in the suit which was prosecuted she only appeared in her representative capacity to recover damages for the minor children of the deceased, who are not parties to this suit. The holding of this court in the case of *Chicago, B. & Q. R. Co.* v. *Wymore*, 40 Neb. 645, 58 N. W. 1120, is relied upon by plaintiff to sustain this contention. In that case it was held that the election of the wife to accept the provisions of one of these benefit certificates did not estop a personal representative of the deceased from prosecuting an action for damages against the company under the provisions of § 2, chap. 21, Comp. Stat., for the benefit of his minor heirs, but that the beneficiary alone was barred by this act. The reason of the rule laid down in that case is that neither the deceased nor the beneficiary named in his certificate are authorized to contract against the liability prescribed by § 2, chap. 21. *supra*, commonly called "Lord Campbell's act;" that while the beneficiary in the certificate may contract with reference to her own right of recovery under this act, yet she cannot extend such contract so as to bar the right of recovery of her minor children. In other words, that decision stands on the proposition that the Lord Campbell's act gives a right of recovery to minor children for the loss of support and maintenance, caused by the negligent or unlawful killing of their father, which neither he nor the wife surviving him can waive by contract. In that case the widow first accepted the benefit of the certificate, and then, having been appointed administratrix, brought the action in her representative capacity for herself as widow and the minor children as the next of kin of the deceased, and it was held that she might prosecute the action for the benefit of the minors, but not for her own benefit as widow. In the case at bar the widow of the deceased, as beneficiary of the certificate in issue, did not, in the first instance, elect to claim the benefit provided in such certificate, but, on the contrary, she took out letters of administration on the estate of the deceased, and in her representative capacity prosecuted the defendant railroad company under the provisions of the Lord Campbell's act, omitting, however, to name herself as widow among the beneficiaries. The result of the action was the recovery of the full amount allowed by statute for the wrongful killing of the deceased. In this action it is clear that the administratrix sued as trustee for all the beneficiaries permitted to recover under the provisions of § 2, chap. 21, *supra*, —*i. e.*, for the widow and the next of kin, —and the mere fact that the petition omitted to name some one of the beneficiaries would not and could not prevent such beneficiary from participating in the distribution of the fund when recovered. If the plaintiff, as widow of the deceased, has not received her distributive share of this $5,000 from herself as administratrix of the estate of Granville R. Oyster, then she, as widow and distributee of this fund, has a good cause of action against herself, as administratrix of the estate of the deceased, for her proportionate share of the money recovered.

Seeing, then, that the railroad company has paid the full penalty prescribed by law for the unlawful killing of Granville R. Oyster to his personal representative, we must then look to the terms of the certificate on which this cause of action is predicated to determine whether or not it gives a further right of action to plaintiff for this same injury. It is plain that, if any such additional right of action for the wrongful killing of this man exists at all, it must be by the terms of the benefit certificate of the voluntary relief department of the defendant; and these terms provide that, if any authorized person brought a suit against the company which was prosecuted to judgment, or afterwards compromised, the beneficiary would have no claim on the relief fund. Plaintiff must take this certificate with the conditions imposed by the contract, or not take it at all. Without the contract contained in this certificate,

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she has no right of action; and with the contract, by the condition it contained, she is barred from a recovery. *Maine* v. *Chicago, B & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Donald* v. *Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. 971; *Pittsburg, C. C. & St. L. R. Co.* v. *Cox*, 55 Ohio St. 497, 35 L. R. A. 507, 45 N. E. 641; *Pittsburgh, C. C. & St. L. R. Co.* v. *Moore*, 152 Ind. 345, 14 L. R. A. 638, 53 N. E. 290.

It is therefore recommended that the judgment of the district court be affirmed.

Barnes and Pound, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment of the District Court is affirmed.*

HARRISON NATIONAL BANK of Cadiz, Ohio, *Appt.*,
v.
Cyrus O. AUSTIN *et al.*

(.....Neb.....)

*1. **Where one has placed his agent for the investment of money** in notes and mortgages in such a situation that persons of ordinary prudence, and acquainted with business usages, would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal.

2. **That a party to whom money due another is paid is not in possession of the evidences of the indebtedness** is not conclusive of the question of authority or lack of it to make the collection. Such authority may be inferred from the fact that similar acts, through a series of transactions relating to a like business, have been uniformly ratified by the creditor.

3. **Evidence examined**, and found to sustain the findings and judgment of the trial court.

(July 22, 1902.)

APPEAL by plaintiff from a judgment of the District Court for Chase County in favor of defendants in an action brought to foreclose a mortgage. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. **A. W. Lane** for appellant.

Mr. **Charles W. Meeker** for appellees.

Kirkpatrick, C., filed the following opinion:

This is a suit brought in the district court of Chase county by appellant, Harrison National Bank, against Cyrus O. Austin and others, to foreclose a mortgage given by Austin to C. C. Burr on May 31, 1890, due June 1, 1895, which note and mortgage was by Burr indorsed, assigned, and delivered to appellant long before maturity. The petition is in the usual form. The answer admits the execution and delivery of the note and mortgage, and pleads payment of the sum by Edward Kuse, who purchased the premises subject to the mortgage to Burr, who, it is alleged, was the agent of appellant bank, and that such money had been paid by Burr to the bank. To this answer was filed by way of reply a general denial. Trial was had, which resulted in a finding and judgment for appellee Kuse, holding that the note and mortgage had been satisfied by the payment to Burr, and decreeing the mortgage to be no lien upon the premises. The case is brought to this court on appeal by the Harrison National Bank, and the only question presented by the record is whether or not the decree of the trial court is sustained by sufficient competent evidence.

It is disclosed by the record that appellee Kuse paid to C. C. Burr, on the 7th day of January, 1893, long before the note was due, the face of the note and mortgage, with interest accrued up to that time. Burr executed a release in satisfaction of the mortgage, which he delivered to appellee, who placed it of record in Chase county. It is clearly established by the evidence that C. C. Burr was the agent for appellant in the matter of negotiating farm loans in Nebraska, and that during the time he acted as such agent he placed farm loans upon land in various counties in the state to a sum amounting to about $250,000. The method which seems to have prevailed in the transaction of the business between Burr and appellant was as follows: Appellant, by J. M. Sharon, its cashier, would write a letter to Burr, directing him to send them a certain amount of farm loans; *e. g.*, from three to ten thousand dollars' worth. Agents for Burr in different counties in the state, on being notified to do so, would take applications for farm loans, and send them to Burr at Lincoln. Such as were satisfactory to him were accepted, and he would thereupon prepare notes and mortgages to be sent to the agent, to be signed and executed by the borrowers. The mortgage, when executed, would be placed of record, abstracts prepared, and the note and mortgage of the borrower, and the abstract showing the recording of the mortgage would be forwarded to Burr, who would send the papers, accompanied by a sight draft, through the First National Bank at Lincoln to appellant at Cadiz, Ohio. The testimony shows that, so far as the business agency of Burr with appellant is concerned, the former did not take these applications for loans and make the loans thereon except upon orders coming to him from appellant. All of the business was transacted by Burr, and, while it appears

*Headnotes by KIRKPATRICK, C.

NOTE.—As to right to pay written obligation to agent who is not in possession of it, see, in this series, Kernohan v. Durham (Ohio) 12 L. R. A. 41; Wilson v. Campbell (Mich.) 35 L. R. A. 544; Hollinshead v. Globe Investment Co. (N. D.) 42 L. R. A. 659; and Kohl v. Beach (Wis.) 50 L. R. A. 600.

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from the letters written by the officers of appellant bank that Burr was admonished to take only good, first-class farm loans, yet it does not appear that in any instance loans sent in by him in pursuance to such orders were rejected by appellant. Burr indorsed the notes, and usually assigned the mortgages. The notes were payable at the First National Bank of Lincoln, Nebraska. It is contended by appellant that it purchased these notes and mortgages in the usual course of business, and that Burr was not in any sense acting as its agent in placing the loans. The transactions between the parties regarding the placing of loans will not bear the construction placed on their relations contended for by appellant. It does not appear that Burr had any money invested in any of the loans; but that uniformly, after drawing a sight draft on appellant bank, he would give his check to the party to whom the money was loaned. There can be no doubt that Burr was simply acting as the agent of appellant in placing these loans.

The transactions between Burr and appellant amounted to the sum, it is claimed, of $250,000, and extended over a period of many years; at least from the spring of 1888 up to the latter part of 1894, and for a period of about a year after the loan in question was paid. Sometimes, before the coupons upon the loans handled by Burr came due, he would send out a notice to the mortgagors, notifying them of the amount of interest, and the maturity of the same, and request prompt remittance to him at Lincoln. The same course was followed at the maturity of the principal notes. There seems to have been no correspondence and no business connections of any description between the borrowers of the money and appellant, but Burr seems to have had exclusive charge of the loan business in Nebraska for appellant. Burr kept an open account with appellant bank in the name of J. M. Sharon, its cashier, which account he credited with all coupons and principal notes collected, and in which he charged appellant for all items remitted. Burr testified that he collected more than $75,000 in the manner indicated, all of which belonged to appellant. When mortgages became due, and were not paid, Burr, in many instances, proceeded to foreclose, and took title in his own name, and executed to appellant a mortgage and note for the amount of the original note, with interest. When mortgages matured, and parties were not able to pay, in many instances Burr granted extensions, taking coupons signed by the parties, representing the accruing interest during the period of extension, and sending them to appellant. No objection was made by appellant to any of these transactions. In Burr's testimony he stated that he had received as many as 3,000 letters from the officers of appellant bank regarding the loan business being transacted for them by him. A number of these letters appear in the record, among which is the following, which is set out in order to explain the character of the business relations which appear to have existed between Burr and appellant:

Cadiz, O., 4/21/94.

C. C. Burr, Esq.,
Lincoln, Nebraska.

Dear Sir:—

Your favor of the 17th inst., is received, containing New York draft for $36, which pays the balance due on Thomas Murray $400 loan collected by you, and I inclose you the note, mort., rel., and abst. in same. You say in payment of balance due on Murray and Misner loans. If you will refer to my letter of April 13, you will see that I said balance due on Murray loan $36, and balance due on the Misner loan $20, making $56 on the two. I see this bal. should be $61.40. The $122 credit reported was part of the T. D. Moulton $250 note. Moulton has not yet paid all of this note. On another sheet I inclose you list of the loans you collected, and showing credits on the same. [The accompanying list showing seventeen loans which had been collected by Burr, and payments credited thereon.] . . .

[Signed] Yours truly,
J. M. Sharon, Cash.

From the correspondence in the record, and from other testimony, it is quite clearly established that Burr was permitted by appellant to manage these loans, collect both principal and interest, in all respects as though they were his own, appellant having apparently neither knowledge nor concern about the borrowers themselves. The officers of the appellant bank testify that these coupons and notes were sent to Burr for payment on account of his indorsement, and not for collection. It is suggested by counsel for appellee, and, we think, aptly, that this claim of appellant is not consistent with sound business principles, nor is it the usual method pursued by banks having paper for collection. These notes and mortgages were made payable at the First National Bank at Lincoln, and the uniform custom of appellant in sending them to Burr instead of the bank cannot be reconciled with reason and sound business methods if the contention of appellant that they were sent to Burr as indorser or guarantor is to be credited. The fact that they were uniformly sent to Burr, taken in connection with the letters from appellant to Burr appearing in the record, showing, as they do, the custom of looking to Burr for the collection of overdue paper, quite conclusively establishes the contention of counsel for appellee that Burr was the agent of appellant, and was so regarded by it. Appellant seems to have availed itself of Burr's services in making these collections, placing loans, and foreclosing mortgages, until it was discovered that Burr was in failing circumstances; and this, it appears from the record, was a discovery made more than a year after the note and mortgage in suit had been paid. It was then that appellant made an investigation of its business in Burr's hands, and found that he had misap-

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propriated some $16,000. Burr testified that the officers of appellant bank were in Lincoln on different occasions, staying in some instances several days, visiting at his office, and that they must have known of the manner in which he was doing business for them. It is true that Burr did not have the note and mortgage in suit in his possession at the time he made the collection; nor did he have them again after sending them to appellant; but this is only one of the circumstances which are to be taken into consideration in determining whether or not Burr was in fact the agent of appellant in the collection of the note and mortgage in suit. In the case of *Phœnix Ins. Co.* v. *Walter*, 51 Neb. 182, 70 N. W. 938, this court said: "That the party to whom money due another is paid is not in possession of the instruments by which the indebtedness is evidenced is not conclusive of the question of the authority or lack of it in the party receiving the money to collect it." To the same effect is *Estey* v. *Snyder*, 76 Wis. 624, 45 N. W. 415; and *Dunn* v. *Hornbeck*, 72 N. Y. 87. Although this note and mortgage, as well as other farm mortgages handled by Burr on behalf of appellant, were made payable at the First National Bank at Lincoln, appellant saw fit to send the note and mortgage direct to Burr for collection, and allowed him to deal with the borrowers for a number of years in all respects as though he was the owner of the mortgages. In the case of *Johnston* v. *Milwaukee & W. Invest. Co.* 46 Neb. 480, 64 N. W. 1100, this court said: "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform . . . a particular act, . . . [and therefore deals with the agent], the principal is estopped, as against such innocent third person, from denying the agent's authority." *Holt* v. *Schneider*, 57 Neb. 523, 77 N. W. 1086. In the case at bar the apparent authority with which appellant clothed Burr, even if he was not in fact its agent, and the acceptance by appellant of all the benefits of his acts on its behalf, is such that justice requires that in this case appellant should sustain the loss. It conclusively appears from the exhibits in this case that Burr did frequently collect both principal and interest at the times when he did not have the notes or the coupons in his possession, remitting the amounts collected to appellant, who thereupon returned to him for delivery to the borrower the canceled evidences of the debts, and who in no instance objected to this course on the part of Burr. In *First Nat. Bank* v. *Ridpath*, 47 Neb. 96, 66 N. W. 37, this court said: "When the extent of an agent's authority is in issue, no special instructions having been given to him, his actual authority to do a particular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and intrusted to the agent under similar circumstances." The testimony in the record is sufficient to establish the fact found by the trial court that Burr was the general agent of appellant in Nebraska for the negotiation and collection of farm loans which it had made through Burr, and the right to collect the note before due sufficiently appears from his custom, ratified by appellants, of granting extensions, and renewals of other loans. This he apparently did wholly without objection on the part of appellant, and his acts concerning which were ratified by appellant when brought to its notice.

It appears that the findings and judgment of the trial court are sustained by sufficient competent evidence, and are right, and it is, therefore, recommended that the same be affirmed.

Day and Hastings, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment of the District Court is affirmed.*

FIRST NATIONAL BANK OF DAVID CITY, *Plff. in Err.*,
v.
Charles H. SARGENT.

(.....Neb.....)

*1. **Where the pleadings raise an issue of fact,** and under the evidence but one finding can be justified, it is not error for the trial court to assume the existence of the fact so established, and instruct the jury accordingly.

2. **A deed absolute in form will be treated as a mortgage** when it is given to secure payment of a debt, although the parties may have agreed that upon default of payment the deed should become absolute.

3. **Instruction copied** in the opinion as to what constitutes duress examined, and *held* the giving thereof not erroneous.

4. **Petition examined,** and *held* to state a cause of action, and evidence *held* sufficient to support the verdict of the jury.

5. **One S. had conveyed by a warranty deed** absolute in form to a bank certain real estate as security for an indebtedness owing by S. to the bank. S. was in financial distress, and had no means of meeting his

*Headnotes by HOLCOMB, J.

NOTE.—For duress in respect to transactions regarding real property, see also Joannin v. Ogilvie (Minn.) 16 L. R. A. 376, and *note*.

As to recovery back of money paid under duress, see Adams v. Irving Nat. Bank (N. Y.) 6 L. R. A. 491, and *note*.

As to what constitutes duress, see, in this series Shattuck v. Watson (Ark.) 7 L. R. A. 551; De La Cuesta v. Insurance Co. of N. A. (Pa.) 9 L. R. A. 631, and *note;* Flack v. National Bank of Commerce (Utah) 17 L. R. A. 583; Thompson v. Niggley (Kan.) 26 L. R. A. 803; and Galusha v. Sherman (Wis.) 47 L. R. A. 417.

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indebtedness save by a sale of the real estate. The bank thereafter assumed to be the absolute owner of the property, and denied to S. any right, interest, or equity therein, and by injunction proceedings undertook to dispossess him of a portion of such land. S. procured a purchaser at an advantageous price, and endeavored to adjust his differences with the bank, so as to effectuate a sale of the property and meet pressing demands against him. The bank refused to consent to a sale, or release its interest, or reconvey the premises to S., so that a sale might be consummated, without the payment by S. of a large sum of money in excess of the amount justly due. *Held*, under the facts and circumstances as disclosed by the record, that the payment of the excess over and above the amount justly due was made under duress and compulsion, and might be recovered back in an action brought for that purpose.

6. **At the time of making the arrangements for the payment of the sum demanded**, a written agreement was entered into in the nature of a compromise or settlement of the differences existing between the parties, which was accepted and acquiesced in by S. so as to regain control of the land, be able to effectuate a sale of the property, and extricate himself from his financial difficulties. *Held*, that the jury was justified, under the evidence, in finding that the agreement was vitiated, because of duress, for the same reason and to the same extent as the overpayment was the result of legal duress.

7. **Instructions of the court in stating the substance of the pleadings** and the issues of fact to the jury examined, and found the issues were submitted fairly to both parties, and that no error was committed by such instructions.

8. **Other alleged errors examined**, and found to be without merit.

(July 22, 1902.)

ERROR to the District Court for Butler County to review a judgment in favor of plaintiff in an action brought to recover back money alleged to have been paid under duress. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Matt Miller** and **Arthur J. Evans**, for plaintiff in error:

The facts pleaded failed to show any urgent necessity or distress, any ground to fear, or to apprehend ultimate loss, or any danger, present or future. Such facts must appear, in order to justify a recovery in this suit.

Detroit Nat. Bank v. *Blodgett*, 115 Mich. 160, 73 N. W. 123, 885; *Horton* v. *Bloedorn*, 37 Neb. 666, 56 N. W. 321; *Bennett* v. *Luby*, 112 Wis. 118, 88 N. W. 37; *Rochester Mach. Tool Works* v. *Weiss*, 108 Wis. 545, 84 N. W. 866.

Messrs. **A. M. Walling** and **W. M. Cain** for defendant in error.

Holcomb, J., delivered the opinion of the court:

An action was brought in the lower court by the plaintiff, who is now the defendant in error, against the defendant, plaintiff in error, to recover a sum of money alleged to have been paid under compulsion and duress. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of $640. The defendant prosecutes error.

The petition in error contains 112 assignments of error. With the thermometer registering well up to the same mark, we can scarcely be expected to note and consider each assignment at length and in detail. If we generalize in our treatment and discussion of the case, it is for the sake of brevity, and not because of a lack of investigation and consideration of each and every question presented in briefs of counsel. There are, as it appears to us, a few questions of a controlling character, which, when considered and disposed of, properly must determine the whole case as presented by the record. The controversy arises out of a transaction wherein the defendant by warranty deed obtained the legal title to 154 acres of land theretofore belonging to the plaintiff, and one of the controverted questions is whether by the transaction referred to the defendant obtained the absolute title and ownership of the said real estate, or whether it held the conveyance as security only by way of mortgage. The plaintiff's action is grounded on the theory that the defendant although having a deed absolute on its face for the property included therein, the instrument was but a mortgage, and that in the adjustment and payment of the amount due thereunder the defendant, by reason of the circumstances then surrounding the parties and the relations existing between them, by threats and duress extorted from the plaintiff a much larger sum than was actually due on such indebtedness. The defendant denied that it held the deed as a mortgage, and alleged that it had become the absolute owner of the property by such conveyance, and it also pleaded as a defense that by way of compromise and settlement the parties had adjusted their differences, and that such settlement so made was a bar to any recovery on the cause of action pleaded in plaintiff's petition. On the submission of the cause to the jury, the court assumed and by an instruction told the jury that the deed by which the defendant acquired title to the property, and under which it claimed to be the owner of the real estate, although absolute in form, was in fact a mortgage to secure an indebtedness owing by the plaintiff to the defendant. The giving of this instruction is assigned as error, it being the contention of the defendant that whether or not the deed was to be regarded as an absolute conveyance, or only intended as a mortgage, was, under the issues and the evidence, a question of fact to be determined by the jury, and that the court could not properly withdraw such question from the jury as triers of fact. If there was any evidence upon which a finding that the defendant acquired the absolute ownership of the property by means of the conveyance could be sustained, then we apprehend the question ought to have been submitted to

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the jury as contended for. It appears from the record that prior to the execution of the deed the plaintiff was indebted to the defendant, a national bank, for some $600 or $700, and to secure such indebtedness had executed a second mortgage on the real estate over which the controversy arose. A first mortgage to secure the sum of $2,500 for a loan made thereon was held by a third party at the time the defendant obtained its second mortgage, and about the 1st of January, 1897, and shortly before the deed in controversy was executed, default having been made in the payment of interest due on the first mortgage, and also taxes assessed against the land, foreclosure proceedings were about to be instituted by the owner thereof. To protect its own interest as second mortgagee, the bank, on learning of the prospective foreclosure proceedings on the first mortgage, was anxious that the plaintiff should take some action which would forestall any further proceedings looking toward a foreclosure of the first mortgage. The plaintiff found himself unable to pay the defaulted interest and the back taxes upon the payment of which it appears the first mortgagee was willing to allow the principal to run until some future time. This condition of affairs existed for some little time, and after considerable negotiations it was agreed between the plaintiff and defendant that the bank should pay the back interest due on the first mortgage and taxes past due, and agree to pay the principal sum on the 1st of January following, cancel its own indebtedness, and the second mortgage securing the same, the total of the indebtedness and costs aggregating $3,830.67, and that the plaintiff would execute a warranty deed for the real estate covered by the two mortgages mentioned. At the time of the execution of the deed to the bank it executed back to the plaintiff a formal lease of the premises for the year 1897, and also a formal contract of sale, agreeing to reconvey the premises upon the payment of the said sum of $3,830.67 on or before January 1, 1898, with interest thereon, at 10 per cent per annum after the last-mentioned date. The plaintiff testifies, in substance, that the deed was given and accepted as a mortgage only, while the president of the bank says it was an absolute conveyance, and that the bank became the purchaser outright of the land by virtue of such conveyance. The negotiations leading up to the execution of the deed and the accompanying instruments appear to have been by correspondence, the letters of the bank relating to the matter being introduced in evidence. We look in vain for any act or words of the parties outside of the formal documents they at the time executed, evidencing an intention on the part of the plaintiff to sell the land and the bank to become the purchaser thereof by the execution and delivery of the deed of conveyance. We think the language and the conduct of the officers of the bank negative the idea that it was at the time purchasing the property or accepted the conveyance otherwise than as security for its indebtedness owing by the plaintiff and the advancements made and to be made by it on the first mortgage. No other consideration entered into the transaction, and by its own testimony we think it is firmly established that the conveyance, although an unconditional warranty deed, was in fact and in contemplation of law but a mortgage to secure the plaintiff's indebtedness secured by the two mortgages hereinbefore referred to. In urging the plaintiff to take some action regarding the matter, it is stated by the president of the bank in one of his letters to him: "It is quite important to us to have this loan [the first mortgage] reinstated now, as it will leave the interest at 6 per cent, instead of 9 per cent or 10 per cent, and save costs. We do not wish to take up the $2,500 now either. The only way I can see out is for you now to deed over your land to the bank, and then we can advance the back interest and get it reinstated. As soon as you can arrange the loan or money, we are perfectly willing to deed it back to you. It is understood that this is merely a temporary arrangement, and that you proceed with your efforts to make other arrangements to redeem the land." In another letter, after giving the items going to make up the aggregate sum due, including taxes and costs, the president of the bank writes as follows: "The transfer and sale would necessarily have to be understood to be absolute, and not in the nature of a trust or mortgage, and all rights vested in the bank or its trustee, in order to enable the bank to acquire and carry this loan for a year. During the year ending January 1, 1898, you could pay off the purchase money from time to time and buy it back." And again, in a letter of later date urging the plaintiff to execute the deed and close up the transaction, the president of the bank writes: "I cannot see anything to be gained by longer delay to sign and forward the deed at once, to settle this matter. If Mr. Dodge, or some other good friend, should send you the money to redeem or buy back, the bank is ready to deed over the land in an hour's notice on payment of the cash." Nowhere is it suggested that the bank by the transaction is becoming the purchaser unconditionally of the land, or that the plaintiff is losing his entire interest and the equity of redemption therein. It is manifest, we think, that the conveyance was executed by the plaintiff solely as security, and that the defendant so understood and accepted it on its delivery to the officers of the bank. The formal lease executed at the time as a part of the same transaction and the contract to resell the land to the plaintiff but confirms him in his contention that the deed was in reality a mortgage, and that his right of redemption was preserved to him. Evidently what the parties tried to accomplish was to execute a conveyance that would operate as security for the indebtedness owing by the plaintiff, preserving to the grantor the right to redeem at any time, upon payment of the mortgage debt, before January 1, 1898, after

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which, if redemption was not effectuated, the deed should become absolute; but as is said in *State Bank* v. *Mathews*, 45 Neb. 659, 63 N. W. 930, a deed so executed and delivered must be treated as a mortgage notwithstanding such an agreement. Says Commissioner Irvine, who wrote the opinion: "This was the understanding and is the legal effect of all mortgages, and the whole doctrine of foreclosure and redemption arose from courts of equity relieving against this understanding and its legal effect." It is, therefore, we think, clear that the deed in question must be taken and held to be a mortgage only, and not susceptible of any other construction, and that the trial court did not err in treating and assuming in its instruction to the jury that the instrument was a mortgage, and not an absolute conveyance.

On the question of what is required to constitute duress, the court instructed the jury as follows: "'Duress' may be defined as an unlawful restraint, intimidation, or compulsion of another to such an extent and degree as to induce such other person to do or perform some act which he is not legally bound to do, contrary to his will and inclination." This instruction is complained of as erroneous. It is said that the instruction should have told the jury that the will must be "overpowered," or the injured party "bereft of the quality of mind essential to the making of a contract." We think, under the issues and the character of the duress complained of, the instruction is a fair presentation of the meaning of the word, and that no error was committed such as is complained of. "Duress," it is said, "exists when one, by the unlawful act of another, is induced to make a contract or perform some other act under circumstances which deprives him of the exercise of free will." *Hackley* v. *Headley*, 45 Mich. 569, 8 N. W. 511. It is obvious that, if the act is done contrary to the will and inclination of the injured party, it cannot be the exercise of his free will. His will is subjected to that of another, and he is compelled to yield and submit to an illegal exaction because of the dominant power. In *Parmentier* v. *Pater*, 13 Or. 121, 9 Pac. 59, it is said that to constitute duress by threats "it is sufficient that they do in fact compel the person threatened to do an act which otherwise he would not have done." Ordinarily it may be said duress is that degree of constraint or danger either actually inflicted or threatened and impending, sufficient to overcome the mind and will of a person of ordinary firmness. *Brown* v. *Pierce*, 7 Wall. 214, 19 L. ed. 136; *Baker* v. *Morton*, 12 Wall. 157, 20 L. ed. 264; *French* v. *Shoemaker*, 14 Wall. 322, 20 L. ed. 856; *United States* v. *Huckabee*, 16 Wall. 431, 21 L. ed. 464; 1 Chitty, Contr. 11th Am. ed. 269; 2 Greenl. Ev. §§ 301, 302; 1 Wharton, Cont. Pref. IV.; 2 Wharton, Ev. §§ 931, 1099; 1 Story, Eq. § 239; 2 Pom. Eq. Jur. § 950. The instruction comes fairly within the rule, and the exception thereto is not well taken.

It is also contended that the petition does not state facts sufficient to constitute a cause of action, and that the evidence will not support the verdict returned by the jury. These two questions may be considered together. The petition charges that the plaintiff was in great financial distress and in poor health, both in body and mind, and after the defendant had obtained a deed of the premises under the circumstances narrated, and as security for the debt owing by the plaintiff, who had reposed trust and confidence in the officers of the bank by giving to them a deed absolute on its face when only security was intended, such officers soon thereafter began to assume to be the absolute owner of the property, and to have the right of possession and control thereof, and began a systematic effort to dispossess the plaintiff and compel him to acknowledge the bank as the absolute owner, and that in the controversy as to the right of possession the defendant brought an injunction suit to restrain the plaintiff from holding possession of said premises or a part thereof, and denied any and all rights of the plaintiff in and to the premises; that the plaintiff was heavily in debt, without means to meet the same, save by a sale of the land, which he was endeavoring to effectuate; that in the spring of 1898 he obtained a purchaser for the real estate at an advantageous price, and thereupon endeavored to obtain an adjustment of the indebtedness due the defendant, and to have the same paid out of the purchase price to be obtained by the proposed sale of said real estate; that the defendant demanded several hundred dollars more than was due; denied that the plaintiff had any interest in the land and refused to consent to its sale or to relinquish its title to the property or join in a conveyance unless paid the exorbitant sum so demanded; that it was near springtime, when farming operations begin, and the purchaser threatened to withdraw his bid unless the sale should soon be consummated; that the defendant refused to make any statement of the items comprising the indebtedness it claimed to be due it, or to give any reason why such sum as demanded was due, and threatened to appeal the suit then pending to the court of last resort, if the judgment obtained in the trial court was not satisfactory, where it would probably remain undisposed of for several years, and in the meantime the plaintiff would be compelled to pay a high rate of interest on such indebtedness as well as the costs and expenses of litigation; that the plaintiff was unable to meet his indebtedness without resort to a sale of the property mortgaged, and that the sale could not be effectuated without a compliance with the demands of the defendant as to the payment of the sum it claimed to be due, and that thereupon the plaintiff, after the defendant had reduced its demand in a small amount from the total sum first claimed, involuntarily and by compulsion paid the same in order to effectuate a sale of the property and relieve himself from the financial distress he was then suffering;

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that the overpayment to recover which the suit was brought was paid under compulsion and duress, and not of plaintiff's free will. The evidence fairly substantiates the allegations of the petition. The duress complained of rests, we apprehend, in the unfortunate financial condition in which the plaintiff found himself, coupled with the control over the legal title to the land and apparent ownership thereof which the bank had acquired, and its power to prevent a voluntary disposal by the plaintiff to meet his just indebtedness without first obtaining the consent of the bank and complying with such demands as it might impose as a condition of releasing its interest and title to the property. The duress relied on as grounds of relief, if existing, consisted not so much in threats against the defendant or duress of his person as it did in a wrongful and unjust exercise of control and ownership of the property of the plaintiff, being the real estate to which it held title apparently in fee simple, and the right of disposal on any terms it saw fit to impose, or of withholding the land from sale altogether, until compelled to act by a final decree in a proper suit brought to try and determine the rights of the respective parties. The case is one of duress of the property of an individual, rather than duress of his person. The ancient doctrine of duress applied only to duress of the person, such as amounted to a reasonable apprehension of imminent danger to life, limb, or liberty, which was in law deemed sufficient to avoid a contract or enable the injured party to recover back money when so paid. The law, however, has progressed and gradually extended the doctrine so as to recognize duress of property as a species of moral duress which might equally with duress of the person constitute a defense to a contract induced thereby, or entitle a party to recover money paid under its influence. The rule is that when such pressure or constraint is brought to bear as will compel a man to go against his will, and takes away his free agency, destroying the power of refusing to comply with the unjust demand of another, this will constitute legal duress, regardless of manifestations or apprehension of physical force. It is held in *Joannin* v. *Ogilvie*, 49 Minn. 564, 16 L. R. A. 376, 52 N. W. 217. "There may be duress with respect to real property, as well as personal, so as to render a payment on account of it involuntary, so that the money [so paid] may be recovered back." In that case it appears a mechanic's lien was filed against property upon an unfounded claim which the owner paid under protest in order to clear the title of record so that he might consummate a loan on the property which he had negotiated in order to raise money to pay a prior overdue mortgage and other pressing debts, he having no other available means of raising the money. The payment under the circumstances was held to be in consequence of duress of property, and that an action would lie for its recovery. Says the author of the opinion: "He was so situated that he could neither go backward nor forward. He had practically no choice but to submit to plaintiffs' demand. Had it been goods and chattels which plaintiffs had withheld under like circumstances, there would be no doubt, under the doctrine in *Fargusson* v. *Winslow*, 34 Minn. 384, 25 N. W. 942, but that the payment would be held to have been made under duress. But, while filing the lien did not interfere with defendant's possession of the land, yet it as effectually deprived him of the use of it for the purposes for which he needed it as would withholding the possession of chattel property. It has been sometimes said that there can be no such thing as duress with respect to real property, so as to render a payment of money on account of it involuntary. But this is not sustained by either principle or authority. In view of the immovable character of real property, duress with respect to it is not likely to occur as often as with respect to goods and chattels. But the question in all cases is, Was the payment voluntary? And for the purpose of determining that question there is no difference whether the duress be of goods and chattels, or of real property, or of the person. *Frascr* v. *Pendlebury*, 31 L. J. C. P. N. S. 1; *Pemberton* v. *Williams*, 87 Ill. 15; *Close* v. *Phipps*, 7 Mann. & G. 586; *White* v. *Heylman*, 34 Pa. 142; *State ex rel. McCardy* v. *Nelson*, 41 Minn. 25, 4 L. R. A. 300, 42 N. W. 548." These remarks are very pertinent, and apply with equal force to the situation of the plaintiff in the case at bar. Another case, which seems apropos to the one at bar, was decided by the supreme court of Wisconsin in *Guetzkow Bros. Co.* v. *Breese*, 96 Wis. 591, 72 N. W. 45. In that case a lessor refused to join his lessee in executing proofs of loss after fire had destroyed the leased property and indorse drafts payable to them jointly, unless the lessee paid him a sum of money he did not owe. The condition of the lessee's business was such that he was compelled to have the insurance money without prolonged delay, and he thereupon paid the lessor his unlawful exaction. Afterwards the lessee brought suit to recover the money thus paid as having been paid under duress, recovered judgment, and the action was sustained.

The authorities are abundant to the effect that where goods or other property is in possession of one not the owner, who refuses to deliver such property to the owner unless the latter pays him a sum not rightfully due, and the owner in order to obtain possession of his property pays the unlawful exaction, a payment so made is in a legal sense under duress, and may be recovered back in a proper action; and especially is such the case where the wrongful detention is connected with circumstances of hardship or serious inconvenience to the owner. *Chase* v. *Dwinal*, 7 Me. 134, 20 Am. Dec. 352; *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Adams* v. *Schiffer*, 11 Colo. 15, 17 Pac. 21; *Chamberlain* v. *Reed*, 13 Me. 357, 29 Am. Dec. 506; *White* v. *Heylman*, 34 Pa. 142; *Crawford* v. *Cato*, 22 Ga. 594; *Central*

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Bank v. *Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Scholcy* v. *Mumford*, 60 N. Y. 498.

In a very early case (*Astley* v. *Reynolds*, 2 Strange, 915) the plaintiff pawned plate to the defendant as a pledge for the payment of a sum of money loaned. When desiring to redeem, the defendant demanded and was paid a large sum of money in excess of the amount loaned, with legal interest. Suit was brought to recover the surplus above legal interest. The court of the King's bench says: "We think, also, that this is a payment by compulsion. The plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not. We must take it he paid the money relying on his legal remedy to get it back."

In other cases it is said, in order to constitute duress, "there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." *Brumagim* v. *Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Radich* v. *Hutchins*, 95 U. S. 210, 24 L. ed. 409. In 6 Am. & Eng. Enc. Law, p. 84, with respect to the relations existing between mortgagees and mortgagors, the rule as to payment under duress is stated as follows: "If a mortgagee of land who is in possession for condition broken require that the mortgagor or his assignee pay more than is legally due in order to redeem, and it is paid accordingly for the purpose of preventing a foreclosure, it is such a compulsory payment as entitles the party who so pays to recover it back." In support of the text is cited *Cazenove* v. *Cutler*, 4 Met. 246; *Fraser* v. *Pendlebury*, 31 L. J. C. P. N. S. 1; *Bennett* v. *Healey*, 6 Minn. 240, Gil. 158; *Freeman* v. *Etter*, 21 Minn. 3; *McMurtrie* v. *Keenan*, 109 Mass. 185.

The evidence in the case at bar fairly supports the contention of the plaintiff that he was without redress or remedy, and was compelled to submit to the exactions of the defendant or lose a voluntary sale of his property at advantageous figures. It appears that he was utterly unable to meet his obligations save by a sale of the property to which defendant held the legal title, and that unless the sale was consummated at about the time the terms of sale were agreed upon he would not only lose the opportunity of selling to the prospective purchaser, but probably also to other buyers, because farming operations for the coming year were then due to begin, and arrangements for the year's work must be made accordingly. With the title in litigation, and with the threat of the defendant to keep it so for years to come, unless its terms were acceded to, and with the large indebtedness standing against the land, drawing interest from January preceding at the highest rate allowed by law, we can readily appreciate how the plaintiff's mind was overpowered, and the payment exacted made in order to meet pressing demands, and save, if possible, the little remaining equity which he held in the property, as well as to prevent payment of costs incidental to long-continued litigation, accumulating interest, and impending deficiency judgments. The evidence, we are satisfied under the principles announced and the authorities cited, was sufficient to justify the jury in finding that the payment was, under the circumstances, involuntary and under duress.

We are of the opinion that the compromise and settlement pleaded as a defense was but a part of the transaction constituting duress on the part of the defendant; that the same facts which would justify a recovery of the overpayment as being made under duress must for the same reason annul and render valueless the alleged settlement as a compromise of honest differences. The defendant had undertaken by an injunction suit to restrain the plaintiff from enjoying the use and possession of the real estate in controversy. Plaintiff had answered in that action, pleading that the defendant's conveyance, through which it claimed through an absolute deed in form, was in fact but a mortgage to secure an indebtedness owing by him to the bank, and asked to have an accounting of the amount due, and that the deed be declared a mortgage securing the same in conformity with the facts and intention of the parties. This suit was pending at the time of the alleged settlement. It is to be borne in mind that the case is entirely different from one in which the indebtedness is fixed and certain, and evidenced by written instruments secured by a mortgage in form as well as in fact. In the case at bar the plaintiff was completely at the mercy of the defendant. He could make no disposition of his property until his differences with the defendant were adjusted in some form. He could not dispose of his equity of redemption, since this interest and right was denied, and but few care to buy a lawsuit with the purchase of property. He could not allow the matter to run the ordinary course of litigation without losing all his equity in the land and facing a probable deficiency judgment. He could not pay costs of litigation and the increased interest of the indebtedness for any length of time without the whole property being swallowed up. He was met with the threat that, unless the differences were settled on the terms offered by the bank, the litigation would be continued, and, in the event of an unsatisfactory judgment in the trial court, the cause would be appealed there, to take its course with the accumulated litigation then pending in the appellate court awaiting final disposition. This meant a delay of years, as the plaintiff well knew. He must have been cognizant of the fact, as all well-informed men are, that should the matter be litigated, and the property finally exposed to forced sale to satisfy the indebtedness admittedly existing against

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it, the sum thus realized would not be at all as favorable to him as would be the result in the event of a voluntary sale and a voluntary purchaser. It was under these circumstances, and because an immediate sale of the property was necessary to immediately relieve him from his financial distress, that the agreement was executed by his son as attorney in fact, and afterwards ratified and acquiesced in by the plaintiff in finally consummating the sale of the property, and paying out of the proceeds thereof the demands of the defendant. The overpayment was an unlawful and unjust demand, and this is practically conceded. If the defendant had only a mortgage on the land, as has been held, then it could not justly require of the plaintiff the payment of more than its indebtedness, with costs and lawfully accrued interest. But it was not satisfied to accept what was justly due, and, because of the peculiar situation of the parties, the plaintiff acceded to its demands, agreed to the terms of settlement evidenced by the agreement pleaded as a settlement and compromise, and paid the money demanded, and which it is alleged was an overpayment and made under compulsion. Duress, like fraud, vitiates all contracts, and the contract of settlement was the result of duress, —as much so as the overpayment made thereunder which it is sought to recover. The contract simply provides that, upon the payment of all costs in the injunction proceeding, and the payment to the defendant of the amount it demanded after reducing the original sum claimed, $125, and a certain judgment obtained against the plaintiff, that it would quitclaim its interest in the property to the plaintiff, thereby permitting him to consummate a sale thereof. The jury found under the instructions given that this contract, as well as the payment of the excess demanded by defendant according to its terms, was the result of duress and compulsion, and the evidence relating to the matter is, we think, sufficient to sustain the finding. Therefore the defense thus interposed to the plaintiff's cause of action must fail.

Some complaint is made because of the manner of stating the issues in the court's instructions to the jury, but on examination we are satisfied that the statement of the substance of the pleadings in the instructions was fair to both parties, and that no error was committed in that regard.

Several other alleged errors are argued which are found to be without merit. The instructions appear to have fairly submitted all issues of fact to the jury, were without prejudice to the losing party, and the verdict, we are of the opinion, should be permitted to stand. The petition states a cause of action, and the verdict is supported by the evidence.

The judgment is accordingly affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Charles R. SMITH
v.
ERIE RAILROAD COMPANY, *Plff. in Err.*

(67 N. J. L. 636.)

*1. **As between a railroad company and such of its employees** as are required, in the performance of their duties, to travel upon its trains, the company is bound to exercise reasonable care to so construct and maintain the track and roadbed as to make them reasonably safe for such travel.

2. **For the negligence of the trackmen charged with the inspection** and repair of the tracks and roadbed, where such negligence causes injury to a trainman traveling thereon, the railroad company is responsible.

3. **The master's duty to exercise reasonable care in furnishing a place for the work,** and appliances for the work, that shall be reasonably safe for those engaged in the general employment, is not fully discharged by the employment of competent agents for its performance. Those servants to whom the duty is delegated are not fellow servants enguged in a common employment with those for whose reasonable safety the duty is imposed upon the master.

4. **A servant has the right to take it for granted that his master has performed his duty** by exercising reasonable care for the servant's safety in the respects above indicated, until the servant is warned or notified of a danger arising from the master's negligence, or until the danger becomes so obvious that a reasonably prudent servant under the circumstances, would observe it.

5. **The risk of injury from a defect in a railroad track or roadbed** negligently permitted to remain in bad repair is not among the ordinary and natural risks that are assumed by a trainman, and is not assumed unless it becomes known to him, or is so obvious that by the exercise of ordinary care on his part it would be observed.

*Headnotes by PITNEY, J.

(June 16, 1902.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an

NOTE.—As to what persons are deemed to be in the same common employment, see *note* to Sofield v. Guggenheim Smelting Co. (N. J. L.) 50 L. R. A. 417, especially cases on pages 432 *et seq.* as to servants handling trains and servants employed in the repair or construction of the permanent way.

As to liability for injury to employee through defect in railroad roadbed, see, in this series, Meloy v. Chicago & N. W. R. Co. (Iowa) 4 L. R. A. 287, and Minty v. Union P. R. Co. (Idaho) 4 L. R. A. 409.

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action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Cortlandt Parker** and **Cortlandt Parker, Jr.,** for plaintiff in error:

While, as to passengers, it might be contended that the accident was evidence of negligence, yet this rule does not apply in the case of employees.

Baldwin v. *Atlantic City R. Co.* 64 N. J. L. 232, 45 Atl. 810; *Fenderson* v. *Atlantic City R. Co.* 56 N. J. L. 708, 31 Atl. 767; *Brownfield* v. *Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038; Elliott, Railroads, § 1308.

The master "must exercise reasonable care and skill in furnishing suitable machinery and appliances, . . . and in keeping such machinery in repair."

Nord Deutscher Lloyd S. S. Co. v. *Ingebregsten,* 57 N. J. L. 400, 31 Atl. 619; *Ats* v. *Newark Lime & Cement Mfg. Co.* 59 N. J. L. 41, 34 Atl. 980; *Baldwin* v. *Atlantic City R. Co.* 64 N. J. L. 232, 45 Atl. 810.

If the plaintiff was guilty of any negligence contributing to the injury for which the recovery is sought, he cannot recover.

Drake v. *Mount,* 33 N. J. L. 441.

If the plaintiff's negligence, proximately, —that is, directly,—contributed to the injury, it will disentitle him to a recovery. A court of law cannot undertake to apportion damages arising from an injury caused by the co-operating negligence of both parties.

Menger v. *Laur,* 55 N. J. L. 205, 20 L. R. A. 61, 26 Atl. 180.

Common employment, is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee that, through the negligence of fellow servants, it may probably expose them to injury.

McAndrews v. *Burns,* 39 N. J. L. 117; *Rogers Locomotive & Mach. Works* v. *Hand,* 50 N. J. L. 464, 14 Atl. 766; *Evan* v. *Lippincott,* 57 N. J. L. 192, 54 Am. Rep. 148.

Messrs. **W. Bradford Smith** and **Robert H. McCarter,** for defendant in error:

The servants of the defendant intrusted with the duty of inspecting and repairing its tracks, and having no part in the running of its trains, and the plaintiff, a baggage master, whose duties were strictly confined to the running of its trains, and who had no part in the inspection and repair of its tracks, are not fellow servants engaged in a common employment.

Nord Deutscher Lloyd S. S. Co. v. *Ingebregsten,* 57 N. J. L. 400, 31 Atl. 619; *Van Steenburgh* v. *Thornton,* 58 N. J. L. 160, 33 Atl. 380; *Collyer* v. *Pennsylvania R. Co.* 49 N. J. L. 59, 6 Atl. 437; *Maher* v. *Thropp,* 59 N. J. L. 186, 35 Atl. 1057; *Belleville Stone Co.* v. *Mooney,* 60 N. J. L. 323, 38 Atl. 835; *Gardner* v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern P. R. Co.* v. *Herbert,* 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Baltimore & O. R. Co.* v. *Baugh,* 149 U. S. 369, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Snow* v. *Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720.

Pitney, J., delivered the opinion of the court:

At the time of the occurrence which gave rise to this action, plaintiff was in the employ of the defendant in the capacity of baggage master and acting brakeman, and in the performance of his duties was traveling upon one of defendant's passenger cars over the Greenwood Lake Branch of its railroad. This car, together with a locomotive and tender, made up the train. The occurrence took place on the evening of Saturday, January 14, 1899, shortly after 7 o'clock. The train was running at some speed down a grade of about 60 feet to the mile, when, in rounding a curve, the passenger car became derailed, and, after bumping for some distance over the crossties, broke away from the tender, and was thrown down a steep embankment and demolished. The plaintiff sustained serious personal injuries, to recover damages for which he brought this action. The verdict and judgment in the court below having gone in his favor, the defendant now asks for a reversal because of alleged errors committed by the trial judge.

Plaintiff's insistment at the trial was that the derailment was occasioned by the nonrepair of the track. Evidence was introduced tending to show that the inspection and repairs of this part of the railroad were customarily done by a section gang of which one Duffy was foreman, and Sloat and two others were members; that during this particular week the section gang worked only on the alternate days; that at least as early as the afternoon of Friday, the day before the accident, a noticeable depression, called by the witnesses a "low joint" or "low spot," was found in the outer rail of the track at or near the curve in question; that this depression was observable by a person walking the track, and was sufficient to cause a decided lurch in a car passing over it; that on Friday afternoon Sloat reported this low joint to Duffy, yet the section gang was laid off duty from Friday night until Monday morning. Duffy, the track foreman, was called as a witness by the plaintiff, and testified that he was at work on Saturday, the 14th, but that his men were not, they having been laid off by him on the orders of Mr. Lynch, the supervisor of that division; that none of the trackmen were on duty on the 14th except Duffy himself; and that he walked over the section twice that day, but did nothing towards the repair of the low point in question; it being conceded that he could not repair it without help.

The plaintiff also produced the printed book of rules of defendant company, from which he introduced in evidence, without objection, the following rules:

"Supervisors. The supervisor has charge of the repairmen and other laborers employed on his subdivision, and must see that

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they perform their duties properly, and discipline them for neglect of duty. It is the supervisor's duty to keep the track, roadbed, bridges, culverts, buildings, and other property of the company on his subdivision in repair. He must pass over his subdivision daily; observe the condition of the track and bridges; see that the proper slopes and ditches are preserved, . . . that ties are of a standard size, evenly spaced, and properly tamped, and that the rails are in proper surface and securely fastened; . . . and do everything necessary to secure the safety of the road."

"Track Foremen. Track foremen report to, and receive their instructions from, the supervisor. They have charge of repairs on their respective sections, and are responsible for the proper inspection and safety of the tracks, bridges, and culverts. They must see that the track is in good line and surface, and properly spiked; that it is in true and uniform gauge; that the cross-ties are properly spaced, lined, and tamped; that the roadbed is in good order," etc.

Upon this evidence, and other to the same effect, the plaintiff claimed that the proximate cause of the accident was the bad condition of the track; that the defect was such that reasonable vigilance and proper inspection would have discovered it, and inspection would have discovered it, and that in fact it was discovered by the trackmen in ample time to enable them to mend it before the accident, so that there was negligence of the trackmen, for which the defendant was responsible to the plaintiff. Defendant's insistment was that the low spot in the track was not the cause of the derailment of the car, and that the disaster was the result of the reckless speed of the train, for which the locomotive engineer, a fellow servant of the plaintiff, was responsible. With respect to the speed of the train the testimony was quite variant. There was evidence from which the jury would have been at liberty to believe that it was not exceeding 20 miles an hour, and other evidence from which they might believe its speed was far in excess of 30 miles per hour. It was claimed by the defendant that the low spot was 60 feet or more above the point where the wheels of the passenger car left the track; it being argued that this distance, of itself, demonstrated that the low spot did not cause the derailment. It was further insisted that in a derailment resulting from such a low spot the wheels would jump over the outer rail, whereas, in this case several lengths of the outer rail rolled over under pressure of the wheels, thereby causing a spreading of the track, and permitting the wheels to settle down upon the cross-ties. As corroborating the defendant's theory, and negativing the theory which attributed the derailment to the low joint, it was pointed out that the locomotive remained on the track, and that the tender remained attached to the locomotive, although the rear wheels of the tender left the track. It is also claimed that after the passenger car became derailed it remained attached to the tender, and that its wheels bumped along the cross-ties for a distance of over 200 feet before the car broke from the tender and pitched down the bank. From all this it is argued that the occurrence resulted, not from the car leaving the track by reason of roughness, unevenness, or any low joint, but by the locomotive and cars remaining on the track, clinging to it and destroying it. But the evidence tends to show that the low joint indicated that the track was being heaved by the frost, and so it cannot be said to be a necessary conclusion that the weakness of the track was confined to the immediate vicinity of the low joint. Nor can it be said that a derailment which occurs by the overturning of the rails, caused by the weight of a train consisting of a locomotive, a tender, and a single car driven at a speed less than that which would cause them to jump the track, necessarily excludes the notion that the rails spread by reason of the nonrepair of the tracks.

There were motions for nonsuit and for directions of a verdict for the defendant. The refusal of these motions raises the questions on which the principal stress was laid in the argument before this court. The motions were based in part on the ground "that the accident was due to the negligence of a fellow servant of the plaintiff." As we have already seen, there was evidence from which the jury had a right to infer that the occurrence was due to negligent nonrepair of the track, and not to excessive speed of the train. Therefore, the question is raised whether the employees whose duty it was to inspect and repair the track were fellow servants of the plaintiff, engaged in a common employment with him, within the meaning of the rule that absolves the master from liability to a servant for the consequences of a fellow servant's negligence. It is entirely clear that as between a railroad company and such of its employees as are required, in the performance of their duties, to travel upon its trains, the company is bound to exercise reasonable care to so construct and maintain the tracks and roadbed as to make them reasonably safe for the purposes of such travel. So far as the trainmen are concerned, the tracks and roadbed come within the familiar rule that imposes on the master the duty of taking ordinary care that the places in which, and the appliances with which, the servant is required to work shall be reasonably safe for the purpose. The cases of *Harrison* v. *Central R. Co.* 31 N. J. L. 293, and *Paulmier* v. *Erie R. Co.* 34 N. J. L. 151, are instances in which the supreme court asserted the master's liability where the supports of the track were insecure, and the master had notice thereof. The recent decisions of this court furnish numerous illustrations of the general principle. Among them are *Mills* v. *Maine Ice Co.* 51 N. J. L. 342, 17 Atl. 695; *Nord Deutscher Lloyd S. S. Co.* v. *Ingebregsten*, 57 N. J. L. 400, 31 Atl. 619; *Western U. Teleg. Co.* v. *McMullen*, 58 N. J. L. 155, 32

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L. R. A. 351, 33 Atl. 384; *Van Steenburgh* v. *Thornton*, 58 N. J. L. 160, 33 Atl. 380; *Day* v. *Donohue*, 62 N. J. L. 380, 41 Atl. 934; *Cole* v. *Warren Mfg. Co.* 63 N. J. L. 626, 44 Atl. 647. In each of these cases the employer was held liable by reason of some neglect of the duty in question.

The defendant's insistment involves the proposition that the men in charge of inspection and repair of the track were fellow servants of the plaintiff, so that for the consequences of their negligence he cannot recover against the common employer. This contention cannot prevail. It is true that in *Harrison* v. *Central R. Co.*, where the imputed negligence was the failure to repair a railroad bridge known to be unsafe for want of repair, in consequence of which the bridge broke down under the weight of a train, thereby causing the death of a brakeman upon the train, the late Chief Justice Beasley said, in substance, that if the company had in fact directed its agents, possessed of competent skill, to examine at stated periods the bridge in question, and they had reported it secure, the plaintiff could not recover, even if the agents making such report had acted carelessly in the discharge of their duties, or falsely reported their conclusions. But this remark was confessedly based upon a supposed state of facts precisely opposite to that presented by the case, nor was the remark necessary for the decision. This *dictum* has sometimes been treated as authority for the proposition that a master may fully discharge his duty with respect to providing a safe place of work and safe appliances for the work by employing competent agents to make inspections and repairs. But since the decision by this court in the case of *Nord Deutscher Lloyd S. S. Co.* v. *Ingebregsten*, 57 N. J. L. 400, 31 Atl. 619, it must be taken as established that this duty may not be delegated by the master, except at his own risk; that those who are employed to make inspections and repairs for the purpose of keeping in proper repair the place of work and the tools and appliances of the work are not fellow servants engaged in a common employment with those employees for whose reasonable safety the precautions are required. In that case Mr. Justice Dixon said: "The master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals. . . . So far the authorities are at one. Almost as unanimous are they in the proposition that, if the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault."

It is now fully recognized in this state that the test for determining, in a given case, whether the master is liable to one servant for the negligence of another servant, is in the answer to the inquiry whether the negligent servant was in the performance of work which the law imposes as a positive duty upon the master, by way of preparation for the general employment, or whether, on the other hand, such negligent servant was at the time in the performance of some duty incidental to the general employment itself. In the former case the master is liable; in the latter case, not. It is the master's duty to exercise reasonable care in furnishing those things which go to make up the plant and appliances, so as to have them at the outset reasonably safe for the work of the servants who are engaged in the general employment, and, further, to exercise reasonable care, by means of inspections and repairs, when needed, to keep the plant and appliances reasonably safe. These duties the master cannot avoid by employing others for their performance. If the negligence of those who are charged with such performance results in injury to one of those servants for whose safety the precautions are required, the master is liable, unless by reason of the obvious character of the consequent risk, or otherwise, it is assumed by the injured employee, or unless the injury is brought about by contributory negligence. Recent cases clearly recognize the distinction referred to. In *Maher* v. *Thropp*, 59 N. J. L. 186, 35 Atl. 1057, Mr. Justice Van Syckel, speaking for this court, said: "The master was charged with the duty to furnish to the plaintiff proper implements with which to do the work in which he engaged. If he intrusted the discharge of that obligation to the foreman, he is undoubtedly responsible for the failure of the foreman to exercise due care in that respect. The injury to the plaintiff is in no way chargeable to the failure of the master to furnish proper tools. On the contrary, the accident is attributable wholly to the fact that the plaintiff, under the advice of the foreman, laid aside the safe tool, and used in its place a chisel and a pair of tongs. In doing that the foreman did not act as the vice principal, standing in the place of the master, but he acted as a fellow servant, performing, with the assistance of the plaintiff, the work in which both were engaged, and for which the master had provided the necessary implements with due care." In *McLaughlin* v. *Camden Iron Works*, 60 N. J. L. 557, 38 Atl. 677, Mr. Justice Collins said: "Where appliances for work are needed, the duty is on the master to use reasonable care in their selection, and he cannot escape it by delegation. But carelessness in their use, or failure to use them on the part of his servant, whereby injury is received by a fellow servant in the same common employment, is not chargeable to the master, no matter what may be the grade or authority of the servant." In *Curley* v. *Hoff*, 62 N. J. L. 758, 42 Atl. 731, Mr. Justice Collins said, at page 762, 62 N. J. L., and page 732, 42 Atl.: "While delegation to others will not relieve the master

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from the consequences of negligence in the performance of what the law makes the master's duty, it will not charge upon the master the consequences of the negligence of his servants toward each other. The risk of that negligence, for reasons of public policy, the law places on the servants. The test always must be whether the negligent act or omission was in discharge of the master's or the servant's duty." In *Cole* v. *Warren Mfg. Co.* 63 N. J. L. 626, 44 Atl. 647, the same distinction was taken.

It is plain, therefore, that, so far as the motions to nonsuit and for direction of a verdict were based upon the idea that the men charged with inspection and repair of the track were fellow servants of the plaintiff, the motions were properly refused. This disposes at the same time of the principal remaining exceptions, they being intended to raise the same question upon the instructions of the trial court to the jury.

The motion to nonsuit and to direct a verdict were based on the further ground that the risk of derailment by reason of the low point in question was assumed by the plaintiff, because he had passed over the same place many times before while traveling in defendant's trains, the last trip being about an hour before the accident. The low spot caused a sudden jolt or lurch, that was readily observed by passengers in the train. It is insisted, therefore, that the plaintiff assumed the risk. *Regan* v. *Palo*, 62 N. J. L. 30, 41 Atl. 364; *Atha & I. Co.* v. *Costello*, 63 N. J. L. 27, 42 Atl. 766. But the risk of injury from a defect in a track or roadbed negligently permitted to remain in bad repair is not one of the ordinary and natural risks of the employment of a trainman. It was, therefore, not assumed by the plaintiff unless it was known to him, or was so obvious that by the exercise of ordinary care on his part it would have been known. A servant has the right to take it for granted that his master has performed his duty by the exercise of that reasonable care for the servant's safety which the law requires, until the servant is warned or notified of danger, or until the danger becomes so obvious that a reasonably prudent servant, under the circumstances, would observe it. But plainly, it was far from obvious to one traveling upon the train that the roughness of the track indicated a weakness sufficient to cause derailment. The trial judge, therefore, could not say, as a matter of law, that the plaintiff assumed the risk of the injury that he received; and so it was, at best, a question for the jury to determine whether the special danger was known to the plaintiff, or was so obvious that he ought to have known of it.

One of the assignments of error is directed to the refusal to charge, as requested by the defendant, that, "if the plaintiff was guilty of any negligence contributing to the injury for which recovery is sought, he cannot recover." The court charged, in substance, that in order to bar the plaintiff the defendant must show "that some negligence of the plaintiff contributed to the accident in such a way that, if the plaintiff had not been negligent, the accident would not have happened." The criticism is upon the use of the word "accident" instead of the word "injury," which was included in the request. The negligence imputed to the plaintiff was the failure to couple up the air brakes when the train was made up. This, admittedly, was his duty. The argument is that the "accident" refers to the derailment, while the "injury"—that is, the wounding of the plaintiff—occurred by the fall of the car to the bottom of the embankment. The answer is, that with respect to causation they are practically indistinguishable. If the derailment was not caused in whole or in part by the air brakes being uncoupled, neither was the fall of the car from the bank so caused. It is true, the evidence indicates that the car was dragged along the ties for 200 feet or more after leaving the rails, and that then the coupling between the tender and the car broke, leaving the car to pitch down the embankment. But it is not perceived that the use of air brakes after the car left the track could have averted the catastrophe. For the purposes of this case, it was proper enough to treat "accident" and "injury" as synonymous.

The other assignments of error have been examined, and found to be without support. The trial judge in his charge to the jury did no injustice to the defendant. His rulings upon questions of evidence, so far as complained of, were correct.

The judgment should be affirmed, with costs.

NEW YORK COURT OF APPEALS.

Lena E. HUNT, *Appt.*,
v.
Joseph T. HUNT *et al.*, Exrs., etc., of Wilson G. Hunt, Deceased, *et al.*, *Respts.*

(171 N. Y. 396.)

Marriage does not take a parol contract to convey property in consideration thereof out of the provisions of a statute making void every agreement made upon consideration of marriage except mutual promises to marry, unless they are in writing, so that the conveyance can be enforced in equity.

(June 10, 1902.)

NOTE.—For a case in this series somewhat similar to the above as to enforceability in equity of a verbal antenuptial contract where the contract was one which a statute made valid only if in writing, see Deshon v. Wood (Mass.) 1 L. R. A. 518, with *note* thereto as to antenuptial agreements generally. See also McNutt v. McNutt (Ind.) 2 L. R. A. 372, and *note;* and Richardson v. Richardson (Ill.) 26 L. R. A. 305.

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APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Ontario County in favor of defendants in an action brought to enforce specific performance of an antenuptial contract. *Affirmed.*

Statement by **Werner**, J.:

The plaintiff is the widow of Wilson G. Hunt, deceased. She brought this action to obtain specific performance of an antenuptial contract. Said Wilson G. Hunt died on October 14, 1897, and during the pendency of this action. The defendants, who were substituted in his place, are his heirs at law and next of kin. By his last will and testament, dated and executed on August 30, 1897, said Hunt bequeathed substantially all of his estate, consisting of both real and personal property, to the present defendants. Proceedings for the probate of said will were pending at the time of the decision of the trial court herein.

Mr. **Edwin Hicks**, for appellant:

The language of the statute indicates that it was especially designed to apply to cases of executory contracts, when neither party had done anything toward its consummation, or when there had been no part performance; no matter what the subject of the agreement was.

Lobdell v. *Lobdell*, 36 N. Y. 327; *Godine* v. *Kidd*, 64 Hun, 585, 19 N. Y. Supp. 335; *Pursell* v. *Stryker*, 41 N. Y. 480; *Shakespeare* v. *Markham*, 10 Hun, 311; *Healy* v. *Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927, 166 N. Y. 624, 60 N. E. 1112; *Winne* v. *Winne*, 166 N. Y. 263, 59 N. E. 832; *Chase* v. *Peck*, 21 N. Y. 581; *Husted* v. *Ingraham*, 75 N. Y. 251.

Antenuptial contracts by which it is attempted to regulate and control the interests which each of the parties to the marriage shall take in the property of the other, during coverture or after death, like dower, are favored by the courts, and will be enforced in equity, according to the intention of the parties, whenever the contingency provided by the contract arises.

Johnston v. *Spicer*, 107 N. Y. 185, 13 N. E. 753; Pom. Spec. Perf. p. 203.

The contract was made upon a good, sufficient, and valuable consideration, and should be enforced in equity.

Piper v. *Hoard*, 107 N. Y. 73, 13 N. E. 626; Kent, Com. 7th ed. p. 511; *Sterry* v. *Arden*, 1 Johns. Ch. 260; *Bradish* v. *Gibbs*, 3 Johns. Ch. 523; *Peck* v. *Vandermark*, 33 Hun, 214; *Wright* v. *Wright*, 59 Barb. 505.

Parties who have made a contract which is void under the statute of frauds may afterwards meet and by such an act as the statute requires validate and make effectual that which before was a void or imperfect contract.

Webster v. *Zielly*, 52 Barb. 483.

A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.

Hamer v. *Sidway*, 124 N. Y. 538, 12 L. R. A. 463, 27 N. E. 256; Anson, Contr. 63; Parsons, Contr. 444; 2 Kent, Com. 12th ed. p. 465; Pollock, Contr. p. 166; *De Barante* v. *Gott*, 6 Barb. 492.

A voluntary settlement made after marriage, though not good against prior creditors, is good between the parties.

Threewits v. *Threewits*, 4 Desauss. Eq. 560; *Liles* v. *Fleming*, 16 N. C. (1 Dev. Eq.) 185; *Cruger* v. *Cruger*, 5 Barb. 225; *Wickes* v. *Clarke*, 8 Paige, 172; *Sterry* v. *Arden*, 1 Johns. Ch. 261; *Lawton* v. *Levy*, 2 Edw. Ch. 197; *Bunn* v. *Winthrop*, 1 Johns. Ch. 329; *Magniac* v. *Thompson*, 7 Pet. 348, 8 L. ed. 709; *Verplank* v. *Sterry*, 12 Johns. 536, 7 Am. Dec. 348; Bump, Fraud. Conv. 290; *Prewit* v. *Wilson*, 103 U. S. 22, 26 L. ed. 360; Bishop, Married Women, §§ 775, 776; *Freeman* v. *Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Durham* v. *Taylor*, 29 Ga. 166.

The will having been made and published, and other parts of the agreement performed, it was in fulfilment of the promise, and was effective.

Sprague v. *Blake*, 20 Wend. 61; *McKnight* v. *Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370; *Re Gloucester*, 32 N. Y. S. R. 901, 11 N. Y. Supp. 899.

The agreement was fully performed. Hunt waived the statute of frauds, and it cannot now be invoked by his representatives.

Wood v. *Rabe*, 96 N. Y. 422, 48 Am. Rep. 640; Pom. Spec. Perf. 386, 387; Pom. Eq. Jur. 393; Story, Eq. Jur. § 64*g*; *Burch* v. *Newberry*, 1 Barb. 649; *National Bank of Deposit* v. *Rogers*, 166 N. Y. 380, 59 N. E. 922; *Brown* v. *Crabb*, 156 N. Y. 447, 51 N. E. 306.

Defendants' testator could waive the statute of frauds.

Foley v. *Royal Arcanum*, 151 N. Y. 196, 45 N. E. 456; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Re New York, L. & W. R. Co.* 98 N. Y. 447; *Re Cooper*, 93 N. Y. 507; *Embury* v. *Conner*, 3 N. Y. 511, 53 Am. Dec. 325.

The statute once waived cannot be subsequently invoked.

New York v. *Manhattan R. Co.* 143 N. Y. 1, 37 N. E. 494; *Sentenis* v. *Ladew*, 140 N. Y. 463, 35 N. E. 650; *Crane* v. *Powell*, 139 N. Y. 379, 34 N. E. 911; *Hamer* v. *Sidway*, 124 N. Y. 538, 12 L. R. A. 463, 27 N. E. 256.

Plaintiff having fully performed the contract on her part by the marriage, her change of residence, leaving her home, etc., and Hunt having partly performed the contract on his part, by the execution of his will, the delivery of a part of his property, these constitute such acts of part performance as take the case out of the operation of the statute.

Pom. Contr. 2d ed. § 104; Browne, Stat. Fr. § 446 *a*, *b*; 1 Pom. Eq. Jur. p. 86; *Winne* v. *Winne*, 166 N. Y. 263, 59 N. E. 832; *Cooley* v. *Lobdell*, 153 N. Y. 596, 47 N. E. 783; *Mentz* v. *Newcitter*, 122 N. Y. 491, 11 L.

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R. A. 97, 25 N. E. 1044; *Lloyd* v. *Fulton*, 91 U. S. 479, 23 L. ed. 363; *Brantingham* v. *Huff*, 43 App. Div. 414, 60 N. Y. Supp. 157; *Hope* v. *Balen*, 58 N. Y. 380; *Hutchins* v. *Hebbard*, 34 N. Y. 24; *Chapin* v. *Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Juilliard* v. *Chaffee*, 92 N. Y. 529; Schouler, Wills, § 454; 3 Parsons. Contr. 7th ed. §§ 406, 407; Waterman, Spec. Perf. § 41; *Bolman* v. *Overall*, 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624; *Stephens* v. *Reynolds*, 6 N. Y. 454.

The will made by Hunt in pursuance of the contract is irrevocable.

Edson v. *Parsons*, 85 Hun, 263, 32 N. Y. Supp. 1036; *Johnson* v. *Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Rivers* v. *Rivers*, 3 Desauss. Eq. 195, 4 Am. Dec. 609; *Parsell* v. *Stryker*, 41 N. Y. 480; *Lowe* v. *Bryant*, 30 Ga. 528, 76 Am. Dec. 673; *Spearman* v. *Wilson*, 44 Ga. 473; *Bolman* v. *Overall*, 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624; *Shakespeare* v. *Markham*, 10 Hun, 322; *Rhodes* v. *Rhodes*, 3 Sandf. Ch. 279; *Frisby* v. *Parkhurst*, 29 Md. 58, 96 Am. Dec. 503; *Wright* v. *Tinsley*, 30 Mo. 389; *Colby* v. *Colby*, 81 Hun, 221, 30 N. Y. Supp. 677.

The agreement of the defendant to give by his will his property to the plaintiff, having, as it did, the support of an executed consideration, was effectual so far as relates to the estate which he may leave at his death; and the execution of this agreement may be enforced by way of specific performance, or otherwise, if he fails to leave his will to that effect.

Johannes v. *Martin*, 22 App. Div. 561, 48 N. Y. Supp. 102; *Johnson* v. *Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Edson* v. *Parsons*, 85 Hun, 263, 32 N. Y. Supp. 1036; *Sherman* v. *Scott*, 27 Hun, 331; *Ryan* v. *Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Murphy* v. *Whitney*, 69 Hun, 573, 23 N. Y. Supp. 1134; *Heath* v. *Heath*, 18 Misc. 521, 42 N. Y. Supp. 1087; *Willetts* v. *Sun Mut. Ins. Co.* 45 N. Y. 45, 6 Am. Rep. 31; *Newman* v. *Nellis*, 97 N. Y. 285; *Durham* v. *Taylor*, 29 Ga. 166; *Malins* v. *Brown*, 4 N. Y. 403; *Freeman* v. *Freeman*, 51 Barb. 306; *Cooper* v. *Monroe*, 77 Hun, 1, 28 N. Y. Supp. 222; *Gates* v. *Gates*, 34 App. Div. 608, 54 N. Y. Supp. 454; *Dunckel* v. *Dunckel*, 141 N. Y. 427, 36 N. E. 405; *Canda* v. *Totten*, 157 N. Y. 281, 51 N. E. 989.

Equity will not allow the defendants to invoke the statute of frauds to aid them in the perpetration of a fraud.

1 Pom. Eq. Jur. 472, § 430; *McCormick* v. *Crogan*, L. R. 4 H. L. 82; *Wood* v. *Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Colby* v. *Colby*, 81 Hun, 221, 30 N. Y. Supp. 677; *Durham* v. *Taylor*, 29 Ga. 167; *Lowe* v. *Bryant*, 30 Ga. 528, 76 Am. Dec. 673; *Ryan* v. *Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Bond* v. *Hopkins*, 1 Sch. & Lef. 433; *Miller* v. *Ball*, 64 N. Y. 286; *Lowry* v. *Tew*, 3 Barb. Ch. 407; *Rhodes* v. *Rhodes*, 3 Sandf. Ch. 279; *Murphy* v. *Whitney*, 140 N. Y. 541, 24 L. R. A. 123, 35 N. E. 930; *Richmond* v. *Foote*, 3 Lans. 244; *Johnson* v. *Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Dygert* v. *Remerschnider*, 32 N. Y. 642; 59 L. R. A.

Pawling v. *Pawling*, 86 Hun, 502, 33 N. Y. Supp. 780; *Cooper* v. *Monroe*, 77 Hun, 4, 28 N. Y. Supp. 222; *Mutual L. Ins. Co.* v. *Holloday*, 13 Abb. N. C. 16.

Mr. **William S. Moore**, for respondents:

The marriage of the parties was not such an act of part performance of the alleged antenuptial parol agreement as to take the same out of the statute of frauds, and a court of equity will not enforce such a contract.

Brown v. *Conger*, 8 Hun, 625; *Lamb* v. *Lamb*, 18 App. Div. 250, 46 N. Y. Supp. 219; *Ennis* v. *Ennis*, 48 Hun, 11; *Whyte* v. *Denike*, 53 App. Div. 320, 65 N. Y. Supp. 577; *Dygert* v. *Remerschnider*, 32 N. Y. 629; *Reade* v. *Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520; *Borst* v. *Corey*, 16 Barb. 136; *Re Willoughby*, 11 Paige, 257; *Dung* v. *Parker*, 52 N. Y. 494; *Levy* v. *Brush*, 45 N. Y. 589; *Wheeler* v. *Reynolds*, 66 N. Y. 227; *Cagger* v. *Lansing*, 43 N. Y. 550; *Lathrop* v. *Hoyt*, 7 Barb. 59; *Bauman* v. *Holzhausen*, 26 Hun, 505; *Shindler* v. *Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Miller* v. *Ball*, 64 N. Y. 286; *Caton* v. *Caton*, L. R. 1 Ch. 137; *Taylor* v. *Beech*, 1 Ves. Sr. 297; *Warden* v. *Jones*, 23 Beav. 497; Pom. Contr. 2d ed. p. 158, § 111; Tiffany, Personal & Dom. Rel. p. 160; Kelly, Contracts of Married Women, p. 3; 8 Am. & Eng. Enc. Law. p. 685; *Hunt* v. *Hunt*, 55 App. Div. 430, 66 N. Y. Supp. 957; *Bradley* v. *Saddler*, 54 Ga. 681.

The statute of frauds has set its seal of condemnation upon marriage as a consideration when applied to antenuptial agreements not reduced to writing.

Reade v. *Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520; *Dygert* v. *Remerschnider*, 32 N. Y. 630; *Whyte* v. *Denike*, 53 App. Div. 320, 65 N. Y. Supp. 577; *Borst* v. *Corey*, 16 Barb. 136; *Re Willoughby*, 11 Paige, 257.

The plaintiff cannot avail herself of the act of the decedent in executing the alleged will of October 17, 1896, in her favor, by making such act the basis for equitable relief, and such act of the decedent did not constitute such a part performance of the alleged antenuptial agreement as to take the latter out of the operation of the statute.

Levy v. *Brush*, 45 N. Y. 589; *Bauman* v. *Holzhausen*, 26 Hun, 505; *Cagger* v. *Lansing*, 43 N. Y. 550; *Rathbun* v. *Rathbun*, 6 Barb. 98; *Dung* v. *Parker*, 52 N. Y. 494; *Lathrop* v. *Hoyt*, 7 Barb. 59; *Wheeler* v. *Reynolds*, 66 N. Y. 227; *Caton* v. *Caton*, L. R. 1 Ch. 137; *Bucknaster* v. *Harrop*, 7 Ves. Jr. 341; *Luckett* v. *Williamson*, 37 Mo. 388; Pom. Spec. Perf. 2d ed. § 105, p. 149; *Bradley* v. *Saddler*, 54 Ga. 681; *Shindler* v. *Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Re Callister*, 153 N. Y. 294, 47 N. E. 268; *People* v. *Pettit*, 74 N. Y. 320; *People ex rel. Public Charities & Correction Comrs.* v. *Cullen*, 153 N. Y. 629, 44 L. R. A. 420, 47 N. E. 894.

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Werner, J., delivered the opinion of the court:

This action was brought to compel the specific performance of an oral antenuptial contract which was entered into between the plaintiff and Wilson G. Hunt, the testator of the defendants, prior to their intermarriage in October, 1896. Under said contract, and in consideration of plaintiff's promise to marry said Wilson G. Hunt, the latter orally agreed to give the former at once the sum of $5,000 in money, the further sum of $2.50 per week, the income of a house and lot in the city of Geneva, New York, to convey to her another house and lot in the same city, and to make a will giving her all of his property except a watch and $200. The making of this contract, the subsequent intermarriage of the parties thereto, and the still later breach of the agreement by said Wilson G. Hunt, are established by the findings of the learned trial court, and upon these findings is based the conclusion of law that plaintiff is not entitled to recover because said contract is void under the statute of frauds. Under the unanimous affirmance of the learned appellate division the only question brought to this court by the appellant is whether an oral antenuptial contract, founded upon no other consideration than marriage, can be specifically enforced in a court of equity. The statute provides that "every agreement or undertaking made upon consideration of marriage, except mutual promises to marry," shall be void unless such agreement or undertaking, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith, or his agent. 2 Rev. Stat. pp. 135, 136, chap. 7, title 2, §§ 2, 8. The learned counsel for the appellant concedes that the contract in suit falls within the scope of this broad statute, but argues that the intermarriage of the parties to the contract is such a part performance thereof as to invest a court of equity with the power of specific enforcement. The argument for the respondents may be compressed into the single statement that the same act of performance which brings the contract within the sweep of the statute cannot be relied upon to exclude it therefrom. The most notable feature of the statute above quoted is its simplicity and directness of language. All contracts founded upon consideration of marriage, except mutual promises to marry, shall be void unless the commands of the statute are obeyed. Mutual executory promises to marry are expressly excluded from its operation. All other contracts founded upon consideration of marriage are as clearly within its terms. These two diverse provisions of the statute, standing in juxtaposition to each other, so plainly disclose the legislative intent as to render construction unnecessary, if not impossible. The letter of the law bears its own interpretation. This view of the statute is not original. Pomeroy, in his work on Contracts, under the head of "Specific Performance," 2d ed. § 111, states it most forcibly as follows: "When a verbal contract is made in relation to or upon the consideration of marriage, the marriage alone is not a part performance upon which to decree a specific execution. This rule, which is firmly established, is based upon the express language of the statute. A promise made in anticipation of a marriage, followed by the marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes a writing essential. In fact, until a marriage takes place, there is no binding agreement independent of the statute, so that the marriage itself is a necessary part of every agreement made upon consideration of it, which the legislature has said must be in writing." Beach, in his Modern Equity Jurisprudence (§ 622), says: "It is also well settled that marriage is not an act of part performance which will take a parol contract out of the statute, for the statute expressly provides that a contract in consideration of marriage shall not be binding unless it is in writing." This is also the view of the statute entertained by the courts of England and the courts in other jurisdictions where the English statute of frauds has been copied.' *Caton* v. *Caton*, L. R. 2 H. L. 127, Affirming L. R. 1 Ch. 137; *Taylor* v. *Beech*, 1 Ves. Sr. 297; *Dundas* v. *Dutens*, 1 Ves. Jr. 196; *Lassence* v. *Tierney*, 1 Macn. & G. 551; *Warden* v. *Jones*, 23 Beav. 487; *Peek* v. *Peek*, 77 Cal. 106, 1 L. R. A. 185, 19 Pac. 227; *Bradley* v. *Saddler*, 54 Ga. 681; *McAnnulty* v. *McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; *Henry* v. *Henry*, 27 Ohio St. 121. In our own state the trend of the decisions is in the same direction. In *Brown* v. *Conger*, 8 Hun, 625, it was held that equity cannot enforce an oral contract for the conveyance of lands made in consideration of a marriage subsequently consummated. In *Dygert* v. *Remerschnider*, 32 N. Y. 629, this court enforced, as against the creditors of the husband, an oral antenuptial contract under which the latter conveyed lands to his wife; but the decision was based upon the distinct ground that the payment by the wife of some of the husband's debts created an independent consideration for the transfer, and in his discussion of that fact Judge Davies said: "Under the authorities, I think she [the wife] had no rights based solely upon the consideration of marriage, which courts, either of law or equity, could have enforced." To the same effect are *Lamb* v. *Lamb*, 18 App. Div. 250, 46 N. Y. Supp. 219; *Ennis* v. *Ennis*, 48 Hun, 11; *Whyte* v. *Denike*, 53 App. Div. 320, 65 N. Y. Supp. 577; *Reade* v. *Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520; *Borst* v. *Corey*, 16 Barb. 136; and *Re Willoughby*, 11 Paige, 257. In none of these cases, except *Brown* v. *Conger*, 8 Hun, 625, was the question presented in precisely the same form as in the case at bar, but in all of them the validity of a parol antenuptial contract was a pertinent and underlying question, upon which

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the courts have held with unvarying uniformity that marriage is not such a part performance of an oral antenuptial contract as to take it out of the operation of the statute of frauds.

Counsel for the appellant vigorously contends that in the case at bar the statute of frauds is being used by the respondents as an instrument of fraud, and that this is a consummation that equity never tolerates. In support of this position, we are referred to such cases as *Freeman* v. *Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Winchell* v. *Winchell*, 100 N. Y. 159, 2 N. E. 897; *Winne* v. *Winne*, 166 N. Y. 263, 59 N. E. 832; *Ahrens* v. *Jones*, 169 N. Y. 555, 62 N. E. 666; *Goldsmith* v. *Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Dunckel* v. *Dunckel*, 141 N. Y. 427, 36 N. E. 405; and other cases in which equity has intervened to prevent the perpetration of fraud in the name of the statute. There is no analogy between such cases and the case at bar. Courts of equity, in exercising their powers upon the statute of frauds, are bound by two important limitations. The first is that equity will never interfere where there is an adequate remedy at law (*Russell* v. *Briggs*, 165 N. Y. 500, 53 L. R. A. 556, 59 N. E. 303), and the second is that equity cannot repeal the statute (*Dung* v. *Parker*, 52 N. Y. 494). The first of these limitations has, of course, no application to the case at bar, because the appellant is clearly without a remedy at law. The second of these limitations is applicable here, for the reason that the statute must be repealed before the contract in suit can be enforced. It is just here that we observe the essential difference between this case and those upon which the appellant relies. In the latter class of cases equity intervenes because the language of the statute is so general and elastic as to compel, or at least permit, the presumption that it was not designed to operate as a shield for fraud. In cases like the one at bar the language of the statute is so specific and rigid that no presumption can be invoked that conflicts with the letter of the law, although in certain cases great injustice may ensue.

Counsel for the appellant also insists that there was evidence tending to show that Wilson G. Hunt made a will in pursuance of the antenuptial contract and in conformity with its terms, and that this fact of itself establishes such a part performance of the contract as to take it out of the statute. We cannot discuss this question upon the merits, because the trial court has made no finding upon the subject. We have no right to amplify the findings of fact in order to make a sufficient ground for reversal. *Hilton* v. *Ernst*, 161 N. Y. 227, 55 N. E. 1056.

The judgment herein should be affirmed, with costs.

Parker, Ch. J., and **Bartlett, Haight, Martin, Vann**, and **Cullen**, JJ., concur.

59 L. R. A.

MARLIN FIREARMS COMPANY, *Respt.*,
v.
George O. SHIELDS, *Appt.*

(171 N. Y. 384)

The publication of an unjust and malicious criticism of a manufactured article is not the subject of equitable cognizance, although the manufacturer has no remedy at law because of inability to prove special damage.

Bartlett and Haight, JJ., dissent.)

(June 10, 1902.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County in favor of defendant in an action brought to enjoin the publication of false statements regarding plaintiff's manufactured goods. *Reversed.*

The facts are stated in the opinion.

Messrs. **John S. Wise** and **H. A. Wise**, for appellant:

The complaint does not state facts sufficient to constitute a cause of action at law.

Kidd v. *Horry*, 28 Fed. 773; *Tobias* v. *Harland*, 4 Wend. 537; *LeMassena* v. *Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882; *Kennedy* v. *Press Pub. Co.* 41 Hun, 422; Townshend, Slander & Libel, ¶ 204; *Bosi* v. *New York Herald Co.* 33 Misc. 622, 68 N. Y. Supp. 898; *Dooling* v. *Budget Pub. Co.* 144 Mass. 258, 59 Am. Rep. 83, 10 N. E. 809.

If the complaint does not state facts sufficient to constitute a cause of action at law, the facts stated do not constitute a cause of action in equity. Courts of equity have no power to create equities contrary to law.

Hendricks v. *Toole*, 29 Mich. 340; 11 Am. & Eng. Enc. Law, p. 175; *Magniac* v. *Thomson*, 15 How. 299, 14 L. ed. 703; *Portland Sav. Inst.* v. *Makin*, 23 Me. 360; *O'Reilly* v. *New York Elev. R. Co.* 148 N. Y. 353, 31 L. R. A. 407, 42 N. E. 1063; 1 Pom. Eq. Jur. 320; *Brandreth* v. *Lance*, 8 Paige, 24, 34 Am. Dec. 368; *New York Juvenile Guardian Soc.* v. *Roosevelt*, 7 Daly, 188; *Mauger* v. *Dick*, 55 How. Pr. 132; Eden, Inj. 1852, p. 372; *Mulkern* v. *Ward*, L. R. 13 Eq. 619; *Lawrence* v. *Smith*, Jac. 471; *Singer Mfg. Co.* v. *Domestic Sewing Mach. Co.* 49 Ga. 73, 15 Am. Rep. 674; Kerr, Inj. Am. ed. 1889, p. 502; High, Inj. 3d ed. Chicago, 1890, § 1015; 1 Beach, Inj. 1895, pp. 73, 890.

Equity possesses no jurisdiction derived from "the general trend of public opinion."

Kidd v. *Horry*, 28 Fed. 773; *Boston Diatite Co.* v. *Florence Mfg. Co.* 114 Mass. 69,

NOTE.—For injunction against false statements as to plaintiff's property or business, see Flint v. Hutchinson Smoke Burner Co. (Mo.) 16 L. R. A. 243, and *note*; also, in this series, Grand Rapids School Furniture Co. v. Haney School Furniture Co. (Mich.) 16 L. R. A. 721, and Shoemaker v. South Bend Spark Arrester Co. (Ind.) 22 L. R. A. 332.

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19 Am. Rep. 310; *Whitehead* v. *Kitson*, 119 Mass. 484; *New York Juvenile Guardian Soc.* v. *Roosevelt*, 7 Daly, 188; *Brandreth* v. *Lance*, 8 Paige, 24, 34 Am. Dec. 368; *Mauger* v. *Dick*, 55 How. Pr. 132; *Caswell* v. *Central R. & Bkg. Co.* 50 Ga. 70; *Life Asso. of America* v. *Boogher*, 3 Mo. App. 173; *Baltimore Car-Wheel Co.* v. *Bemis*, 29 Fed. 95.

Mr. **Charles Gibson Bennett,** for respondent:

A continuing scheme of blackmail, which has caused and will continue to cause money damage by loss of business, may be enjoined as a wrongful course of conduct, or acts which constitute a taking of property.

Sun Printing & Pub. Asso. v. *Delaney*, 48 App. Div. 623, 62 N. Y. Supp. 750; *Murdock* v. *Walker*, 152 Pa. 595, 25 Atl. 492; *McCandless* v. *O'Brien*, 8 Lanc. L. Rev. 254; *Emack* v. *Kane*, 34 Fed. 46; *Casey* v. *Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Consolidated Steel & Wire Co.* v. *Murray*, 80 Fed. 811; *American Steel & Wire Co.* v. *Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 608; *United States* v. *Kane*, 23 Fed. 748; *Vegelahn* v. *Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077; *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L. R. A. 407, 77 N. W. 13.

The supreme court has the power to restrain the publication of false and malicious statements which injuriously affect property and property rights.

Gee v. *Pritchard*, 2 Swanst. 403; *Hovey* v. *Rubber Tip Pencil Co.* 57 N. Y. 119, 15 Am. Rep. 470; *Croft* v. *Richardson*, 59 How. Pr. 356; *Emack* v. *Kane*, 34 Fed. 46; *Bell* v. *Singer Mfg. Co.* 65 Ga. 453; *Meyer* v. *Devries*, 64 Md. 532, 2 Atl. 915; High, Inj. Chicago, 1890, § 1015; *Dixon* v. *Holden*, L. R. 7 Eq. 488; *Routh* v. *Webster*, 10 Beav. 561; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Beddow* v. *Beddow*, L. R. 9 Ch. Div. 89; *Thorley's Cattle Food Co.* v. *Massam*, L. R. 14 Ch. Div. 763; *Quartz Hill Consol. Gold Min. Co.* v. *Beall*, L. R. 20 Ch. Div. 501; *Loog* v. *Bean*, L. R. 26 Ch. Div. 306.

Parker, Ch. J., delivered the opinion of the court:

The plaintiff corporation, which manufactures Marlin repeating rifles, brought this action to perpetually restrain defendant, the proprietor of a magazine called "Recreation," from publishing "any article or statement, in any form or under any guise, falsely attacking, misrepresenting, or depreciating plaintiff's said rifle, or its accuracy, effectiveness, merit, or value." Defendant demurred to the complaint, and the question presented on this review is whether it states a cause of action. The following is as brief a synopsis of it as will suffice to present fully the question before us:

Plaintiff is engaged in the manufacture and sale of the Marlin repeating rifles, which have become well known as a distinct model throughout the United States and elsewhere, and for some time it advertised the rifles in defendant's magazine. Defendant having advanced his rates, plaintiff withdrew the advertisement, whereupon defendant published letters, purporting to be from correspondents, reflecting on the rifle; such publications taking place, one in March and two in October, 1899, and one in September and another in November, 1900. These letters were not in fact written by correspondents, but were sham letters, written and published by defendant in furtherance of a design to force plaintiff to advertise with him, or, failing in that, to gratify his malice. The first letter was complimentary to the Marlin rifle throughout, and contained an expression of surprise that its advertisement no longer appeared in "Recreation," and the same issue contained an answer by the editor in which the reason for the disappearance of the advertisement was stated to be an advance in advertising rates because of increase in circulation, which advance plaintiff refused to pay, and the complaint alleges that the reason assigned by the editor for the absence of the advertisement and the statement as to its circulation are false. The first of the two letters in the October (1899) issue purports to be written from Montana, and in it the writer says: "I have owned and used a great many Winchester and Marlin rifles of all models. . . . I have come to the conclusion that the Marlin is not to be compared with the Winchester as regards ease, rapidity, or certainty of action, beauty of outline, finish, and all that goes to make up a first-class weapon. I consider the first model Winchester a more reliable weapon than the latest Marlin. Someone will ask, Why? And I answer: Because they handle the cartridges perfectly, and as rapidly as the lever can be worked by the operator, under any circumstances, while the Marlin might fail to handle the cartridges if handled with one half the rapidity of the Winchester. . . . The Marlin has a faulty extractor and ejector,"—citing instances in his own experience in support of his assertion and specifying what the Marlin lacks. The letter concludes: "Here is an extract from a well-known Northwestern gun dealer's catalogue which has been in circulation several years: 'I do not manufacture, recommend, or guaranty Marlin rifles. If they chew up the heads of cartridges, clog up in the action and magazine, it is not my fault; so do not ship them back on my hands. I have Marlin rifles for sale for those who want them, but when sold and delivered my responsibility ceases.' A good advertisement, truly. I consider any gun that leaves the Winchester factory perfect in every respect, both as regards accuracy and manipulation." The statement that "the Marlin has a faulty extractor and ejector" is alleged to be false, and reasons are given in support of the allegation. The other letter in that issue contained the following: "Were the Winchester people to take the '86 model frame, and make it light for a .38–55 barrel, and then have a .38–55 Marlin barrel fitted, it would in my opinion be the ideal gun for general work for the man who cannot afford a .30–30 or other late arm. I've used Marlins a good deal,

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and was always bothered by the side ejector. It is no good, and the extractor in the Marlin is a little weak." The complaint charges that the statement in this letter that "the side ejector is no good" is false, and, further, that "the side-ejecting system as used by plaintiff is one of the most important improvements of recent development in the art, as shown by plaintiff's successful usage in all of its repeating arms made during the last eleven years." The letter in the September number, 1900, purporting to be signed by Percy C. Bowker, of Wakefield, Massachusetts, states that, while out squirrel hunting with a friend named Ripley, the latter said his rifle had worn out, and on examination they found that "the little racker that racks the carrier had worn out" after "the rifle had been fired about 800 times." Ripley took the gun to a dealer, who said he did not warrant the Marlin rifle. The letter compared the Winchester with the Marlin, favorably to the former, and stated that the writer did not want the "so-called improvement" in the Marlin, the solid top and side ejector, and expressed the opinion that there is room for great improvement in the Marlin action. The complaint alleges that the statement in this article that "the little racker that racks the carrier had worn out" after "the rifle had been fired about 800 times" is false, and in support thereof further alleges that "the piece referred to is solidly and substantially designed to perform its functions. These parts are made of excellent material, carefully inspected and tested. Similar rifles, that have seen years of hard service and been fired many thousands of times, show no considerable wearing at this time. It would be impossible to wear out the part in the manner and time stated." The publication of November, 1900, purported to be from a correspondent, and stated, in substance, that the Marlin is handsome, but its place is at the bottom of a list of rifles; "no repeating rifle can handle the long rifle cartridges;" the Marlin extractor is defective; the twist in the barrel is too short, and in a specified gun the carrier became worn out before 500 cartridges were used, which gun also shed gas into the action. These statements the complaint alleged to be false, and assigns reasons at length in support of the allegation. The complaint further alleges that the statements in such several letters have greatly injured the plaintiff in its business of manufacturing and selling its rifles, and have "caused it to lose sales of same to a large extent, but to what extent plaintiff is unable to state." It alleges on information and belief that the defendant intends to carry on said scheme, and to continue to publish in its magazine false and unfounded statements, calculated to slander and depreciate the accuracy, effectiveness, general merits, and value of plaintiff's rifle. It neither asks nor seeks any relief at law for any past publication, but alleges that the plaintiff has no adequate remedy at law, and prays equitable aid by way of injunction, in order to avoid a succession of suits, and also "because of the impossibility of ascertaining, identifying, or establishing, according to legal principles, any measure of damage," and demands judgment against defendant that he "be perpetually enjoined and restrained from publishing, or causing or permitting to be published, in his said magazine or elsewhere, any article or statement, in any form or under any guise, falsely attacking, misrepresenting, or depreciating plaintiff's said rifle, or its accuracy, effectiveness, merit, or value, and generally restraining and enjoining the defendant from continuing to carry out its said wrongful and illegal scheme to force the plaintiff again to advertise its rifle in defendant's magazine."

As the demurrer to the complaint necessarily assumes that all of the facts alleged therein are true, it must be treated as an established fact that the articles published in defendant's magazine were not written by real correspondents, but by defendant himself, and the natural inclination of all fair-minded men, charged with the responsibility of administering the law, would be to relieve the plaintiff from the annoyance to which it is subjected from wholly unworthy motives, as we must further assume. But equity does not undertake to relieve from all the annoyances caused by those who are inconsiderate of the feelings and business interests of others. On the contrary, it is a general rule, which has some exceptions, that it will not undertake to interfere where a party has an adequate remedy at law, and when it does interfere it is guided by principles of equity which during the long course of its administration have become established. Concededly there is no precedent in the courts of this state for the interference of equity in a case of this character. Hence it becomes necessary to examine the complaint in the light of the established principles for the purpose of ascertaining whether it states a cause of action.

It should be noted, first, that this complaint contains no allegation of any statement made against the character or conduct of plaintiff. It has not been libeled. The words published in defendant's magazine, and for which defendant is responsible, whether written by him or another, criticise the gun manufactured by plaintiff. They do not charge that plaintiff was guilty of any deceit in vending, or want of skill in manufacturing, the gun. Every statement published and of which complaint is made relates solely to the quality of plaintiff's rifles and their relative desirability, as compared with rifles manufactured by others. Now, it has been the law of this state since the decision in *Tobias* v. *Harland*, 4 Wend. 537, in which the opinion was written by Judge Marcy, that "when the words are spoken, not of the trader or manufacturer, but of the quality of the articles he makes or deals in, to render them actionable *per se* they must import that the plaintiff is guilty of deceit or malpractice in making or vending of them." Where the

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libel or slander is of a manufactured article, and does not directly impeach the integrity, knowledge, skill, diligence, or credit of the plaintiff, the words are not actionable at law, unless special damage be alleged and proved; and a "general allegation of loss of customers is not sufficient to enable the plaintiff to show a particular injury." The complaint in this action not only fails to contain allegations of special damage, but it in terms specifically negatives the claim of special damage by alleging that it is unable to state to what extent it has been injured by said publications. Among the more recent cases in which the doctrine of *Tobias* v. *Harland* has been recognized and followed are: *Le Massena* v. *Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882, in which the court said: "When the slander is of a property right or title, or of a thing, falsity of utterance, malice, and special damages flowing or resulting necessarily or naturally as the proximate consequence must be alleged and shown by the plaintiff, except in those cases where the slanderous words also impute to the owner dishonesty, fraud, deception, or other misconduct in his trade or business in connection with the property." *Kennedy* v. *Press Pub. Co.* 41 Hun, 422, in which the court said: "It is settled by authority that a libel on a thing is not actionable, unless the owner of the thing alleges and proves that he has sustained pecuniary loss as a necessary or natural consequence of the publication." *Dooling* v. *Budget Pub. Co.* 144 Mass. 258, 59 Am. Rep. 83, 10 N. E. 809, in which the court said: "Words relating merely to the quality of the articles made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damage." We need not stop to consider the reason for the rule, for it has been too long and too firmly established to admit of questioning at this day. The plaintiff's first excuse for invoking the aid of equity—to avoid a multiplicity of actions at law—is evidently not well founded, for plaintiff has not only failed to state facts sufficient to constitute one action at law, but it has affirmatively stated facts which show that it has not an action at law. In such a situation it goes without saying that a court of equity cannot be invoked to aid a plaintiff, unless some other ground for its interference be shown.

Another ground of equity alleged is that plaintiff has no adequate remedy at law, "because of the impossibility of ascertaining, identifying, or establishing, according to legal principles, any measure of damages." That he has no adequate remedy at law is true; for, as we have seen from an examination of the authorities, his complaint indicates that he has no remedy at law whatever. This brings us to the real question of the case,—whether an unjust and malicious criticism of a manufactured article, for which the manufacturer has no remedy at law because of his inability to prove special damage, is the subject of equitable cognizance. The constitutional guaranty of freedom of speech and press, which in terms provides that "every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press" (N. Y. Const. art. 1, § 8), has for its only limitations the law of slander and libel. Hitherto, freedom of speech and of the press could only be interfered with where the speaker or writer offended against the criminal law, or where the words amounted to a slander or libel of a person or corporation or their property, and the guaranteed right of trial by jury entitled the parties accused of slander or libel to have twelve men pass upon the question of their liability to respond in damages therefor and to measure such damages. But the precedent which the plaintiff seeks to establish would open the door for a judge sitting in equity to establish a censorship, not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require, and, in case of the violation of the provisions of such a decree, the usual course and practice of equity would necessarily be invoked, which would authorize the court to determine whether such published articles were contrary to the prohibitions of the decree, and, if so found, punishment as for a contempt might follow. Thus, a party could be punished for publishing an article which was not libelous, and that, too, without a trial by jury.

While we have pointed out in general terms the limitations of the courts in dealing with slander and libel, we shall confine ourselves on this review to a consideration of those authorities which bear directly upon the question whether equity, which creates neither rights nor liabilities, has heretofore assumed jurisdiction to restrain the publication of criticisms unjustly affecting the merits of articles of property belonging to a plaintiff, when such publication will not support an action at law; for, if such precedent be not already established by the courts of this state, in our view it ought not to be. It was long ago held in this state that a court of chancery has not jurisdiction to restrain the publication of a libel, by injunction, upon a bill filed by a party whose character or business will be injured by the publication. *Brandreth* v. *Lance*, 8 Paige, 24, 34 Am. Dec. 368. In Eden, Inj. 3d ed. p. 372, it is said: "There is, perhaps, but one instance in the books of any judge having maintained the existence of a power in the court of chancery of restraining publications on any other ground but that of property and copyright; and it was then done in language so strange and unconstitutional as to carry with it its own refutation." In *Singer Mfg. Co.* v. *Domestic Sewing Mach. Co.* 49 Ga. 70, 15 Am. Rep. 674, the court said: "It is well settled that an injunction will not be granted to

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restrain slander or libel of title or of reputation,"—citing cases. "Not that it is not wrong, not that the wrong might not be irreparable, but simply because courts of chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law." In *Mauger* v. *Dick*, 55 How. Pr. 132, it is said: "The jurisdiction of a court of equity does not extend to false representations as to the character or quality of the plaintiff's property, or to his title thereto, when it involves no breach of trust or contract, nor does it extend to cases of libel or slander. . . . If the plaintiff has any remedy it is by action at law." See also Pom. Eq. Jur. § 320, note 3; *Mulkern* v. *Ward*, L. R. 13 Eq. 619; Kerr, Inj. 2d Am. ed. p. 377; High, Inj. 3d ed. § 1015; 1 Beach, Inj. p. 73. In *Kidd* v. *Horry*, 28 Fed. 773, application was made to Mr. Justice Bradley for an injunction to restrain defendants from publishing libelous circulars concerning plaintiff's business and patent rights pending the trial of the principal suit brought to restrain infringement of patents. The learned justice said: "The application seems to be altogether a novel one, and is urged principally upon a line of recent English authorities,"—citing cases. "An examination of these and other cases relied on convinces us that they depend on certain peculiar acts of Parliament of Great Britain, and not on the general principles of equity jurisprudence." After commenting upon the English statutes he further says: "But neither the statute law of this country, nor any well-considered judgment of the courts, has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction,"—citing cases in this state and other states in support of the proposition. To the same effect are *Baltimore Car-Wheel Co.* v. *Bemis*, 29 Fed. 95; *Mayer* v. *Journeymen Stonecutters' Asso.* 47 N. J. Eq. 519, 20 Atl. 492, which was an application to the chancellor to restrain the circulation of libelous matter; and *Francis* v. *Flinn*, 118 U. S. 385, 30 L. ed. 165, 6 Sup. Ct. Rep. 1148, in which the bill prayed an injunction against sundry things done by defendants against plaintiff's pilot boat,—among other things, false publications. Mr. Justice Field said: "The bill does not state what the publications were . . . If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere, and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law."

Our attention is not called to any decisions in this state in suits founded solely on slander or libel for which an action at law could not be maintained, holding a contrary doctrine, nor to any text writers differing from those cited. In *Hovey* v. *Rubber Tip Pencil Co.* 57 N. Y. 119, 15 Am. Rep. 470, the action was one of libel, and it was sought therein to restrain defendant's publication, wherein it claimed to be the owner of valuable rights secured by letters patent; but the only question decided by the court was that the court below had rightly determined that the action was not one within its jurisdiction, and the case is authority for no other proposition. *Croft* v. *Richardson*, 59 How. Pr. 356, is a special term decision, which seems not to have received very careful consideration; but even in that case a cause of action for libel upon property was stated. The case of *Vegelahn* v. *Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077, was a bill against 14 individuals and a trade union, and it alleged conspiracy. There was no question of libel involved, but, instead, an injunction was sought against patrolling in front of plaintiff's premises, threatening with violence those willing to be employed, etc.; the object of the plaintiff being to checkmate a conspiracy to prevent him from getting workmen. *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L. R. A. 407, 77 N. W. 13, was a boycott case, and enjoined "picketing and distribution of boycotting circulars, and all acts of intimidation and coercion." It recognized, however, the general principle that an injunction will not ordinarily issue to restrain an individual from publishing a libel, where there is no conspiracy, no intimidation, and no acts of coercion. *Casey* v. *Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135, was an action brought for the purpose of checkmating an alleged combination or conspiracy by a trade union to boycott a newspaper for refusing to unionize its force, which combination was held to be unlawful by Judge Sage of the United States circuit court, and, as an incident to the relief granted, he enjoined the publication and circulation of posters, handbills, and circulars, printed and circulated in pursuance and in aid of such combination or conspiracy to boycott. We do not express any views upon either one of the three decisions which aimed at the restrainment of those who were engaged in boycotting; for it quite sufficiently appears that, whatever may be their value as decisions, they are not in point in this controversy, for the question was not up for consideration whether the publication of an alleged libel upon property which did not result in damages which could be proved should be restrained. There were more important questions involved in the disposition of those cases than whether the circulation of libelous matter could be enjoined; the latter being a mere incident, brought in with everything else that it was deemed necessary to enjoin in order to break down the boycott. *Emack* v. *Kane*, 34 Fed. 46, which is a decision by a single judge, seems to be authority in support of plaintiff's contention. A very careful examination of it, however, leads to the conclusion that its attempt to overthrow the reasoning of Mr. Justice Bradley

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in *Kidd* v. *Horry*, 28 Fed. 773, was not successful.

Our conclusion from a review of the authorities, therefore, is that all well-considered decisions agree in determining it to be the law that a court of equity has not jurisdiction to grant the relief to secure which this suit was brought.

The order of the Appellate Division should be reversed, and the judgment of the special term affirmed, with costs in all courts.

Gray, O'Brien, Cullen, and **Werner, JJ.**, concur. **Bartlett** and **Haight, JJ.**, dissent.

Frank L. MAGAR, *Respt.*,
v.
Stoddard HAMMOND *et al.*, *Appts.*

(171 N. Y. 377.)

One who attempts to take fish from a private lake contrary to law, knowing that it is guarded by a watchman with a gun which is sometimes discharged, cannot recover for a wound unintentionally inflicted upon him by a shot from the gun, although it was negligently fired.

(June 10, 1902.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Orange County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Bacon & Merritt,** with *Mr.* **George H. Carpenter,** for appellants:

There is no negligence in a legal sense which can give a right of action, unless there is a violation of a legal duty to exercise care.

Cooley, Torts, p. 660; *Blyth* v. *Topham*, Cro. Jac. 158; *Brock* v. *Copeland*, 1 Esp. 203; *Jordin* v. *Crump*, 8 Mees. & W. 781; *Bush* v. *Brainard*, 1 Cow. 78; *Robertson* v. *New York & E. R. Co.* 22 Barb. 91; *Baker* v. *Byrne*, 58 Barb. 438; *Roulston* v. *Clark*, 3 E. D. Smith, 366; *Boyle* v. *New York, L. E. & W. R. Co.* 39 Hun, 171, Affirmed in 115 N. Y. 636, 21 N. E. 724; *Magilton* v. *New York C. & H. R. R. Co.* 82 Hun, 308, 31 N. Y. Supp. 241; *McNeven* v. *Arnott*, 4 App. Div. 133, 38 N. Y. Supp. 759; *Downes* v. *Elmira Bridge Co.* 41 App. Div. 339, 58 N. Y. Supp. 628; *Lagerman* v. *New York C. & H. R. R. Co.* 53 App. Div. 283, 65 N. Y. Supp. 764; *Nicholson* v. *Erie R. Co.* 41 N. Y. 525; *Larmore* v. *Crown Point Iron Co.* 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; *Zoebisch* v. *Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *Howland* v. *Vincent*, 10 Met. 371, 43 Am. Dec. 442; *Dillon* v. *Connecticut River R. Co.* 154 Mass. 478, 28 N. E. 899; *Mugford* v. *Boston & M. R. Co.* 173 Mass. 10, 25 N. E. 1078; *Hargreaves* v. *Deacon*, 25 Mich. 1.

The plaintiff having gone to the place where he was hurt upon a criminal errand, his unlawful act necessarily contributed to produce the accident.

Munger v. *Tonawanda R. Co.* 5 Denio, 255, 4 N. Y. 349, 53 Am. Dec. 384; *Terry* v. *New York C. R. Co.* 22 Barb. 574; *Graham* v. *Delaware & H. Canal Co.* 46 Hun, 386; *Van Norden* v. *Robinson*, 45 Hun, 567; *Voshefskey* v. *Hillside Coal & I. Co.* 21 App. Div. 168, 47 N. Y. Supp. 386; *Stewart* v. *Ferguson*, 52 App. Div. 317, 65 N. Y. Supp. 149; *Jetter* v. *New York & H. R. Co.* 2 Keyes, 154; *Lewis* v. *Long Island R. Co.* 162 N. Y. 52, 56 N. E. 548; *Bosworth* v. *Swansey*, 10 Met. 363, 43 Am. Dec. 441; *Heland* v. *Lowell*, 3 Allen, 407, 81 Am. Dec. 670; *Jones* v. *Andover*, 10 Allen, 18; *McGrath* v. *Merwin*, 112 Mass. 467, 17 Am. Rep. 119; *Smith* v. *Boston & M. R. Co.* 120 Mass. 490, 21 Am. Rep. 538; *Lyons* v. *Desotelle*, 124 Mass. 387; *Planz* v. *Boston & A. R. Co.* 157 Mass. 377, 17 L. R. A. 835, 32 N. E. 356; *Newcomb* v. *Boston Protective Department*, 146 Mass. 596, 16 N. E. 555.

An action for negligence cannot be sustained if the wrongful act of the plaintiff co-operated with the misconduct of the defendants or their servants to produce the damages sustained. This is so whether the defendant's act be negligent or wilful.

Ilott v. *Wilkes*, 3 Barn. & Ald. 304; *Wohlfahrt* v. *Beckert*, 92 N. Y. 490, 44 Am. Rep. 406.

There was no proof from which the jury might find that the bullet discharged from the gun at the angle and under the circumstances detailed in this case could reasonably have been expected to inflict a wound upon the plaintiff, and therefore no cause of action for negligence was made out.

Hope v. *Fall Brook Coal Co.* 3 App. Div. 70, 38 N. Y. Supp. 1040; *Beetz* v. *Brooklyn*, 10 App. Div. 382, 41 N. Y. Supp. 1009; *Hubbell* v. *Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858; *Jex* v. *Straus*, 122 N. Y. 293, 25 N. E. 478; *Glasier* v. *Hebron*, 131 N. Y. 447, 30 N. E. 239.

The instructions to Tompkins, given by Hammond, were of such a character as did not authorize him to discharge the gun in any way that would put in danger a human being.

Vanderbilt v. *Richmond Turnp. Co.* 2 N. Y. 479, 51 Am. Dec. 315; *Mali* v. *Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Fraser* v. *Freeman*, 43 N. Y. 566, 3 Am. Rep. 740; *Isaacs* v. *Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418; *Wright* v. *Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *Meehan* v. *Morewood*, 52 Hun, 566, 5 N. Y. Supp. 710; *Fisher* v. *Brooklyn Jockey Club*, 50 App. Div. 446, 64 N. Y. Supp. 69.

Mr. **William Vanamee,** with *Mr.* **Thomas Watts,** for respondent:

The master assumes the liability of even

NOTE.—As to liability for killing or injuring trespassers by means of spring guns, traps, or other dangerous instruments, see, in this series, State v. Barr (Wash.) 29 L. R. A. 154, and *note*.

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the wrongful execution by the servant of his duties as placed upon him by the master.

Rounds v. *Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; *Mott* v. *Consumers' Ice Co.* 73 N. Y. 547; *Isaacs* v. *Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418; *Cosgrove* v. *Ogden*, 49 N. Y. 257, 10 Am. Rep. 361; *Cohen* v. *Dry Dock, E. B. & B. R. Co.* 69 N. Y. 170; *Hoffman* v. *New York C. & H. R. R. Co.* 87 N. Y. 25, 41 Am. Rep. 337; *Quinn* v. *Power*, 87 N. Y. 535, 41 Am. Rep. 392; *Lang* v. *New York, L. E. & W. R. Co.* 51 Hun, 603, 4 N. Y. Supp. 565; *McCann* v. *Sixth Ave. R. Co.* 117 N. Y. 505, 23 N. E. 164; *Palmeri* v. *Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136, 30 N. E. 1001; *Montgomery* v. *Sartirano*, 16 App. Div. 95, 44 N. Y. Supp. 1066; *Levy* v. *Ely*, 48 App. Div. 554, 62 N. Y. Supp. 855; *Grimes* v. *Young*, 51 App. Div. 239, 64 N. Y. Supp. 859; *Girvin* v. *New York C. & H. R. R. Co.* 52 App. Div. 562, 65 N. Y. Supp. 299, Affirmed in 166 N. Y. 289, 59 N. E. 921; *Burns* v. *Glens Falls, S. H. & Ft. E. Street R. Co.* 4 App. Div. 428, 38 N. Y. Supp. 856; *Curley* v. *Electric Vehicle Co.* 68 App. Div. 21, 74 N. Y. Supp. 35.

The fact that the plaintiff was a trespasser does not add to or take from the liability of the defendants.

Buswell, Personal Injuries, § 71; Shearm. & Redf. Neg. § 720; Reeve, Dom. Rel. p. 462, footnote; *Larmore* v. *Crown Point Iron Co.* 101 N. Y. 394, 54 Am. Rep. 718, 4 N. E. 752; *Woodbridge* v. *Marks*, 17 App. Div. 144, 45 N. Y. Supp. 156; *Rounds* v. *Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; *Amato* v. *Sixth Ave. R. Co.* 9 Misc. 4, 29 N. Y. Supp. 51; *Baber* v. *Broadway & S. Ave. R. Co.* 10 Misc. 109, 30 N. Y. Supp. 931; *Palmer* v. *Gordon*, 173 Mass. 410, 53 N. E. 909; *Herrick* v. *Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; *Clark* v. *New York, L. E. & W. R. Co.* 40 Hun, 605, Affirmed in 113 N. Y. 670, 21 N. E. 1116; *Girvin* v. *New York C. & H. R. R. Co.* 52 App. Div. 562, 65 N. Y. Supp. 299.

O'Brien, J., delivered the opinion of the court:

There is very little dispute with respect to the leading and important facts of this case, but the rule of law to be applied to the facts is not so clear. The defendant Hammond and his servant have been sued jointly in an action based upon a personal injury that the plaintiff sustained resulting from the servant's negligence, as is claimed. The jury rendered a verdict for the plaintiff of $15,000, and the judgment has been unanimously affirmed below.

In the year 1893 Hammond purchased over 300 acres of wild forest land in Sullivan county. By damming up small streams or springs, and other operations, he created an artificial lake upon the property, of considerable dimensions. There was some low land, free from timber, which, it seems, furnished a natural bed for the lake, and it was surrounded by a dense growth of timber and bushes. Having created the lake, he proceeded to stock it with trout. It seems that it was impossible for the fish to get into the lake through the dams on the surrounding springs or streams, but the fish were propagated by artificial means; and it became an industry that produced some revenue to the owner, by selling the trout, and permitting people to fish there for a compensation. He also built a house, boat house, and hatchery for trout spawn, in which it is said 2,000,000 of the same were produced annually. He had to employ men to attend to the hatchery, and otherwise in and about the property, and to prevent vermin from destroying the eggs. He prepared and posted notices around the tract to warn off trespassers, as prescribed by the statutes of the state. The owner's codefendant in this action was the night watchman, whose business it was to be on the lake at night to protect the fish from poachers and wild animals that frequently came to the place to take the fish. The owner had two guns,—one a shotgun, and the other a rifle. The watchman had been in the habit of carrying one or the other of the guns with him when on the lake in a boat for the purpose of killing muskrats, mink, and other animals about the lake. He sometimes fired into the air in order to frighten off poachers. On the 9th day of June, 1899, the plaintiff and two other young men went to the lake to take fish, and were there after 10 o'clock in the evening, the night being very dark. They did some fishing, and retired into the thick woods on the shore. It does not appear that the watchman had seen them or knew that they had been fishing, but the crackling of the brush in the woods indicated to him that someone was there, or at least the jury could have so found. There is no claim that the watchman knew that the plaintiff was in the woods, but there was some evidence tending to show that he knew, or should have known, that some human being was there, and the verdict affirms this proposition. The watchman had the rifle, and, on hearing the noise in the woods, fired at least three shots in the direction; and one of the bullets struck the plaintiff in the hip, inflicting a very serious, if not permanent, injury. The master was not present, and knew nothing of the transaction; but he did know that the guns were on the premises, and that the watchman was accustomed to use them in the manner and for the purposes described, and, if he is responsible at all for the act of the servant, it must be implied from these facts.

There were several propositions decided by the learned trial judge at the close of the case, which, for all the purposes of this appeal, must be treated as the law of the case. He ruled that there was no question for the jury, and it could not be found, that the shooting was wilful or malicious, and the only question was whether the watchman was negligent, and the owner responsible for such negligence. He instructed the jury that the plaintiff was guilty of

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a crime in going upon the defendant's premises to fish in the manner described and that the defendant owed him no duty, except to refrain from intentionally doing him an unnecessary injury, or an injury through wanton or reckless negligence; that the owner gave no express authority to the watchman to shoot at any human being, but, on the contrary, ordered him not to shoot at any human being; and that there was no evidence that it was within the scope of his employment to so shoot; that there was no evidence in the case that either of the defendants intended or desired to injure any human being, or expected that the shooting would result in such injury. The theory upon which the case was submitted to the jury will clearly appear by the following passage from the charge: "Now, the question which I will leave to you in this case, gentlemen, is this, and I hope you will understand it: Did this man Tompkins, when he fired in the night and into the woods as he did, have reason to believe that there were human beings there, or did he in fact know they were there? Did he know when he fired into the woods as he did that human beings were where he fired, or by the exercise of ordinary care could he have ascertained, from what has been described here as having happened, that human beings were there and, knowing they were there, or having the ability to find out by the exercise of ordinary care, did he, notwithstanding that, wantonly, recklessly, fire in the direction where these human beings were? That is the vital question in this case. Because, as I have stated, this defendant had a right to have a watchman. The watchman had a right to have a gun. He had a right to have a rifle loaded with a bullet. He had a right to fire his gun in the night anywhere, and as often as he pleased, on his own land. But did Tompkins, when he fired on that occasion, know he was firing where there were human beings, or in the immediate proximity of where there were human beings, and knowing that, or being able to find it out by the exercise of ordinary care, did he still, recklessly and wantonly, discharge his bullet in the direction where these human beings were?" It will be seen that the learned judge excluded from the jury very important elements tending to support the plaintiff's case. Wilfulness, malice, intention to injure, or desire or motive to do so, express authority from the owner, and perhaps other elements, were eliminated from the case. It is not very plain how the jury could, with all these elements excluded, have found that the shooting was wanton or reckless, assuming always that the watchman had the right to do all the things that the court held that he had; but it is quite likely that the form in which the case comes here precludes any discussion in this court upon that question.

There is, however, an exception in the case that we think is fatal to the judgment. The defendants' counsel asked the court to instruct the jury that if the plaintiff knew that the watchman on the lake was in the habit of discharging a gun, and went there after receiving such information, he cannot recover, even if the defendants, or either of them, were negligent, and that if the plaintiff knew or had heard that the lake was generally protected by a watchman, who had and discharged a gun, there could be no recovery. The court refused to so charge, and the defendants' counsel excepted. This request embodied the general rule that, where the negligence or misconduct of the injured party is a contributing cause of the injury, he cannot recover, even though negligence could be imputed to the defendants. With all the elements to which reference has been made excluded from the case, the defendants were entitled to have the jury instructed that, if the plaintiff voluntarily exposed himself to a known danger, he could not recover for the act of the watchman, though this act, in defense of the master's property, was without due care; and that is the fair construction of the request. There was proof in the case, aside from the statutory notices warning intruders, which everyone could see, that the plaintiff knew what other precautions the defendants had adopted for the protection of their property, including the use of firearms; and, since the proposition amounted to a request to apply the general rule of law to these facts, it was not a mere abstract one, but was applicable to the proofs in the case, and should have been given to the jury.

It follows that *the judgment must be reversed*, and a new trial granted; costs to abide the event.

Parker, Ch. J., and **Gray, Haight, and Vann**, JJ. (**Bartlett**, J., in result), concur. **Martin**, J., not voting.

NORTH CAROLINA SUPREME COURT.

Kitty S. FOWLER, *Appt.*,
v.
Stanley G. FOWLER.

(131 N. C. 169.)

Legitimation of a bastard by the laws of his parents' domicil through their marriage during his minority fixes his status so that he is legitimate everywhere.

(October 21, 1902.)

APPEAL by defendant from a judgment of the Superior Court for Moore Coun-

NOTE.—As to conflict of laws as to legitimation of bastard children, see some cases in *note*, 59 L. R. A. as to legal status of adopted children, to Warren v. Prescott (Me.) 17 L. R. A. 435; also Day-

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ty in plaintiff's favor in a proceeding for the legitimation of their child. *Reversed.*

The facts are stated in the opinion.

Messrs. **Douglass & Simms** and **Shepherd & Shepherd** for appellant.

Mr. **U. L. Spence** for appellee.

Clark, J., delivered the opinion of the court:

This is a proceeding begun before the clerk by the plaintiff for the legitimation of his son under Code, § 39. The petition alleges that the plaintiff is a citizen and resident of the county; that about July 1, 1893, the plaintiff and defendant were married at Milwaukee, Wisconsin; that for four or five years previous thereto, and up to the marriage, they had lived and habitually cohabited together at 6337 Carpenter street, Chicago, Illinois, and during that time there was born to them on November 15, 1892, a son, of whom the plaintiff was and has always been reputed to be the father; and that the plaintiff and the defendant have continued to live together since the marriage. The wife answers, admitting all of above allegations, except that she denies that plaintiff is a resident and citizen of the county, and for a further defense alleges cruel treatment by plaintiff, for which she has an action for divorce a *mensa et thoro* pending, and that the clerk of the superior court has no jurisdiction. The child was made a party defendant, and, through his guardian *ad litem*, answered, admitting all the above-recited allegations of the complaint. The clerk granted the petition, and his judgment on appeal was affirmed by the judge at chambers, from which judgment the wife appealed.

The plaintiff contends that by virtue of Code, § 136, the words "superior court," in § 39, mean the clerk, and that, if this is not so, the case having gotten before the judge of the superior court, his action is valid by virtue of chapter 276, Laws 1887, amending Code, § 255, and relies on *Roseman* v. *Roseman*, 127 N. C. 494, 37 S. E. 518, and *Ury* v. *Brown*, 129 N. C. 270, 40 S. E. 4, and cases there cited. The defendant contends that, considering the caption of § 39, as may be done (*State* v. *Woolard*, 119 N. C. 779, 25 S. E. 719), and other language in § 39, § 136 does not apply, but the superior court at term alone has jurisdiction, and that this defect is not cured by the appeal to the judge at chambers. We are not called upon to decide this very interesting question, because upon the face of the petition there is a fatal defect, in that no cause of action is stated,—a defect which the court must notice *ex mero motu*. *Nash* v. *Ferrabow*, 115 N. C. 303, 20 S. E. 458; *Ladd* v. *Ludd*, 121 N. C. 118, 28 S. E. 190; *J. R. Cary Co.* v. *Allegood*, 121 N. C. 54, 28 S. E. 61. This proceeding is provided to legitimate illegitimates, but it appears from the averments in the complaint that the child is already legitimated. By the laws of this state the subsequent marriage of the parents does not legitimate their children born prior to the marriage. But legitimacy is a status, and by the laws of Illinois the subsequent marriage of the parents legitimates their prior offspring. "If the mother of any bastard child and the reputed father shall at any time after its birth intermarry, the said child shall in all respects be deemed and held legitimate." Rev. Stat. 1895, § 15, p. 203. The parties were domiciled, according to the complaint, at the time of the child's birth and up to the time of the marriage, in Illinois, and it is well settled that, the child being still a minor, its legitimacy then accrued, and accompanies it wherever it goes. Even if the domicil had been in Wisconsin at the time of the marriage, the law there is the same, if the father recognized the child as his, as it appears he did. Wis. Rev. Stat. 1878, § 2274. The Illinois statute was enacted as far back as 1845. By both the civil and canon law the subsequent marriage of the parents legitimated their offspring born before marriage. 1 Bl. Com. 454. It was when the bishops, at the Parliament held at the Priory of Merton, in Surrey, in 1236, attempted to procure a change in the common law to that effect, that the barons answered, *Nolumus leges Angliæ mutare*,—"We are unwilling to change the laws of England" (1 Bl. Com. 456; 2 Kent, Com. 209),—and made an entry on the journal (20 Hen. III. chap. 9) which is known as the "statute of Merton." This remains the law of England to-day, as it does in North Carolina, though Virginia and many other states, as well as Illinois and Wisconsin, have adopted the civil law in this particular. It seems well settled in England, as well as elsewhere, that when, by the law of the domicil of the parents at the time of the birth and the law of the domicil at the time of the subsequent marriage of the parents, the effect of the marriage is to legitimate the children, the legitimacy attaches (if the children are not adults), and goes with them wherever they go. "If by that law he is thereby rendered legitimate, he will be regarded as legitimated everywhere, even in states whose laws do not recognize subsequent legitimation." Minor, Confl. L. § 99, citing very numerous authorities. The English courts only differ from others in holding that it is the law of the father's domicil at the time of the birth which governs, and not the law of the domicil at the time of marriage. Minor, Confl. L. *supra*, where the whole subject is clearly and interestingly discussed. To same purport, Dicey, Confl. L. rule 134; Wharton, Law of Nature, 172; Wharton, Confl. L. §§ 240–248; Story, Confl. L. 8th ed. §§ 93, 93*b*, where the subject is exhaustively consid-

ton v. Adkisson (N. J. Eq.) 4 L. R. A. 488; Blythe v. Ayres (Cal.) 19 L. R. A. 40; Williams v. Kimball (Fla.) 26 L. R. A. 746; and Leonard v. Braswell (Ky.) 36 L. R. A. 707.

As to effect of subsequent marriage of par-

ents on antenuptial issue, see, in this series, Adams v. Adams (Mass.) 13 L. R. A. 275, and *note;* also Ives v. McNicoll (Ohio) 43 L. R. A. 772.

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ered; *Miller* v. *Miller*, 91 N. Y. 315, 43 Am. Rep. 669; *Ross* v. *Ross* 129 Mass. 252, 37 Am. Rep. 321. The American authorities, all to same purport, will be found collected in 3 Am. & Eng. Enc. Law, p. 895, 896; 6 Century Digest, chaps. 1827–1830. In *Ross* v. *Ross*, 129 Mass. 252, 37 Am. Rep. 321, Gray, Ch. J., reviews all the authorities up to that decision (1880). See also *Adams* v. *Adams* (Mass.) 13 L. R. A. 275, and *notes*. As the child was legitimate, upon the allegations in the complaint, when the child came to this state, the removal of his parents hither could not have the effect to make him a bastard, and the complaint states no cause of action. A similar instance is that of a marriage solemnized in a state whose laws permit such marriage, between a negro and a white person domiciled in such state. This is valid on their removal to this state, though such marriage would have been invalid if the parties had been domiciled here. *State* v. *Ross*, 76 N. C. 242, 22 Am. Rep. 678; *Woodward* v. *Blue*, 103 N. C., at page 114, 9 S. E. 492. The status accompanies the person, and is not changed by the removal.

Action dismissed.

SOUTH CAROLINA SUPREME COURT.

Ella G. STEINMEYER *et al.*, *Appts.*,
v.
Carrie A. E. STEINMEYER, *Respt.*,
and
The GERMANIA FIRE INSURANCE COMPANY, *Appt.*

(.....S. C.....)

1. **A clause rendering an insurance policy void** if any change takes place in the interest, title, or possession of the subject of insurance refers to change after the issuance of the policy and before the fire.
2. **The entry of a judgment setting aside, in favor of creditors, a voluntary deed,** does not change the ownership of the grantee from sole and unconditional, within the meaning of a policy of insurance in favor of the grantee, which is to be void in case the assured has not such ownership.
3. **Insurance effected on the property by a grantee** under a voluntary deed which has been set aside in favor of creditors of the grantor does not inure to their benefit.

(July 17, 1902.)

APPEAL by plaintiffs and the defendant Insurance Company from a judgment of the Common Pleas Circuit Court for Charleston County in favor of defendant Carrie A. E. Steinmeyer in a proceeding to determine the liability for and title to the proceeds of a fire insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Buist & Buist** and **J. E. Burke,** for appellants Steinmeyer:

Mrs. Carrie A. E. Steinmeyer, while not an express trustee, has a relationship to plaintiffs in the nature of a quasi trustee, and public policy will therefore require that the proceeds of any policy of insurance obtained by her should be applied, *ex æquo et bono*, to the plaintiffs.

Bath South Carolina Paper Co. v. *Langley*, 23 S. C. 129; *Clyburn* v. *Reynolds*, 31 S. C. 118, 9 S. E. 973; *Green* v. *Green*, 50 S. C. 532, 27 S. E. 952.

There is such a relationship where a purchaser of property at a sheriff's sale has said sale thereafter declared voidable, and in a direct proceeding set aside.

Ibid.

The quasi trusteeship of Carrie A. E. Steinmeyer in regard to the property in question did not avoid the policy of insurance taken out by her, because of the unconditional and sole ownership clause therein, nor because the interest of the insured in the property was not truly stated therein. The title to the property is fixed by the decrees. These do not declare Mrs. Steinmeyer's title void, but they give creditors the right to a sale, and so to have the property taken from her in a certain contingency.

Lycoming F. Ins. Co. v. *Haven*, 95 U. S. 242, 24 L. ed. 473; *Nease* v. *Ætna Ins. Co.* 32 W. Va. 283, 9 S. E. 233; *Johnson* v. *Johnson*, 27 S. C. 309, 3 S. E. 606.

Plaintiffs have no interest in the property, in the sense of ownership. The court in this contract will lean to that interpretation which is most favorable to the insured.

Travellers' Ins. Co. v. *McConkey*, 127 U. S. 661, 666, 32 L. ed. 308, 310, 8 Sup. Ct. Rep. 1360; *Canton Ins. Office* v. *Woodside*, 33 C. C. A. 63, 61 U. S. App. 214, 90 Fed. 305; *Grace* v. *American Cent. Ins. Co.* 109 U. S. 282, 27 L. ed. 934, 3 Sup. Ct. Rep. 207; *Burkheiser* v. *Mutual Acci. Asso.* 26 L. R. A. 112, 18 U. S. App. 704, 10 C. C. A. 94, 61 Fed. 816; *Palmer* v. *Warren Ins. Co.* 1 Story, 360, Fed. Cas. No. 10,698; *Donnell* v. *Columbian Ins. Co.* 2 Sumn. 380, Fed. Cas. No. 3,987; *Yeaton* v. *Fry*, 5 Cranch. 335, 3 L. ed. 117; *Allen* v. *Charlestown Mut. F. Ins. Co.* 5 Gray, 388; *Lycoming F. Ins. Co.* v. *Haven*, 95 U. S. 245, 24 L. ed. 474.

Where the assured has an insurable interest in the property, and in good faith takes out a policy of insurance thereon, and

NOTE.—For conditions in policy as to sole and unconditional ownership of property, see also, in this series, Hamilton v. Dwelling House Ins. Co. (Mich.) 22 L. R. A. 527; Syndicate Ins. Co. v. Bohn (C. C. App. 8th C.) 27 L. R. A. 614; Dumas v. Northwestern Nat. Ins. Co. (D. C.) 40 L. R. A. 358; and Southern Ins. Co. v. Estes (Tenn.) 52 L. R. A. 915.

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makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest, and issues a policy to him, and accepts and retains his premium, the company must be presumed to have knowledge of the condition of his title, and to assure the property with such knowledge.

Hanover F. Ins. Co. v. *Bohn*, 48 Neb. 743, 67 N. W. 774; *Philadelphia Tool Co.* v. *British American Assur. Co.* 132 Pa. 236, 19 Atl. 77; *Miotke* v. *Milwaukee Mechanics' Ins. Co.* 113 Mich. 166, 71 N. W. 463; *Yost* v. *McKee*, 179 Pa. 381, 36 Atl. 317; *Lycoming F. Ins. Co.* v. *Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Hall* v. *Niagara F. Ins. Co.* 93 Mich. 184, 18 L. R. A. 135, 53 N. W. 727; *German Ins. & Sav. Inst.* v. *Kline*, 44 Neb. 395, 62 N. W. 857; *Erb* v. *Fidelity Ins. Co.* 99 Iowa, 727, 69 N. W. 261; *Wolpert* v. *Northern Assur. Co.* 44 W. Va. 734, 29 S. E. 1024; *Morotock Ins. Co.* v. *Rodefer*, 92 Va. 747, 24 S. E. 393.

When dealing with insurance policies, a forfeiture is not favored in the law.

First Nat. Bank v. *Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *London Assur. Co.* v. *Companhia de Moagens do Barreiro*, 167 U. S. 159, 42 L. ed. 120, 17 Sup. Ct. Rep. 785.

Messrs. **Mitchell & Smith**, for appellant Insurance Company:

In the forms of policy now in use, explicit questions are wholly replaced by conditions stated in the policy. These conditions have the effect of questions and answers as to the nature of title and interest: and in case a statement thereof would be false and insufficient if made in answer to a question, or if the facts are not disclosed which would be required in such answers, there is a breach of the contract; and where there is no statement of the title or specific interest, an acceptance of the policy amounts to a representation by the insured that his title or interest is that stated in the condition, and if it is substantially different, the insurance is avoided.

13 Am. & Eng. Enc. Law, 2d ed. p. 228.

When a disclosure of the true interests of the assured, if the same is not absolute, is required to be made by a condition of the policy, such interest must be stated to the company, or the policy will be void. The acceptance of a policy containing the condition under consideration, without any representation as to title, or any statement of the specific interest of the assured, amounts to a declaration on the part of the assured that his interest is an absolute one.

Mers v. *Franklin Ins. Co.* 68 Mo. 127; *Imperial F. Ins. Co.* v. *Coös County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379.

Policies of insurance against fire are not in the nature of incidents to the property insured, but they are special agreements with persons insuring them against such loss or damage as they may sustain, and not insuring them against the loss or damage which some other person having an interest in the property may sustain.

Carpenter v. *Providence-Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044; *Southwick* v. *Atlantic F. & M. Ins. Co.* 133 Mass. 457; *Annely* v. *De Saussure*, 26 S. C. 505, 2 S. E. 490.

Where a policy is conditioned to be void if the title is not absolute, the questions are (1) whether the insured had an insurable interest in the property, and (2) whether, if the property were destroyed, the whole loss would fall upon him.

13 Am. & Eng. Enc. Law, 2d ed. p. 238.

A life estate is not such an interest.

Ibid.

The question is not whether the insured had an insurable interest, but whether he had the interest described in the policy.

Weed v. *London & L. F. Ins. Co.* 116 N. Y. 106, 22 N. E. 229; *Garver* v. *Hawkeye Ins. Co.* 69 Iowa, 202, 28 N. W. 555.

One who had undisputed possession and the sole and entire beneficial ownership is properly described as the sole and unconditional owner, although the title is held in another name, if there is no fraud or concealment.

American Basket Co. v. *Farmville Ins. Co.* 3 Hughes, 251, Fed. Cas. No. 290.

A substantial outstanding right, though not sufficient to destroy the insurable interest, may prevent one in possession from being the sole and unconditional owner.

Southwick v. *Atlantic F. & M. Ins. Co.* 133 Mass. 457.

If the whole interest of the insured is terminated, the insurance becomes inoperative by reason of the nature of the contract, and no condition to that effect is required in the policy.

Lasher v. *St. Joseph F. & M. Ins. Co.* 86 N. Y. 425; *Mers* v. *Franklin Ins. Co.* 68 Mo. 127; *Weed* v. *London & L. F. Ins. Co.* 116 N. Y. 106, 22 N. E. 229.

The test as to an insurable interest is this: Does the party who takes out the policy of insurance at the time of the loss bear such a relation to the property insured as will create a liability to pecuniary loss if the property is destroyed? If so, such a person has an insurable interest.

Graham v. *American F. Ins. Co.* 48 S. C. 197, 26 S. E. 323.

Mrs. Carrie A. E. Steinmeyer did not even have an insurable interest. The deed to her had been set aside.

Jackson v. *Lewis*, 34 S. C. 7, 12 S. E. 560; *Collins* v. *St. Paul F. & M. Ins. Co.* 44 Minn. 440, 46 N. W. 906; *New Orleans Ins. Co.* v. *Gordon*, 68 Tex. 144, 3 S. W. 718.

Jones, J., delivered the opinion of the court:

This contest involves the question whether the Germania Fire Insurance Company is liable on its policy of fire insurance issued to Carrie Steinmeyer, and, in the event of such liability, who is entitled to the proceeds of the policy. The defendant company issued its policy to Carrie Steinmeyer on the 8th day of May, 1899, insuring certain buildings therein mentioned known as No. 118 Beaufain street, in the city of

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Charleston, South Carolina, against loss or damage by fire. These buildings were partially destroyed by fire on the 24th day of May, 1899, and the damage was adjusted at $580. The insurance company denies liability, alleging that the policy is void by reason of the breach of the conditions of said policy, the answer in this regard being as follows: "(5) Further answering and for further defense, this defendant alleges that the said policy of insurance contained a provision or condition that the same should be void if the interest of the insured in the property be not duly stated herein; and this defendant is informed and believes, and on information and belief avers, that the interest of the said Carrie A. E. Steinmeyer was not truly stated in said policy, inasmuch as the said Carrie A. E. Steinmeyer has been adjudicated to hold said property as trustee, and that by reason of said violation of said provision or condition of said policy the said policy has become null and void, and this defendant is not liable thereunder. (6) That said policy of insurance contained a further provision or condition that the same should be void if the interest of the insured be other than unconditional and sole ownership, or if any change took place in the interest, title, or possession of the subject of insurance, except change of occupants, without increase of hazard, whether by legal process or judgment, or by voluntary act of the insured or otherwise. And this defendant is informed and believes, and on information and belief avers, that the interest of the insured, the said Carrie A. E. Steinmeyer, was not unconditional and sole ownership, and that her interest and title in the subject of insurance has been changed, inasmuch as the said Carrie A. E. Steinmeyer has been adjudicated not to have been unconditional and sole owner in said property, and that she held the same in trust; and that by reason of said violation of said provisions and conditions of the said policy the said policy has become null and void, and the defendant is not liable." The policy contained provisions that the entire policy "shall be void . . . if the interest of the insured in the property be not truly stated herein, . . . if the interest of the insured be other than unconditional and sole ownership, . . . or if any change, other than by death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise." The property insured was originally owned by Eliza R. Steinmeyer, who conveyed the same to Carrie Steinmeyer in May, 1894, who every year thereafter up to the date of the policy in question insured the premises in the defendant company in her own name and interest. In 1897 creditors of Eliza Steinmeyer brought an action to set aside this deed, with other conveyances, as in fraud of their rights, and as the result of that suit this court affirmed the decree of the circuit court rendered August 13, 1894, adjudging said conveyance to be voluntary, and subjecting the property conveyed, if necessary, after exhausting the grantor, to the payment of the judgment in favor of the grantor's creditors. The decree of this court in said cause (55 S. C. 9, 33 S. E. 15) was rendered April 18, 1899, and the remittitur was filed in the circuit court May 2, 1899. Six days thereafter the policy in question was issued. After the fire, which occurred on the 24th day of May, 1899, the property was sold under the order of the court, and the proceeds applied to the judgment in favor of the said creditors, leaving a balance due thereon more than the amount of the insurance money claimed.

Do these facts warrant a conclusion that the policy is void by reason of a breach of the quoted conditions? We think not. The clause or condition last quoted, relating to change of interest, title, or possession, is not applicable, for such condition refers to change of interest after the issuance of the policy and before the fire. In this case it appears that there was no change of interest between the issuance of the policy and the fire. The other conditions relate to the interest or ownership of the insured at the time of the insurance. Such conditions are reasonable and valid, and a breach of them should prevent a recovery. In 1 May, Ins. § 283, the author says: "Inquiries about a greater or less interest and a more or less perfect title usually refer to the quality of the estate, having reference to its duration, —whether an estate in fee, for life, for years, or at will; to what is vested in distinction from what is conditional or contingent, and not to questions of encumbrance, as affecting the quantity of estate." The question, then, is, What was the interest of the insured, and was her ownership sole and unconditional, with respect to the insurance company, at the time of the insurance? The title of a grantee in a voluntary conveyance by the owner is good against the grantor and all the world, subject to the equity of the grantor's creditors to have the property, if necessary, applied to the payment of their judgment against the grantor. In the absence of actual fraud, as in this case, a voluntary deed is not void *ab initio*, and it is unassailable, even by the creditors of the grantor, until it is legally ascertained that the property is necessary to pay the creditor after exhausting the grantor. *Suber* v. *Chandler*, 18 S. C. 529. Then it is void only as against the right of the creditor to subject it to his judgment. When it is said that such a voluntary deed is "void" or "set aside," these terms must be understood as meaning only that the conveyance, while good against all others, shall not operate to defeat the equity of the creditors of the grantor. With respect to any right of the insurance company, the insured by the grant of the owner, was invested with the fee-simple title at the time of the insurance. The insured's ownership was sole because no one else had any interest in

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the property as owner, and it was unconditional because the quality of her estate therein was not limited or affected by any condition. The right of the grantor's creditors in certain contingencies to subject said property to their claims did not give such creditors any interest in the property as owners, nor did the judgment declaring the deed void as against creditors operate to restore the fee to the grantor, with respect to the insurance company. The status of the voluntary grantee at the time of the insurance was rather that of one holding the fee subject to an encumbrance, the equity of the grantor's creditors. The existence of a lien or encumbrance on the insured's property is not a breach of the condition which requires sole and unconditional ownership. *Manhattan F. Ins. Co.* v. *Weill*, 28 Gratt. 389, 26 Am. Rep. 364; *Carrigan* v. *Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687; *Carson* v. *Jersey City Ins. Co.* 43 N. J. L. 300, 39 Am. Rep. 584; *Hubbard* v. *Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 125; *Dolliver* v. *St. Joseph F. & M. Ins. Co.* 128 Mass. 315, 35 Am. Rep. 378. It does not appear that any inquiries were made by the insurance company as to the existence of encumbrances against the property, and no representations were made by the insured touching her interest in said property except what would be involved by the use of the terms of the conditions considered. The insured was in the use and possession of the premises under said deed at the time of the insurance, and clearly had an insurable interest therein; and it is difficult to say how she could have described her interest or estate in the property other than as sole and unconditional owner. All would admit that she would have been such an owner if the claims of the grantor's creditors had been paid by anyone, or in any way released or discharged, before sale of the premises. But as the creditors had no title in the premises to convey, how could the mere payment of their claims add anything to the insured's title, beyond merely removing an encumbrance? Under the circumstances, the position of the insured was not essentially different than would be the position of any debtor insuring property held in fee simple, but subject to an outstanding mortgage or judgment lien. Such outstanding encumbrances may undoubtedly affect the risk, but the insurance company may, if it sees fit to do so, protect itself against such risks by appropriate stipulations in the contract.

The next question is, Who is entitled to the proceeds of the policy,—the insured, Carrie Steinmeyer, or the plaintiffs, who claim as creditors of the grantor, Eliza Steinmeyer? The contention of the plaintiffs is that, in respect to the proceeds of the policy, Carrie Steinmeyer, while not being an express trustee, has a relationship to plaintiffs in the nature of a quasi trustee, and public policy will, therefore, require that the proceeds of the policy should be applied, *ex æquo et bono*, to the plaintiffs. To sustain this proposition plaintiffs cite the cases of *Bath South Carolina Paper Co.* v. *Langley*, 23 S. C. 129; *Clyburn* v. *Reynolds*, 31 S. C. 118, 9 S. E. 973; *Green* v. *Green*, 50 S. C. 532, 27 S. E. 952. The two last-named cases held that insurance money collected by a life tenant on a total loss by fire should be used in rebuilding, or should go to the remainderman, reserving the interest of the life tenant for life to him, upon the ground that a life tenant, with respect to the property insured, was a quasi trustee to the remainderman, and that public policy requires such a disposition of the proceeds of insurance so affected. These cases are not applicable, as the insured in this case was not a life tenant insuring for full value buildings, the fee in which belonged to remaindermen, with whom the insured occupied a relation of trust with respect to the preservation of the property insured. The case of *Bath South Carolina Paper Co.* v. *Langley* comes more closely to the point in hand; but in that case the insured had purchased property at a sheriff's sale under circumstances amounting to fraud in law, and while in possession under the sheriff's deed had insured the property, and, it having been burned, received the insurance money. The court, having held the sale void by reason of the conduct of the purchasers in entering into an agreement having the effect to chill the bidding, held the insured accountable to the true owner for the insurance money. The language used by the court was: "If, as we have seen, the defendants stood in the relation of quasi trustees towards the plaintiffs, then the money received by them for the insurance on the house of the plaintiffs belonged, *ex æquo et bono*, to the plaintiffs. This money may be regarded as a compensation, in part at least, for the loss of property which has been adjudged to be the property of the plaintiffs, and therefore in equity and good conscience it belongs to the plaintiffs. Any other view would, contrary to well-established principle, enable the defendants to make profit for themselves out of the quasi trust property. It is, in effect, money had and received by the defendants to the use of the plaintiffs, and as such recoverable by the plaintiffs, subject, however, to a deduction of all amounts actually paid by the defendants, either by way of premiums or otherwise, in effecting or collecting such insurance." In the case just cited the insured effected insurance on the property of another, of which he had obtained possession under circumstances which rendered the sale voidable by the owner. In this case the insurance was effected by one to whom the original owner had conveyed by deed, which the original owner and grantor could not assail. This case should be decided upon correct principles of law as applicable to the respective rights of the parties under the particular facts. All must admit, and we have already held, that the insured had an insurable interest in the buildings which were partially burned, and that such insurable interest is covered by the policy. No one has estimated the value of

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such insurable interest except as valued in the adjustment of the amount of the loss, $580. Can it be said that the insured shall take nothing as the fruit of her contract with the company, for which she alone paid the consideration? The proper solution of the question requires that notice be taken of the nature of the policy of insurance. The authorities generally agree that a contract of fire insurance is a personal contract between the insurer and insured, by which the former undertakes to indemnify the latter for the loss he sustains by fire. Being a personal contract, it does not run with the buildings said to be insured, is not an incident to the thing insured. Being a contract of indemnity, it is essential that the insured have an insurable interest in the subject of insurance. 1 May, Ins. §§ 2, 6; 16 Am. & Eng. Enc. Law, 2d ed. pp. 840–843; *Carpenter* v. *Providence-Washington Ins. Co.* 16 Pet. 496, 10 L. ed. 1044; *Annely* v. *De Saussure*, 26 S. C. 505, 2 S. E. 490; *Swearingen* v. *Hartford Ins. Co.* 52 S. C. 315, 29 S. E. 722. If, therefore, Carrie Steinmeyer had an insurable interest, and her loss with reference to that interest has been estimated to be the fund in dispute, and if the contract for which she alone paid the premium is one of personal indemnity, upon what principle of law, justice, or public policy can that which is hers be given to the creditors of another? It is not doubted that the creditors of Eliza Steinmeyer had the right to resort to the insured property, or to that into which the insured property had been converted, having the right to follow the property of their debtor; but this gives them no right to the insurance money, which does not represent their debtor's property, but represents the amount of personal indemnity going to Carrie Steinmeyer for her loss. In 14 Am. & Eng. Enc. Law, 2d ed. p. 343, the law is thus stated: "Money due on a policy of insurance, procured by the grantee on buildings situated on the property, title to which has been conveyed to him in fraud of the grantor's creditors, is not to be deemed proceeds of the property, and cannot be subjected by the grantor's creditors to the payment of his debts. A policy of insurance against fire is not an incident to the property insured, but is a mere special agreement with the insured, indemnifying him against such loss or damage from fire as he may sustain thereby. If creditors have a lien by mortgage, judgment, or execution, they can insure their own interests, but they can have no right to attach insurance money due to anyone but their own debtor." Among the cases cited to support the text is *Forrester* v. *Gill*, 11 Colo. App. 410, 53 Pac. 230, which is exactly in point, and thus reasons out the proposition: "A transfer of property made with the intent to defraud creditors is void as to them, and their right to follow the property extends to its proceeds or other form of property into which the fraudulent grantee may have converted it. If the fund which the plaintiff seeks to subject to the payment of his debt was the proceeds of the property, the evidence was admissible, and its exclusion error. The main question in the case, therefore, is, 'Was the money due from the insurance company the proceeds of the property?' We think this question must be answered in the negative. Insurance is a contract of indemnity. The insurer agrees for a consideration to pay to the insured a stipulated amount in case the latter shall sustain loss or damage in consequence of the happening of some event or contingency contemplated by the contract. It is a personal contract, and does not run with the title to the property. *Cummings* v. *Cheshire County Mut. F. Ins. Co.* 55 N. H. 457; May, Ins. §§ 1, 6. The money which the insurance company agreed to pay to Mrs. Craft was not payable as a price for the property, and its payment would not operate to convert the property into a fund. It was her personal interest in the property which was insured, and the agreement was to pay to her personally a certain amount in case of injury to her interest from a specified cause. That she had an insurable interest is conceded, and, even if it were not conceded, is settled by the adjudications. The fund which the plaintiff seeks to reach does not in any sense represent the property. Therefore it cannot be taken for the husband's debt, as the property itself might have been. The fact that the transaction by which her interest was created might have been avoided by her husband's creditors gives them no claim to money payable to her as compensation for the destruction of that interest upon a contract which she had the right to make, which in no manner affected the interest of her husband, and in consequence of which no injury could result to those creditors. *Lerow* v. *Wilmarth*, 9 Allen, 382; *Bernheim* v. *Beer*, 56 Miss. 149; *McLean* v. *Hess*, 106 Ind. 555, 7 N. E. 567; *Nippes's Appeal*, 75 Pa. 472." We agree, therefore, with the circuit court, that the defendant company is liable upon the policy, and that Carrie Steinmeyer, the insured, is entitled to receive the proceeds thereof. This renders it unnecessary to consider any further the exceptions.

The judgment of the Circuit Court is affirmed.

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TENNESSEE SUPREME COURT.

W. E. WEBSTER *et al.*
v.
James C. HARRIS, *Appt.*

(.....Tenn.....)

1. **A lake, although 20 miles long and 7 wide, with water in some places 18 feet deep, is not navigable** in the technical sense, so as to place the title to its bed in the state, where it is covered and filled with trees, stumps, logs, and snags, through which there are no proper channels to make navigation available.
2. **A grant of land bounded by the water's edge at low-water mark on a lake** will not extend the title to the center of the lake, although it is navigable only in the ordinary sense, so that the title to the bed might vest in private owners.
3. **The owner of land bordering on a lake navigable only in the ordinary sense,** even though his title does not extend beyond the water's edge, has a right to have the water remain in place, so that the lake cannot be drained by other riparian owners.
4. **The holder of state grants** which he claims cover the bed of a lake must show with accuracy the particular land he claims before he can recover in ejectment.

(September 1, 1902.)

APPEAL by defendant from a judgment of the Lake County Chancery Court in plaintiffs' favor in a suit to determine the ownership of Reelfoot lake. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Moore & Wells,** for appellant:

A body of water is navigable in a legal sense when it is capable, in the ordinary state of the water, of navigation, ascending and descending, by sea vessels; that is, such vessels as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether sail or steam vessels.

Stuart v. *Clark,* 2 Swan, 14, 58 Am. Dec. 49.

If it be navigable in law, the owner of the banks takes only to ordinary low water; but where the stream is navigable in a common sense, then the owner of the banks may, according as his deed is written or limited, take to the center of the stream or across it.

Holbert v. *Edens,* 5 Lea, 204, 40 Am. Rep. 26; *Posey* v. *James,* 7 Lea, 103; *Sigler* v. *State,* 7 Baxt. 494; *Irwin* v. *Brown,* 3 Shannon Cas. 310; *Gaston* v. *Mace,* 33 W. Va. 14, 5 L. R. A. 396, 10 S. E. 60.

Nature alone makes a navigable water course, whether navigable in law or in the ordinary sense. The water courses must be by nature susceptible of general use as a public highway.

Connecticut River Lumber Co. v. *Olcott Falls Co.* 65 N. H. 290, 13 L. R. A. 828, 21 Atl. 1090.

The test is the natural capacity of the stream; its natural capacity in its natural state is controlling.

Gould, Waters, p. 208; *Olive* v. *State,* 86 Ala. 88, 4 L. R. A. 38, 5 So. 653; *Swanson* v. *Mississippi & R. River Boom Co.* 42 Minn. 532, 7 L. R. A. 674, 44 N. W. 986.

A stream that has become navigable by artificial means is not thereby made a navigable stream.

Willow River Club v. *Wade,* 100 Wis. 86, 42 L. R. A. 323, 76 N. W. 273; *Little Rock, M. R. & T. R. Co.* v. *Brooks,* 39 Ark. 403, 43 Am. Rep. 277; *Rhodes* v. *Otis,* 33 Ala. 578, 73 Am. Dec. 439; *Munson* v. *Hungerford,* 6 Barb. 265; *Chisolm* v. *Caines,* 67 Fed. 285; *State* v. *Gilmanton,* 14 N. H. 467; *Cates* v. *Wadlington,* 1 McCord, L. 580, 10 Am. Dec. 699; *Jeremy* v. *Elwell,* 5 Ohio C. C. 379; *United States* v. *Rio Grande Dam & Irrig. Co.* 9 N. M. 292, 51 Pac. 674.

Reelfoot lake does not belong to the class called navigable in law. The state may grant it.

Hodges v. *Williams,* 95 N. C. 331, 59 Am. Rep. 242; *Ledyard* v. *Ten Eyck,* 36 Barb. 102; *Cobb* v. *Davenport,* 32 N. J. L. 369; Gould, Waters, § 83; *State* v. *Narrows Island Club,* 100 N. C. 477, 5 S. E. 411; *Broadnax* v. *Baker,* 94 N. C. 678, 55 Am. Rep. 633; 12 Am. & Eng. Enc. Law, pp. 612, 617, 618, 628, 648; *Gouverneur* v. *National Ice Co.* 134 N. Y. 355, 18 L. R. A. 695; 13 Am. & Eng. Enc. Law, 2d ed. pp. 568 *et seq.;* 3 Washb. Real Prop. p. 4.

The burden of proof is on him who asserts it to show that a body of water is navigable in either sense, or that it is floatable.

Gaston v. *Mace,* 33 W. Va. 14, 5 L. R. A. 396, 10 S. E. 60; Black's Pom. Water Rights, 216; Gould, Waters, § 112.

The doctrine of accretions only applies in the case of water courses navigable in law.

Posey v. *James,* 7 Lea, 98; *Indiana* v. *Milk,* 11 Biss. 197, 11 Fed. 389; *Trustees of Schools* v. *Schroll,* 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243; *Stoner* v. *Rice,* 121 Ind. 51, 6 L. R. A. 388, 22 N. E. 968; *Hodges* v. *Williams,* 95 N. C. 331, 59 Am. Rep. 242; 12 Am. & Eng. Enc. Law, pp. 617, 618; *Noyes* v. *Collins,* 92 Iowa, 566, 26 L. R. A. 609, 61 N. W. 250; *Lembeck* v. *Nye,* 47 Ohio St. 336, 8 L. R. A. 580, 24 N. E. 686; Gould, Waters, § 85; *Gouverneur* v. *National Ice Co.* 134 N. Y. 355, 18 L. R. A. 696, 31 N. E. 865; *Fuller* v. *Shedd,* 161 Ill. 462, 33 L. R. A. 159, 44 N. E. 286.

If the bank, or margin, or edge, or low water, or shore, or side of the lake, or any

NOTE.—As to what waters are navigable, see also, in this series, Willow River Club v. Wade (Wis.) 42 L. R. A. 305, and *note;* also Griffith v. Holman (Wash.) 54 L. R. A. 178.

As to effect of bounding grant on river or tide water, see Hanlon v. Hobson (Colo.) 42 L. R. A. 302, and *note;* also Freeland v. Pennsylvania R. Co. (Pa.) 58 L. R. A. 206.

As to rights of riparian owners of land bounding on small lakes and ponds, see Gouverneur v. National Ice Co. (N. Y.) 18 L. R. A. 695, and *note.*

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timbers on the lake, are called for, clearly showing the intention to limit title to the same, then title will not extend to the center or thread of the stream or lake.

Martin v. *Nance*, 3 Head, 649; *Holbert* v. *Edens*, 5 Lea, 209, 40 Am. Rep. 26; *Branham* v. *Bledsoe Creek Turnp. Co.* 1 Lea, 708, 27 Am. Rep. 789; *Stuart* v. *Clark*, 2 Swan, 10, 58 Am. Dec. 49; *Iron Mountain R. Co.* v. *Bingham*, 87 Tenn. 523, 4 L. R. A. 622, 11 S. W. 705; *Allen* v. *Weber*, 80 Wis. 531, 14 L. R. A. 361, 50 N. W. 514; Gould, Waters, §§ 196, 197, 200, 203; *Hanlon* v. *Hobson*, 24 Colo. 284, 42 L. R. A. 506, 51 Pac. 433.

Riparian rights do not attach to lakes.

Gould, Waters, § 148.

The right to fish in water covering the lands of another is not a riparian right.

The owner of lands under water has a special or qualified property in the fish in such waters.

8 Am. & Eng. Enc. Law, pp. 31, 32, 34, 38, 39; 12 Am. & Eng. Enc. Law, p. 628; *Lembeck* v. *Nye*, 47 Ohio St. 336, 8 L. R. A. 578, 24 N. E. 686; *Wallace* v. *Myers*, 4 L. R. A. 171, 38 Fed. 184; *Smith* v. *Clows*, 114 N. Y. 190, 4 L. R. A. 393, 21 N. E. 160; *Goff* v. *Cougle*, 118 Mich. 307, 42 L. R. A. 171, 76 N. W. 489; *Willow River Club* v. *Wade*, 100 Wis. 86, 42 L. R. A. 305, 76 N. W. 273; Gould, Waters, §§ 46–49, 80, 81, 83, 182, 184, 185, and notes to §§ 184, 499; *Albright* v. *Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 45 Atl. 634; *Gouverneur* v. *National Ice Co.* 134 N. Y. 355, 18 L. R. A. 695, 31 N. E. 865; 3 Kent, Com. pp. 519–521; *Maney* v. *State*, 6 Lea, 221.

The owner of the soil has a several fishery in the waters covering his land.

Gould, Waters, §§ 184–499.

A custom to take fish from waters over another's land is not a lawful custom.

Gould, Waters, § 184; 12 Am. & Eng. Enc. Law, p. 626; *Turner* v. *Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951.

One may have an easement over another's land, but it gives him only the right to use the land for that purpose,—not to take any part of it.

Gould, Waters, §§ 329, 338; 2 Washb. Real Prop. 313.

The user and enjoyment must also be as of right, not merely permissive.

Gould, Waters, § 338; 2 Washb. Real Prop. 337; *Ferrell* v. *Ferrell*, 1 Baxt. 329; *Slater* v. *Gunn*, 170 Mass. 509, 41 L. R. A. 269, 49 N. E. 1017.

If the public have an easement in waters for purposes of navigation this public easement does not give the state the right to convert the waters to any other uses.

Black's Pom. Water Rights, § 6; 3 Kent, Com. p. 423; *Canal Fund Comrs.* v. *Kempshall*, 26 Wend. 414.

As the lands under this lake belong to Mr. Harris, he has a right to drain it.

The water in this lake is surface water, coming to it as each rain falls in the hills to the east and northeast of it, and from the Mississippi river during its annual overflows.

Gould, Waters, §§ 263, 264; 24 Am. & Eng. Enc. Law, p. 903; Washb. Easements, p. 309; *Sheehan* v. *Flynn*, 59 Minn. 436, 26 L. R. A. 636, 61 N. W. 462; *McDaniel* v. *Cummings*, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795.

It is a recognized right that every landowner has, in law, to drain the surface water from his lands, provided he takes care not to place it on those of others to their injury.

Gould, Waters, §§ 265, 274, 367; 24 Am. & Eng. Enc. Law, pp. 896, 900, 909, 911, 917.

Messrs. **Deason, Rankin, & Waddell** for appellees.

McAlister, J., delivered the opinion of the court:

This case is presented to the court in a most voluminous record, and involves the title, ownership, and navigability of Reelfoot lake, situated in the northwestern corner of the state. It also involves the hunting and fishing privileges and the general riparian rights of the complainants in the waters of said lake. In August, 1899, the defendant J. C. Harris, assuming to be the owner of the soil under the waters of the lake, began to excavate a canal for the purpose of connecting the lake with the Mississippi river, and in this way drain the water from the greater portion of the lands comprising the lake. Thereupon complainants, who are owners of lands, hotels, club houses, fish docks, and other property situated along the eastern shore of the lake, filed this injunction bill to restrain the defendant J. C. Harris from draining it. They base their right to maintain the suit upon the ground that they are riparian owners of certain lands bordering on the lake; that Reelfoot lake is a public and navigable body of water in a legal sense and as a matter of fact; that as such, under the statutes of the state, it is a public highway; that the obstruction or destruction of its navigability will be a public nuisance, and that the drainage of said lake will create a public nuisance on account of the character of its bottom, which is composed of mud and decaying vegetable matter, and thus greatly injure the health of the people in that vicinity. It is also alleged in the bill that the drainage of the lake would destroy the value of the improvements which complainants have erected upon their lands for the entertainment of guests who visit Reelfoot lake at all seasons of the year for pleasure and to hunt and fish. It is further alleged that defendant Harris has set up some pretended claim and title to the land under the waters of Reelfoot lake; that he has declared his purpose to drain the lake; that he has a large number of hands at work digging a canal from the Mississippi river to Reelfoot lake; and that he will drain the lake, unless restrained by law.

The defendant Harris filed his answer and cross bill, in which all the material allegations of the original bill are denied. It is alleged by said Harris that on December

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28, 1898, he purchased from the Reelfoot Outing Club, by deed conveying the title in fee, all the lands covered by the waters of Reelfoot lake at ordinary low-water mark, and also all the shores and margins of said lake and of all the islands in said lake. Defendant alleges in the cross bill that he is the owner of the lake and of all the soil thereunder, and that he has the exclusive right to the hunting and fishing privileges, etc. It is also alleged in said cross bill that the said Harris and his predecessors in title have exercised acts of ownership over Reelfoot lake under their said titles, and that the validity of the titles under which he claims has been determined in his favor by the supreme court of Tennessee.

The chancellor, Hon. W. H. Swiggart, assigned to hold the chancery court of Lake county, heard the cause upon the pleadings and proof. A very able and elaborate written opinion was filed by the judge, which has greatly facilitated the labors of this court in the investigation of the case. The result of the chancellor's opinion was to sustain the original bill, perpetuate the injunction restraining the defendant Harris from draining Reelfoot lake, and to dismiss his cross bill. The court held that the complainants to the original bill are riparian owners, owning tracts of land in severalty along the eastern shore of the lake, with their western boundaries extending to the water's edge at the low-water mark; that they are entitled to the uses, benefits, and privileges of the waters of the lake for all common, usual, domestic, and farm purposes, and entitled to have the waters of the lake continued in their natural state and condition; that Reelfoot lake is a public and navigable body of water in the sense of the law as well as in fact, and therefore not the subject of private ownership and control, under the general land laws of Tennessee, but that the soil under said waters and the fisheries therein, as well as the right of navigation, belong to the state, in trust for the benefit of all the citizens thereof; and that the title under which J. C. Harris and his predecessors claim to own Reelfoot lake is void, and that such title papers confer no title whatever to such of the lands as are covered by water. The court did not determine the title to the islands in the lake, as none of the complainants to the suit are asserting any title thereto. J. C. Harris appealed from the decree of the chancellor and has assigned numerous errors.

The first assignment is that the court erred in holding that Reelfoot lake is a public and navigable body of water in the sense of the law as well as in fact. Second. The court erred in holding this lake is not the subject of private ownership and control, under the laws of Tennessee, but that the soil under the lake and the fisheries therein, as well as the right of navigation, and all other rights, incidents of property, and easements thereto, belong to the state, in trust for the benefit of the citizens thereof. It is insisted this holding of the chancellor was erroneous. The test of a navigable stream is whether, in the ordinary state of the water, it has capacity and suitability for the usual purposes of navigation. *Stuart* v. *Clark*, 2 Swan, 9, 58 Am. Dec. 49. It was further said in that case: "We are aware of no less exceptionable criterion than that to be extracted from some of the cases before referred to, namely, a river capable, in the ordinary state of the water, of navigation, ascending and descending, by sea vessels; that is, such vessels as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether steam or sail vessels." Judge McKinney in that case said: "The distinction between the technical sense of the term and its common acceptation is important to be kept in view in inquiring into the respective rights of the public and the riparian owners in reference to the property in the soil, as well as in the use of water courses. . . . If the river be a public, navigable stream in the legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. But if it be not navigable in the legal meaning of the term, . . . the ownership of the bed of the stream is in the riparian proprietors, but the public have an easement therein for the purposes of transportation and commercial intercourse. A distinction is taken by the common law between streams which in the common acceptation of the term are suited to some purposes of navigation and small shallow streams which are not so. In respect to the former,—which, though not navigable in the sense of the law, are yet of sufficient depth naturally for valuable floatage, as for rafts, flatboats, and perhaps small vessels of lighter draught than ordinary,—while it is settled that the right of property in the bed of the stream is vested in the riparian proprietor, and in that respect it is to be regarded as a private river, still it is equally well settled that the public have a right to the free and uninterrupted use and enjoyment of such stream for all the purposes of transportation and navigation to which it is naturally adapted." These principles were reaffirmed by this court in *Holbert* v. *Edens*, 5 Lea, 207, 40 Am. Rep. 26; *Sigler* v. *State*, 7 Baxt. 493; *Goodwin* v. *Thompson*, 15 Lea, 209, 54 Am. Rep. 410. But it was held by this court in *Irwin* v. *Brown*, 3 Tenn. Cas. 310, that a stream which is not of sufficient depth naturally for valuable floatage, such as rafts, flatboats, and small boats of lighter draught than ordinary, is not navigable in either a strict legal sense or ordinary sense. Hence, it was held that capacity to float a saw log in Hind's creek to a river was not a test of the navigability of said creek. To the same effect is *Allison* v. *Davidson*, 39 S. W. 905, decided by the court of chancery appeals, and affirmed by this court. It was held in *Goodwin* v. *Thompson*, 15 Lea, 209, 54 Am. Rep. 410, that, if a stream is navigable in a legal sense, the title to the soil under the water is in the state, in trust for the public, and individuals setting up a claim thereto must be able to show an express grant by an act

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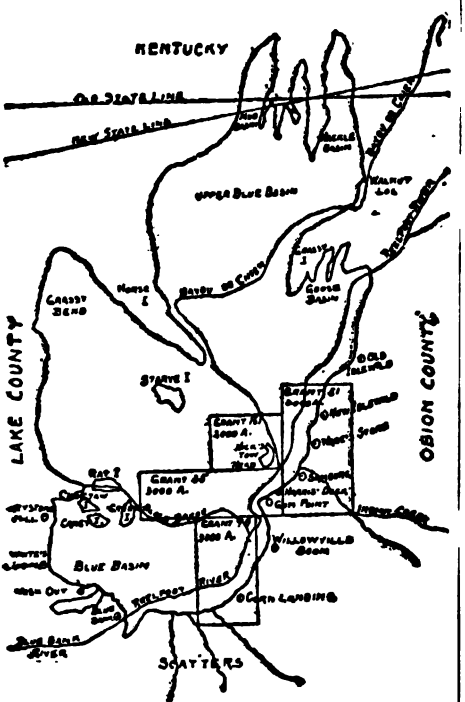
of the legislature; and that the title to the soil under such streams was not intended to be secured by individuals under our general land laws. With these definitions and principles in view, we proceed to inquire if the facts disclosed in this record establish that Reelfoot lake is a navigable body of water in the legal sense, as held by the chancellor. The following diagram is shown to be an accurate representation of the shape of the lake, its banks, boundaries, tributaries, etc., and will serve to illustrate the bearing of the facts established by the evidence:



The origin, history, and description of the lake is given in the following extract, which we take from the very able and learned opinion of Judge W. H. Swiggart, *viz.:*

"The proof shows that Reelfoot lake is a large body of water, lying in the northwest corner of the state of Tennessee, in both Obion and Lake counties, mainly, a small portion of it, consisting of 1,000 acres, or more, being in the state of Kentucky; that portion in Kentucky being certain arms or pockets of the main lake. The lake covers about 25,000 or 30,000 acres of submerged land, not including the arms or pockets, which cover several hundred more. It is about 15 or 20 miles long, and from 2 to 7 miles wide, being of irregular shape. It has several islands in it, which together cover about 1,500 acres. There are also two large promontories or points of land extending into the lake, which are sometimes called islands, to wit, Grassy point, on the eastern shore, and Horse island (so called), on the western shore. The head of the lake is at the north, near the Tennessee and Kentucky line, and only about 3 miles from the Mississippi river. Its course is to the south and somewhat west; and, after passing round Madrid bend, the river comes back to within 2½ or 3 miles of the western shore of the lake at Tiptonville, the county seat of Lake county. The natural outlets of the lake are at its southern end, and consist of sloughs and bayous, sometimes called the 'Scatters' or 'Narrows' of the lake. These carry its waters on south into and through other smaller basins or lakes, and on through other sloughs and bayous into the Obion river, at a distance of about 15 miles from the main body of the lake, and thence through that river into the Mississippi river. This lake was formed by the earthquake or series of earthquakes which occurred in the winter of 1811 and 1812, and which were known to have seriously affected that portion of the country near the old Spanish town of New Madrid, just across the Mississippi river in the state of Missouri. At that date it was a forest of wild land, covered with timber. The small streams called 'Reelfoot river' and 'Bayou De Chein,' passed through the territory now composing the basin of the lake, and came together at a point now in the lake towards its eastern and southern shore, perhaps ¾ of a mile from its eastern bank at the village of Samberg. Reelfoot river enters the lake on its eastern shore, towards the northern end, and Bayou De Chein enters the lake near its extreme northeastern corner, and bears to the southwest, and then back across the lake towards the eastern side, where it empties into Reelfoot river. The course of Reelfoot river is along nearer the eastern bank, towards the south, at the point of confluence above mentioned. From this point the river bears on south and west to the western edge at a point near Campbell's store called 'Blue Bank bayou,' where the old channel leaves the lake, and goes on westward towards the Mississippi river, not being at this date, nor since the formation of the lake, a running stream. There are other smaller streams which flowed across said lake, or into it, and whose waters empty into the lake still. The channel of these streams, Reelfoot river and Bayou De Chein, are still traceable through the waters of the lake, the waters being deeper than at other points, as a rule, and the beds being freer from stumps and logs than other places. It is not shown directly the length of these streams in the lake, but inferentially, I should think, from the proof, that the Reelfoot channel is 20 or 30 miles and the Bayou De Chein is 12 or 15 miles in the lake, following their courses. The lake is now from 2 feet to 18 feet deep, the depth varying at different places. There are many places near the shores where the water is only a few inches in depth. But in the channels of these water courses (as they formerly existed) the average depth of the water is from 4 to 10 feet, in many places deeper, and in one or two places not so deep, especially at Brewer's bar, which has formed across Bayou De Chein, in the upper part of

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the lake. In many other places there are deep, open basins, comparatively clear of stumps, and logs, and where the water is from 12 to 20 feet deep. There are many logs and trees and stumps in said lake, being dead cypress mainly. Many of the trees which stood in it when the land was first submerged have fallen, and the logs lie on the bottom or in the water. Many of them have rotted off at the water's edge, and the stumps still stand, some of them hidden by the water, and others above the water. Many of the logs have been washed out and drifted to the southern end, and filled up Broad slough, one of the outlets of the lake. The extent and depth given above of the lake are what I think the proof shows it to be at ordinary low water, when it is in its ordinary and natural condition. The lake is fed by the streams I have referred to, and by Indian creek, and by many springs which flow into it from the chain of bluffs along its entire eastern shore. Indian creek and Reelfoot river and many of the springs are perennial; others go dry in summer; and it is a disputed question whether Reelfoot river does or does not flow all the year round. But the proof is that it flows substantially all the year. If it has ever ceased to do so, it is only rarely, and when the season is unusually dry, and for only a short time. The lake is subject to overflows from the Mississippi river. The ground between the river and the head of the lake is low, and in great rises in that river its waters overflow all the country round, and fill up the lake to the depth of 10 or 12 feet above its ordinary stages. This occurs generally once a year, but not always. After such flood it gradually runs down to its normal condition, the water remaining higher than is usual until summer, or late spring. The water, except when flooded by such overflows from the Mississippi, is clear, and comparatively pure. It is transparent. It is wholesome, and is used by the people for drinking, cooking, watering stock, etc. The lake is also supplied with an abundance of the finest species of fresh-water fish, which are taken in great quantities for food, and many of which are shipped to the various markets and sold; there being perhaps, according to the proof, 400 or 500 men and their families who are making their living by fishing in this lake. It is claimed by one witness that the fishing done amounts to perhaps $200,000 per year. However this may be, it is shown that quite an extensive business of this sort is carried on. This fishing is done in various ways, nets and seines, as well as hooks and lines, being used; and the fish are taken out in skiffs, generally, and carried to shore, where docks have been built and maintained to receive them. It is also shown, and not denied, that said lake has for a long time been a famous and favorite resort for sportsmen for hunting wild fowls and for fishing thereon. It is shown, also, by a preponderance of the evidence that the lake is gradually filling up at some places, especially at the mouth of Reelfoot river, and at the mouth of Indian creek, and at certain points along the western shore, as the result, perhaps, of sediment washed into it by the waters of these streams and by the overflows from the Mississippi. But while it is asserted by some witnesses that the lake has filled up several feet generally, and does not cover so much land now as formerly by perhaps one fourth or one fifth, I do not think the proof as a whole sustains the contention. The recession of the waters seems to have been greater on the Lake county shore, and even there I do not find that it has receded more than 100 yards, or about that, in the places of greatest recession, and in other places on that shore it has receded only a few yards, and in still others none. While on the east bank there appears to be some land formed by accretion at the mouth of Reelfoot river and at the mouth of Indian creek, the proof does not show the exact amount of such accretions or derelictions at these places; and at other places on the eastern shore there is no such definite proof on the subject as will warrant the court in holding that the waters have permanently receded, leaving relicted land or accretions upon the former banks. Indian creek empties into the lake from the eastern shore at the village of Samberg, formerly called 'Wheeling,' or just north thereof. The proof shows that the lands north and west of this lake, and south and also east for a short distance out to the bluffs which run along this shore, all overflow from the Mississippi to the depth of 5 to 15 feet; that said lands in Lake county, and in Kentucky, and at the Narrows, and many on the east are still in the woods and unimproved. But along the eastern shore, and especially where complainants claim land, the lands fronting on the lake are cleared and in cultivation. Many of these have been so for a great number of years. There is no perceptible current in said lake, except at times when it is flooded from the river, although there is a constant flow of water into and out of the lake; but the quantity is not sufficient, ordinarily, to cause any apparent current in the lake, not even in the channels aforesaid. The waters are not stagnant, but are kept pure and clear by the winds and other natural causes. In the shallow places there is a growth of cut grass, waukapins, and other vegetation natural to wet lands in this climate. In extreme low water the lands in the arms and pockets and around the shores in shallow places become dry, the water temporarily leaving such places exposed. It will be seen from these statements of the pleadings and this summary of the physical facts concerning this lake, that the principal question to be decided is whether the lake is a public navigable body of water which belongs to the state for the use of the people, including the title of the soil, and the fisheries appertaining to it, as well as the right of navigation; or whether, if not so, then it is navigable in such qualified sense as to give the public an easement in it for the purposes of navigation and commercial intercourse only,

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while the soil under its waters and fisheries are the property of the riparian owners or others, to whom it may be granted by the state; and, if the latter be its legal status, then whether the complainants are in fact riparian owners on its shores and banks, and the extent of their titles and rights in the lake as to the soil under it and the waters and fisheries therein, and whether the defendant Harris has acquired the sole proprietary rights in the soil under the water and in the fisheries thereof."

With this admirable statement of the case made by the learned chancellor, we proceed to inquire whether, upon the facts found in the record, Reelfoot lake is a navigable stream in the legal, technical sense of the term; for, unless it is navigable in that sense, the soil under the water was subject to grant under the general land laws of the state, and the title, with the right of fisheries, etc., would vest in the riparian owners or other proprietors. As already stated, Reelfoot lake, to be navigable in the legal, technical sense, must be capable, in the ordinary stage of the water, of being navigated by such vessels as are usually employed for purposes of commerce, whether foreign or inland, and whether steam or sail vessels. Photographs of different views of the lake accompany the record, which we regret cannot be incorporated in this opinion, since they give a very accurate representation of the obstructions to navigation which abound in this lake, as shown by the record. Many of these views impress us in the same manner as several witnesses were impressed by their first sight of the lake. One says: "When I first saw the lake, it just reminded me of the masts of a ship in going into a harbor,—the dead trees standing up there." Another states: "The first time I ever saw it, it looked like a great deadening, covered with timber, and overflowed with water." Another witness testifies: "The lake has large trees in it, making it look like standing water among timber." Still another states that "the lake is full of trees, snags, stumps, and logs in the deepest water, and in the more shallow is covered with moss and water lilies, with the exception of a few basins, which I do not think connect." Another says: "The general appearance is ugly, unsightly, and rugged. The water part is covered with dead cypress trees, snags, and stumps of very irregular height, size, and shape, besides logs—black walnut, gum, oak, and willow—peeping up above and under the surface of the water." Another witness states that "there are stumps, trees, and logs in the lake from one end to the other. Some places they are very thick, and in others not so thick. There are dead trees standing in the water, some high and some low, some large and some small. They range from 1 foot to 6 feet high, and the trees from 20 to 40 feet high, and the snags about the same. In the bottom of the lake there are many logs and limbs, some places thick and some places thin. You cannot cross from the west to the east side, without going by the south end of Green island. A loaded skiff going from west side of the lake at White's landing to Samberg would have to pass around south end of Green island, and also south end of Willow bar." Complainants introduced expert testimony to show that said lake is navigable, but the result of this testimony is that, so far as the volume of water is concerned, there is sufficient for any kind of navigation, but that it will be necessary to remove the trees, logs, stumps, snags, and other impediments. They think this practicable, since such obstructions were removed from the float road built by the Keystone Milling Company. It is also suggested that in all navigable streams there are obstructions, and that dredgeboats and snagboats are constantly engaged in removing such impediments to navigation, and that large appropriations are made by Congress and some of the state legislatures for this purpose. We have examined with much care the evidence submitted by each side on the subject of the navigability of this lake. A review of the testimony in the record has convinced us that Reelfoot lake, on account of the natural obstructions that everywhere abound over and under its water, in the way of trees, stumps, logs, snags, etc., and for want of proper channels, is not a navigable body of water in a legal sense. It is practically conceded by the chancellor that the lake in its present condition is not navigable in a legal sense. On this point he stated, *viz.*: "I think it is not to be held that because navigation of such waters would be attended with difficulty and danger, or even is made wholly impracticable on account of such obstructions, that, therefore, such waters become on that account nonnavigable waters, if there is in fact sufficient volume of water for useful navigation, and it can be made available to the public by a reasonable expenditure in cleaning out the obstructions." Again, he says: "I do not find any authority holding, if navigation is impracticable on account of such obstructions as logs, timbers, and the like, that such waters are not to be regarded as navigable; but if the navigation is impracticable on account of the natural condition of the river bed,—as where it is full of rocks, or other substances, composing the bed of the river, so that it cannot be navigated without making a channel,—then in such cases it would not be navigable in a legal sense. But," continues the court, "it is a matter of common knowledge that obstructions such as snags, logs, drifts, fallen logs, and recently formed sand bars have to be, and constantly are, removed from the beds of nearly or quite all of the navigable rivers of the country." Again, in concluding his opinion, the court says, *viz.*: "I have felt no doubt as to the capacity and volume of water in the lake to carry useful boats, such as are often used in carrying freight and passengers on the smaller navigable rivers. The fact which seems to make the question more difficult of solution than it would otherwise be is the obstruction by trees.

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stumps, and logs now in the water of the lake. If, under the law, the court must find that the water, to be navigable in its natural stage, must be capable of navigation with all the obstructions in it which have filled it up as the result of years of accumulation, then there would be ground for serious debate in this case; but I think the rule should be as I have indicated above on this point." If, as stated by the chancellor, the obstructions to navigation in this lake were of such a character as that they could be removed by a reasonable expenditure of money, there would be much plausibility in the reasoning of the court. But we agree with counsel for defendant "that to undertake to clean or clear out the trees, stumps, snags, logs, and other obstructions in the way of navigation in this lake; to straighten, widen, and make deeper its channels; to prepare landings for the boats, and do all other necessary work in it, in order to make it navigable,—would take an immense amount of money; more than any individual, or association of individuals, could or would command for such purposes; more than the state of Tennessee could afford or would expend. None but the Federal government is capable of undertaking such a vast enterprise. Lying wholly within this state, and having no navigable connections outside of this state, Congress would have no jurisdiction or authority to undertake it or to authorize it. Then the making of this lake navigable by artificial means is out of the question." Moreover, the crucial question is whether the lake is now navigable in a legal sense; not whether it is possible to be made so by artificial means, and a vast expenditure of money, at some remote period of the future.

In the case of *Gaston* v. *Mace*, 33 W. Va. 14, 5 L. R. A. 396–399, 10 S. E. 60, the doctrine of the 2 Swan case is quoted approvingly, and this language used in reference to water courses navigable in the common acceptation of the term: "It will be observed from its definition that whether fresh-water streams be or be not navigable is a question of fact, and, as such, those who claim such nontidal streams to be navigable have on them the burden of proving that such streams are in fact navigable for boats or lighters, and susceptible for valuable use for commercial purposes, in the natural state, unaided by artificial means or devices." Again, on page 29, 33 W. Va., page 399, 5 L. R. A., page 65, 10 S. E., the learned judge says: "The true test, therefore, to be applied in such cases, is whether a stream is inherently in its nature capable of being used for the purpose of commerce," etc. In determining the natural capacity of a body of water for navigable purposes, whether navigable in law or in the ordinary sense, the extent to which it is used for purposes of navigation should be looked to, and this affords the strongest evidence as to its navigability or nonnavigability in either sense. *Olive* v. *State*, 86 Ala. 88, 4 L. R. A. 38–41, 5 So. 653; Gould, Waters, § 43. There must be some commerce and navigation upon it which is essentially valuable. *Swanson* v. *Mississippi & R. River Boom Co.* 42 Minn. 532, 7 L. R. A. 674, 44 N. W. 986. Its connection, or want of connection, with other navigable bodies of water is a strong circumstance to be looked to in order to determine the navigability or nonnavigability of a body of water. Gould, Waters, §§ 82*a*, 83; *Willow River Club* v. *Wade*, 100 Wis. 86, 42 L. R. A. 305–330, 76 N. W. 273. That cannot be considered a navigable river the natural obstructions of which prevent the passage of boats of any description. *Cates* v. *Wadlington*, 1 McCord, L. 580, 10 Am. Dec. 699. The navigability of a water course does not depend upon its susceptibility of being improved by high engineering skill so as to be navigable, but upon its natural capacity and character, rather than the condition of its channel after it is cleaned out, deepened, or widened. *United States* v. *Rio Grande Dam & Irrig. Co.* 9 N. M. 292, 51 Pac. 674. "A distinction is taken between obstructions that nature has placed in the water courses and those which have been put there by other agencies. If the obstructions are naturally there, and have been there all the time, and they render it unfit for use as a public highway, then it is not a navigable stream, though man, by his skill and means, may remove them, and make it fit for navigation. If the obstructions have been placed in the stream by other agencies than nature, then they may be removed so as to make it navigable." The following summary of the facts on this subject we quote with approval from the brief of counsel for defendant, *viz.*: "Is Reelfoot lake now, or was it ever in its natural state or condition, unaided by artificial means or the help of man, inherently capable of being navigated by steamboats or such large flatboats as are ordinarily used on the large rivers and lakes? Could steamboats in size like seagoing vessels navigate Reelfoot lake? In its natural state or condition it is, and has always been, full of trees and logs, planted there by nature. It has no current; is shallow in its ordinary stage of water; has no banks, and only a very doubtful channel, whose depth and width are equally as doubtful and uncertain, and which channel is from 100 feet to a half mile from the water's edge; no outlet nor inlet; no water connection with other navigable water courses; with no way by which to get such boats in or out of it; with stumps, and in places trees, in the channels; and grass, lilies, and yonkerpins growing in all the shallow places; with no connection between the deep basins, which are all surrounded by stumps and trees put there by nature; the lake filling up from year to year; logs lying all over it and in it; snags sticking up everywhere, and many of them hidden beneath the water; with the admitted fact that a steamboat with any tonnage was never on it, and only one steam tug, and two or three light, small flatboats; with the fact that it has never been used for navigation purposes with anything except skiffs, canoes, dug-

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outs, and batteaux. Now, with these conditions existing, most of which are natural, can it be said or argued that the lake is suited or fitted for navigation with such boats as are described by Judge McKinney, or with boats of like size and tonnage? It does seem evident that this lake is not navigable in law, and can never be." But while this is true, it is as equally clear from the evidence that this lake is suitable and of sufficient depth naturally for valuable floatage, as for rafts, flatboats, and perhaps small vessels of lighter draught than ordinary, and in this view the lake is navigable in the common acceptation of the term. It must follow from this view of the case that the land covered by the water was subject to grant, and the title to the lake is not in the state for the use of the public, but in the several grantees and riparian owners; while, as already seen from the authorities, the public still has an easement in such a body of water for commercial intercourse and transportation.

We will next inquire as to the title of complainants who are riparian owners in this lake, and especially whether their titles are limited to low-water mark, or extend *usque ad medium filum aquæ*, and what rights are incident to their titles as riparian owners. Complainants deraign their titles by connected mesne conveyances to two grants issued by the state of North Carolina July 10, 1788, to George Doherty, *viz.*, grant No. 51, for 4,000 acres, and grant No. 35, for 3,000 acres. Complainants Webster and Shaw show that the lands claimed by them are within the bounds of grant No. 35, while the lands of complainants Wade and Moore are embraced within the bounds of grant No. 51. It is shown in proof that its northwest corner, as well as a large portion, of grant No. 51 are in the lake, while the whole of grant 35, excepting 375 acres, is also in the lake. Complainants also introduce in evidence grant No. 98, for 3,000 acres, and grant No. 161, for 2,000 acres, issued by the state of North Carolina to George Doherty, July 10, 1788. It is shown by the proof that grant No. 161 lies entirely under the waters of said lake, and that more than one half of grant 98 is likewise under the waters of the lake. While complainants do not claim under the last two grants, they are introduced for the purpose of showing an outstanding title in third parties to certain lands claimed by defendant Harris. Exceptions were taken in the court below to the introduction of any of the Doherty grants for want of proper certification, and because improperly issued, and because all claims under them have long since been abandoned. The chancellor overruled all of these exceptions, and, without stopping to review his action at this point, it suffices to say that we find no error in his ruling. It will be remembered that these grants were issued by the state of North Carolina in 1788, while the lands were not submerged by water until 1811, when Reelfoot lake was formed by a series of earthquakes occurring in that year. The chancellor correctly found that the entire 2,000 acres held under grant 161, and the greater part of the 3,000 acres held under grant 98, and several hundred of the 4,000 acres held under grant 51, and nearly all of the 3,000 acres held under grant 35 are under the waters of the lake. It is shown that as to grant No. 35 the defendant Harris claims title under a deed made by J. G. Smith, executor of H. H. Crockett, to Wells and Cochran, and that so much of grant No. 51 as is under the lake the defendant Harris also claims under a deed made to him since this suit was begun, June 21, 1900, by J. G. Smith as executor of H. H. Crockett. We agree with the chancellor that complainants Webster, Shaw, Wade, and Moore have deraigned title to these lands by mesne connected conveyances to the Doherty grants issued by the state of North Carolina, and, in addition, have shown actual adverse possession to the granted lands for more than twenty years. It is thus shown that they have established an indefeasible title to the lands embraced within their deeds and possession. Hence it is clear that these particular lands cannot be the property of the defendant Harris, as claimed by him in his cross bill. Two other grants introduced by complainants must be mentioned: First, grant No. 4,436, dated December, 1839, issued by the state of Tennessee to Charles Nix for 70 acres lying just north of grant No. 51, and abutting on the lake. This grant calls for a tree on the bank of the lake, running thence to another tree on the bank of the lake at Tanner's northwest corner. The Tanner grant, No. 4,404, is also introduced, embracing 102 acres, dated December, 1839, and calling for the Nix grant at its northwest corner. It appears that the land covered by complainant Mitchell's deed also includes the Nix grant. Complainants also introduce in evidence a deed from K. Raynor and wife and Jas. Robertson and Jno. Crockett dated November 1, 1851, covering grant No. 51, to Geo. Doherty, calling for a stake in the lake at its northwest corner. A deed from K. Raynor and wife to Crockett, dated February, 1872, and embracing the same land, was also introduced; also a deed from Jas. Robertson to Crockett, dated August, 1854, and conveying all the former's interest in said tract grant No. 51. While no conveyance from Geo. Doherty appears in evidence, yet complainants deraign title by connected conveyances from Robertson and Crockett, and show actual adverse possession of these lands with inclosures for more than seven years under such assurances of title as establish their titles under the statute of limitations, as found by the chancellor. Complainants Ward, Deal, Mitchell, and Powell also establish their titles by the same deraignment and character of possession. It further appears that all the deeds and muniments of title under which the complainants claim call for the lake at low-water mark as the western boundary of their several tracts. The law of this state is that, if the stream is legally and techni-

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cally navigable, the soil under the water and the use of the stream belong to the public. *Goodwin* v. *Thompson*, 15 Lea, 209, 54 Am. Rep. 410. If, however, the stream be only navigable in the ordinary sense, the soil under the water belongs to the riparian owner, but the public has an easement in the stream for the purposes of transportation and commerce. *Holbert* v. *Edens*, 5 Lea, 207, 40 Am. Rep. 26. If such stream be the boundary of lands, the title extends to the thread or center of the stream of common right or by construction of law. *Ibid.* This is true unless there is an intention clearly expressed in the deed or grant excluding the intermediate space between the edges or bank of the stream and its thread. 3 Washb. Real Prop. p. 436; *Martin* v. *Nance*, 3 Head, 650; *Holbert* v. *Edens*, 5 Lea, 204, 40 Am. Rep. 26; *Posey* v. *James*, 7 Lea, 99. We find such intention expressed in the deeds of complainants. Their titles do not extend to the middle or thread of the lake for the reason their deeds expressly call for the water's edge at low-water mark as their western boundary, and hence the rule that ordinarily applies to the rights of riparian owners in nonnavigable waters does not apply in this instance.

What, then, are the rights of these riparian owners in the waters of such nonnavigable stream; that is to say, in a stream navigable, not in the legal, but only in the ordinary, sense? The proof is that complainants have practically adopted this view by inclosing their lands to the water, and some in the water, building their fences in several instances down into the water on the western inclosure of their premises. Riparian proprietors upon both navigable and nonnavigable streams and lakes are entitled to have the water flow or remain in its natural condition undiminished and unpolluted. They have the right to maintain docks, and to have access to the water from their frontage. Gould, Waters, §§ 149, 150, 153, 179. Land formed by alluvium or accretions from the water, and land gained by the gradual recession of the water contiguous to the respective owners, belongs to the riparian owners. Gould, Waters, § 155. This doctrine is applicable to tide waters as well as to nontidal waters and lakes. Id. p. 313; 12 Am. & Eng. Enc. Law, p. 651. The rights of riparian proprietors are correlative. The right of each is subject to a like right of all others similarly situated. It is indivisible. One has no right to use the water so as to prejudice the rights of another. 28 Am. & Eng. Enc. Law, pp. 949 *et seq.* Each has a right to the free and uninterrupted use of the water for domestic purposes. Id. p. 953. In general, he has the right to supply his material wants from it. Gould, Waters, §§ 204, 205, 209, 218; Washb. Easements, 2d ed. 316, 318, etc. These rights may be protected by injunction in equity. Pom. Eq. Jur. § 75; Washb. Easements, 748; 3 Kent, Com. p. 439; 28 Am. & Eng. Enc. Law, p. 970, and long list of authorities cited in notes; *Ulbricht* v. *Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 6 So. 78, 11 Am. St. Rep. 72, and exhaustive note. We entirely concur with the conclusions reached by Judge Swiggart on this branch of the case, which are thus expressed in his learned opinion, *viz.*: "It must therefore follow, from the rules laid down in these authorities, and in others on the subject of the rights of riparian owners on rivers and lakes and other waters, whether navigable or nonnavigable in any sense, that no one, whether he is only a stranger, or is himself a riparian owner on the same body of water, has any right to impair or destroy the interest and the use of such riparian owner to such water. In the language of Mr. Washburn (Easements, 316): 'The right to enjoy this flow of water without disturbance or interruption by any other proprietor is one *jure naturæ*, and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself in its natural state, unaffected by the tortious acts of a neighboring landowner. It is an indispensable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right.' The flow of water cannot be diverted, and turned into a different channel. It cannot be lowered by drainage or other artificial means from its natural level or height. It cannot be raised or increased in volume or level by damming or other means. It cannot be polluted or corrupted, and made less fit for use, wrongfully and unnecessarily. The riparian owner cannot be deprived of any of the many uses he has the right to make of the water, or injuriously affected in that respect."

Defendant Harris, in his cross bill, claims that his title embraces the whole of Reelfoot lake, its shores or banks, and all of the islands in the lake. His muniments of title exhibited in proof are: First, a quitclaim deed, dated December 28, 1898, from the Reelfoot Outing Company, a corporation, of Louisville, Kentucky; second, certain grants to himself and other parties from the state of Tennessee; third, connected mesne conveyances from the original grantors to certain grants. The land claimed by cross-complainant Harris is embraced in the following grants issued by the state of Tennessee: Grant No. 14,864, to W. H. Caldwell, for 5,000 acres, issued 1854; grant No. 14,653, to W. H. Caldwell, for 5,000 acres, issued 1854; grant No. 14,654, to W. H. Caldwell, for 5,000 acres, issued 1854; grant No. 16,042, to W. H. Caldwell, for 5,000 acres, issued 1860; grant No. 17,191, to Wells *et al.*, for 1,680 acres, issued 1897; grant No. ——, to Wells *et al.*, for 2,250 acres, issued 1897; grant No. 17,190, to Wells *et al.*, for 4,745 acres, issued 1897; grant No. 17,084 to Gates *et al.*, for 3,701 acres issued 1,895; grant No. 17,085, to Gates *et al.*, for 4,187 acres, issued 1895; grant No. 17,086, to Gates *et al.*, for 1,768 acres, issued 1895; grant No. 17,087, to J. C. Harris, for 5,562 acres, issued 1895; grant No. 17,088, to Harris *et al.*, for 3,078 acres,

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issued 1895; grant No. 17,089, to Harris *et al.*, for 3,152 acres, issued 1895; grant No. 35, to Geo. Doherty (portion), 2,605 acres, issued N. C. 1788. The defendant Harris does not claim to own all the land embraced in the Caldwell grants. It is also true that the grants to Harris *et al.* and to Gates *et al.* embrace land that is covered by the Caldwell grants. It is also true that since the bill was filed defendant Harris has purchased certain other tracts, which are covered by the waters of Reelfoot lake. It appears the Doherty grant, No. 35, issued by the state of North Carolina in 1788, is also the grant under which the complainants Webster and Shaw deraign title to 395 acres. It appears that all the mesne conveyances from those grants to defendant Harris are deeds with special warranty against parties claiming by or through the grantors themselves, and in the nature of quitclaims. The record fails to show any proof locating the lands embraced in these several grants with reference to Reelfoot lake, except grant No. 35, for 2,065 acres. There is no proof of any survey of the different tracts of land, but there is a map introduced, in which the surveyor undertook to plot the several tracts of land in the lake. Cross-complainant Harris is bound to show with accuracy the particular lands he claims, in order to support ejectment. We entirely concur with the finding of the chancellor on this point, who stated as follows in his written opinion: "No effort is made to plot these various tracts, and to show what exact land or lands any one of the grants or entries embraces or covers. No surveyor is introduced who actually located and established the corners and lines of these tracts. It would be impossible for the court in this case to locate any of these grants with reference to any particular spot or object on Reelfoot lake. The only location or attempt is by general questions to the surveyor Howard and to W. M. Wilson, one of whom (Howard) says he thinks they cover all the lake and a great deal more, and the other (Wilson) says they do not include all the lake."

Our conclusions, then, briefly summarized, are as follows: First. That Reelfoot lake is not navigable in the legal, technical sense, but is navigable in the ordinary and common acceptation of the term. Second. That the lands under the waters of said lake were subject to grant by the state. Third. That complainants have established title to the lands claimed by them, but their lines only extend to low-water mark on said lake. Fourth. That complainants are riparian owners and entitled to all the rights incident to such proprietorship. Fifth. That defendant Harris has failed to locate by proof the lands claimed by him under the waters of said lake, and his cross bill is therefore dismissed. Sixth. That complainants, as riparian owners on said lake, are entitled to have the defendant Harris restrained by injunction from any efforts to drain the waters of said lake, and to that end *the injunction granted by the chancellor is made perpetual.*

CALIFORNIA SUPREME COURT.

W. F. FISHER, *Respt.*,
v.
Julia M. FEIGE *et al.*, *Appts.*

(137 Cal. 39.)

1. **The motive of a riparian owner in cutting trees** along the bank of a stream whereby evaporation is accelerated, in felling them into the stream to the injury of the water, and in building dams, does not affect his legal liability for such acts.
2. **A riparian owner cannot be enjoined from cutting trees** along the stream on the ground that it facilitates evaporation to the injury of the lower proprietor.
3. **A riparian owner cannot be enjoined by a lower owner from building a dam** on his own land, if it does not appreciably diminish the amount of water which would naturally flow onto the neighbor's land.
4. **Felling trees into a stream to the injury of the water** will not be enjoined if it does not appear that the injury thus done to the quality of the water is material.

(July 14, 1902.)

NOTE.—*Liability for facilitating evaporation from stream.*

FISHER v. FEIGE presents a question which has not been often considered by the courts. It is fairly well settled that an upper riparian owner cannot divert water from the stream or hold it back to the injury of lower owners, any further than is necessary for his legitimate uses of the stream. See *note* to Barnard v. Shirley (Ind.) 41 L. R. A. 737. But the question of hastening evaporation has been considered in only a small number of cases.

The few cases in which the question has been considered have formulated no definite rule upon the subject, but it would seem that liability should depend on whether or not the upper owner's use was reasonable under the circumstances. It certainly could not be claimed that a riparian owner should be compelled to refrain from cutting trees on his land merely because evaporation would thereby be increased. For similar reason, the maintenance of a dam, which is necessary for the enjoyment of the rights of the upper proprietor, should not be enjoined merely because evaporation is thereby facilitated.

So, it has been held that the insensible evaporation and decrease of water, contributed to by the presence of a dam in a stream, or the casual increase and decrease in the velocity of the current and the *quantum* of water below occasioned by the dam, are *damna absque injuria*. Dorman v. Ames, 12 Minn. 451, Gil. 347.

And that loss of water by soakage and evaporation from a pond is a necessary result of a

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APPEAL by defendants from a judgment of the Superior Court for Napa County in favor of plaintiff in an action brought to enjoin interference with the flow of a stream. *Reversed.*

The facts are stated in the opinion.

Messrs. **O'Brien, O'Brien, & O'Brien,** for appellants:

The law does not take into account motives as constituting an element of civil wrong.

Allen v. *Flood* [1898] A. C. 1; *Bradford* v. *Pickles* [1895] A. C. 587; *Boyson* v. *Thorn*, 98 Cal. 584, 21 L. R. A. 233, 33 Pac. 492; Cooley, Torts, 2d ed. p. 832.

Changing conditions should be provided for by the judgment, which should not for all time deprive a defendant of rights to which under subsequent conditions she might become entitled.

Gould v. *Eaton*, 117 Cal. 544, 38 L. R. A. 181, 49 Pac. 577; *Modoc Land & Live Stock Co.* v. *Booth*, 102 Cal. 151, 36 Pac. 431; *Wiggins* v. *Muscupiabe Land & Water Co.* 113 Cal. 182, 32 L. R. A. 667, 45 Pac. 160.

Appellants' land is a natural reservoir site. They would not only have the right to use the water for ordinary riparian purposes, but also for extraordinary riparian purposes, unless it infringes on plaintiff's rights.

Davis v. *Getchell*, 50 Me. 602, 79 Am. Dec. 640; *Miner* v. *Gilmour*, 12 Moore P. C. C. 131; *Gould* v. *Eaton*, 117 Cal. 543, 38 L. R. A. 181, 49 Pac. 577; *Wiggins* v. *Muscupiabe Land & Water Co.* 113 Cal. 189, 32 L. R. A. 667, 45 Pac. 160; *Wadsworth* v. *Tillotson*, 15 Conn. 366, 39 Am. Dec. 391.

This injunction utterly destroys the value of appellants' property for reservoir purposes,—a very valuable right.

San Diego Land & Town Co. v. *Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977.

A riparian proprietor may erect a dam to harvest ice, or for pleasure, or for manufacturing purposes, or for a fish pond.

De Baun v. *Bean*, 29 Hun, 236; *Bullard* v. *Saratoga Victory Mfg. Co.* 77 N. Y. 525; *Dodge* v. *Berry*, 26 Hun, 246; *Wood* v. *Edes*, 2 Allen, 580; *Stone* v. *Bumpus*, 46 Cal. 218; *Esmond* v. *Chew*, 15 Cal. 137; *Moulton* v. *Parks*, 64 Cal. 178, 30 Pac. 613; *Green* v. *Swift*, 47 Cal. 536; *DeBaker* v. *Southern California R. Co.* 106 Cal. 258, 39 Pac. 610; *McDaniel* v. *Cummings*, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795.

Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.

Boyson v. *Thorn*, 98 Cal. 584, 21 L. R. A. 233, 33 Pac. 492.

Messrs. **T. B. Hutchinson** and **F. E. Johnston,** for respondent:

The appellants, being upper riparian proprietors, maliciously constructed dams in the channel of the stream whereby its waters were prevented from flowing into and upon the respondent's lands, who was the lower riparian proprietor.

An upper riparian proprietor has no right either to pollute the waters of a stream, or to obstruct the natural flow of the waters, either by the construction of dams, or doing anything else whereby the flow is diminished, except it be for household and domestic purposes, or the watering of stock.

Ferrea v. *Knipe*, 28 Cal. 340, 87 Am. Dec. 128; *Lux* v. *Haggin*, 69 Cal. 255, 10 Pac. 674; *Gould* v. *Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577.

With any use or diversion of the water after it has passed his land, the upper riparian proprietor, having no ownership in and no longer any rights to it, would have no concern.

Hargrave v. *Cook*, 108 Cal. 72, 30 L. R. A. 390, 41 Pac. 18.

McFarland, J., delivered the opinion of the court:

This is an appeal by defendants from a judgment in favor of plaintiff. The plaintiff is a lower riparian proprietor on a certain water course, and defendants are upper riparian proprietors thereon. The action was brought to recover damages in the sum of $5,000 for certain alleged interferences by defendants with the flow of the water in the stream, and for a perpetual injunction restraining defendants from their repetition of the alleged wrongs. The court found that plaintiff was damaged in the sum of 1 cent by the alleged wrongs, for which amount judgment was rendered; and by the judgment defendants were also perpetually enjoined from doing certain acts. Defendants appealed from the judgment.

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reasonable use of the stream for artificial purposes by anyone, and furnishes no cause of action to a lower owner against an upper owner who temporarily detains the water. Gehlen Bros. v. Knorr, 101 Iowa, 700, 36 L. R. A. 697, 70 N. W. 757.

On the other hand, if the size of the dam is so out of proportion to the size of the stream or to the necessities of the builder that it causes a needless injury to the lower owner, the latter will be entitled to a remedy.

Thus, the maintenance of a dam by an upper proprietor, which backs up the water over a large surface, causing a large amount of it to be lost by evaporation and absorption, and preventing any water from flowing down in its natural course to a lower proprietor, is not a reasonable use of such water by said upper proprietor. Barnelch v. Mercy, 136 Cal. 205, 68 Pac. 589.

So, it is not a reasonable use of water for a riparian proprietor, who desires to use the water for cattle, to build dams and spread the water out in such manner that it is lost by evaporation and absorption, so as to injure the proprietor below him on the stream. Ferrea v. Knipe, 28 Cal. 341, 87 Am. Dec. 128.

So, the erection of a dam, which causes the water to spread out over a large tract of land and be lost by evaporation and percolation, is a wrongful diversion of the water. White v. East Lake Land Co. 96 Ga. 415, 23 S. E. 393.

It has also been said that the water cannot be obstructed and diverted to such an extent that the waste caused by frost, absorption, and evaporation causes material injury and damage. Pettibone v. Maclem 45 Mich. 381, 8 N. W. 84. H. P. F.

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It is quite clear that the judgment as it stands cannot be rightfully affirmed. There is no averment or finding that defendants have diverted any water from the stream. It is averred that along and adjacent to the stream as it flows through defendants' land there is a heavy growth of timber, which, before the alleged wrongful acts of defendants, protected the waters of the stream from evaporation by drying winds and the rays of the sun, and that defendants have cut and felled a large number of trees, and thus let in the sun and the wind, and caused the waters to be diminished by evaporation, so that not as much flowed down onto plaintiff's land as formerly, and that they threatened to fell more of said trees in the future. It is also averred that defendants have erected certain dams or embankments across the stream, by which the waters have been prevented from flowing down the channel of said stream "as they have been accustomed to flow," and from flowing into and upon the land of plaintiff "as they otherwise would have flowed." It is also averred that defendants caused about 10 trees to be felled into said stream, and allowed them to remain there, and that this rendered the waters unpalatable and unwholesome. It is also averred that defendants' land is wild and untilled, and is not susceptible of cultivation. The foregoing constitute the main averments upon which plaintiff bases his prayer for damages and injunction, it being averred that defendants threaten to continue the said acts. It is also averred, and found by the court, that said acts were done by defendants "solely for the purpose of injuring the plaintiff and damaging his said property, and out of spite and ill will towards the plaintiff."

As both court and counsel seem to have attached considerable significance to the alleged motive which led defendants to do the acts complained of, it may be proper to briefly notice that subject. In civil cases of the character of the one at bar, the general rule, no doubt, is as stated in *Bradford* v. *Pickles* [1895] A. C. 587, that "no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." But there may be cases where the very question of the legality of an act would depend upon the purpose for which it was done. This is particularly so with respect to the use of water, under the law of this state on that subject. For instance, a riparian owner in California has a right to a reasonable use of the water of a natural stream running through his premises for the purpose of irrigating his riparian land; and this includes the incidental right to divert onto his land what, under all the circumstances, would be a reasonable amount of the water, by dams and other necessary appliances. And in an action by a lower against an upper riparian owner for diversion of water, the latter could successfully defend by showing that he had only used a reasonable amount of the water to irrigate his land; but there would be no such defense if it appeared that he diverted the water merely to let it run to waste, and did not make, nor intend to make, any beneficial use of it for irrigation, or that he had carried it to nonriparian lands. He could not lawfully, any more than could one claiming merely by appropriation, thus divert the water without applying it to a beneficial use. But in the case at bar there was no diversion; and, under the facts found, we cannot see how the lawfulness of the acts enjoined can depend upon the motives by which they were done, or may be done in the future.

It is found that the defendants did fell trees on their lands, and threatened to fell more, the effect of which was and would be to let in the sun and winds, and thus increase evaporation. It was also found that they had built some dams in the stream, by which the waters were prevented from flowing "as they otherwise would have flowed." But there is no finding that these dams prevented the usual amount of water from reaching plaintiff's land. It was also found that the land of defendants is wild and untilled, and, "for the greater part, is not susceptible of cultivation." There is also a finding—somewhat obscured by being mixed up with other matters in finding No. 6—that defendants felled some trees in the stream, by which the waters were rendered unpalatable and unwholesome, and that they threatened to fell other trees into the stream, there to remain and decay, whereby the waters of said stream will be rendered unfit for household and domestic purposes. The foregoing are substantially the findings upon which the injunction is based. The injunction is most sweeping in its terms. By the judgment the defendants are "perpetually enjoined and restrained from in any manner obstructing or impeding or hindering the natural flow of the waters of that certain stream at any point therein or thereon above the said lands of plaintiff," and also "from cutting or felling the timbers and trees growing in the channel and upon the immediate banks of said stream at any point above the said lands of the plaintiff, whereby the said stream will be exposed to the rays of the sun, and the waters thereof lost or materially diminished by evaporation." They are also enjoined from felling any trees into the stream and allowing them to remain there and decay. No right is preserved to defendants, except to take water for domestic purposes and for stock. It is evident that very little, if any, of this injunction can be sustained. It is quite apparent that cutting trees upon one's own land is a lawful act, which cannot be restrained because it "lets in the sun" and causes more evaporation. Any incidental damage which might come to a lower riparian owner from such lawful act would clearly be *damnum absque injuria*. And then a man may build a dam across a stream on his own land, provided that thereby he does not appreciably diminish the amount of water which should naturally flow onto the land of his neighbor below.

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But, in addition, the judgment in this case perpetually prohibits defendants from ever exercising many of the undoubted rights of riparian owners. They are allowed only to use "so much of the waters of said stream as may be necessary for their household and domestic purposes, and for water for their stock." There is not even any provision for changing conditions. The defendants are perpetually cut off from ever using the water for irrigation, or as motive power, or for fish ponds, bath houses, etc., or for ornamental and many other purposes for which a riparian proprietor may, in a measure, control the stream on his own land, if he does not thereby materially diminish its flow onto lands below, or appreciably adulterate its quality. No doubt the defendants could be enjoined from felling trees into the stream, if thereby the water was made unfit for domestic use; but on that subject the findings should, we think, be more certain and specific. It does not fully appear that the injury thus done to the quality of the water was material; and the finding as to that matter is rather inconsistent with the other finding that all the damage done by all of the alleged acts of defendants amounted to only 1 cent. If there be another trial, there should be a fuller finding on this subject, and also as to whether the dams alleged to have been made by defendants on their own land materially lessened the flow of the water onto the land of plaintiff.

The judgment appealed from is reversed.

We concur: **Temple, J.; Henshaw, J.**

VERMONT SUPREME COURT.

J. H. LIVINGSTON
v.
Carroll S. PAGE.

(.....Vt.....)

A contract by the publisher of a newspaper to use it in influencing the choice of delegates and the action of a convention in favor of a certain candidate for public office is void as contrary to public policy.

(August 21, 1902.)

EXCEPTIONS by plaintiff to the direction by the Bennington County Court of a verdict for defendant in an action brought to recover the amount alleged to be due on a contract to render services in procuring a nomination for public office. *Affirmed.*

The facts are stated in the opinion.

Messrs. **H. H. Powers** and **Barber & Darling** for plaintiff.

Messrs. **R. W. Hulburd** and **Young & Young**, for defendant:

The only evidence permissible for the purpose of showing what the contract or arrangement, if any, between these parties was, is the written correspondence.

Morse v. *Low*, 44 Vt. 561; *Hakes* v. *Hotchkiss*, 23 Vt. 231; *Davis* v. *Bradley*, 24 Vt. 55; *Daggett* v. *Johnson*, 49 Vt. 345.

The claim, as made by the plaintiff, is not one that should be enforced by our courts.

Nichols v. *Mudgett*, 32 Vt. 546; *Powers* v. *Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Robertson* v. *Robinson*, 65 Ala. 610, 39 Am. Rep. 17; *Gaston* v. *Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Swayze* v. *Hull*, 8 N. J. L. 54, 14 Am. Dec. 399; *Linese* v. *Hesing*, 44 Ill. 113, 92 Am. Dec. 153.

NOTE.—As to validity of contract to influence election or appointment to office, see also cases in *note* to Cobbs v. Hixson (Mich.) 4 L. R. A. 682; also Wilkes Barre v. Rockafellow (Pa.) 30 L. R. A. 393, and Basket v. Moss (N. C.) 48 L. R. A. 842.

Messrs. **Batchelder & Bates** also for defendant.

Munson, J., delivered the opinion of the court:

At the close of the plaintiff's evidence the defendant moved that a verdict be directed in his favor, on the ground that the contract claimed by the plaintiff was void, as against public policy. The court held the contract void for the reason assigned, and directed a verdict accordingly. The case is here upon the plaintiff's exception to this holding.

The plaintiff called the defendant as a witness. The evidence consisted of certain correspondence had by the parties; and the testimony of the parties as to the circumstances in which the letters were written, the meaning that was attached to the language used, the matters inclosed for publication by one party and the services rendered by the other, and subsequent transactions bearing upon their understanding of the relations they had sustained. The defendant claimed that no contract with the plaintiff was in fact consummated, and that the only contract ever contemplated was one for the publication of extracts from other papers at a legitimate charge for the space actually taken. The plaintiff did not claim to recover on this ground, but claimed to recover a reasonable compensation for the support and influence of his paper and his services as its editor. The plaintiff was a Democrat, publishing a Democratic paper of independent proclivities. The defendant was a Republican, seeking a nomination to Congress from a Republican convention. It appeared from the plaintiff's testimony that he considered defendant's proposal an application for the use and influence of his paper in the nature of a retainer; that he accepted it with the understanding that his paper and his services as editor would be at the command of the defendant during the campaign, to be settled for at its close;

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that he was to do all he could to influence the choice of delegates and secure the defendant's nomination; that original matter was within the scope of his contract, and that his editorials were written in that view; that he supported defendant because of this contract and the money he was to get out of it; that he expected to receive a larger compensation if defendant was nominated than he otherwise would; that he tried to conceal his relations with the defendant from the public, and understood that the defendant was trying to do the same; that he took this course because it would make his efforts in influencing voters in defendant's behalf more successful. The case of *Nichols* v. *Mudgett*, 32 Vt. 546, decided by this court in 1860, is one of the few cases bearing upon this subject. The plaintiff in that case was a candidate for the office of town representative, and a creditor of the defendant. The defendant's party affiliations were such as would naturally lead him to vote for the opposing candidate. Conversations were had which resulted in a mutual understanding that the defendant should use his influence in favor of the plaintiff's election, and that, if the plaintiff was successful, the defendant's indebtedness should be treated as paid. Induced by this agreement, the defendant supported the plaintiff's candidacy until his election was declared. There was no agreement that defendant should vote for the plaintiff unless it was implied in the above understanding. He voted for the plaintiff, however, and did so because of the understanding. The suit was for the recovery of the indebtedness referred to, and the defendant claimed that it had been satisfied. The court considered that there was a sale of the defendant's influence and vote, held the agreement void, and gave judgment for the plaintiff. The agreement in that case involved both the defendant's vote and his influence upon the votes of others, but the court's discussion of the subject does not leave much doubt as to what its conclusion would have been if the undertaking had been confined to the latter service. Certainly no distinction could properly be made between the two. But that contract had reference to the votes to be cast at an election, and the plaintiff contends that, inasmuch as caucuses and conventions are not creations of the law, contracts for services in influencing the choice of delegates and the action of a convention cannot be considered against public policy. In *Liness* v. *Hesing*, 44 Ill. 113, 92 Am. Dec. 153, the contract was for services of this character. It is suggested that there may have been a law in that state regulating primaries, but there is no intimation of one in the opinion, and we have found none in the examination we have been able to make. There the plaintiff sent the defendant $20, with a request that he use his influence to get plaintiff nominated for a certain office, and a direction to call upon him for $20 more if he got the nomination. The defendant kept the $20, and aided the plaintiff's opponent. The suit was to recover this money, but the defendant had judgment. The decision was announced by Justice Lawrence, who characterized the transaction as "an attempt to influence, by moneyed considerations, the action of the defendant in a matter where every person should be governed solely by a regard for the public welfare." In *Strasburger* v. *Burk*, 13 Am. L. Reg. N. S. 607, decided by the city court of Baltimore, the defendant was the keeper of a lager beer saloon, and agreed to give his political influence and furnish beer and cigars to secure a caucus nomination for the plaintiff's father. The gratuitous furnishing of food or liquor to secure votes at an election was prohibited by the Code, but the only statutory recognition of primary elections was a provision for the preservation of order. The court considered that, in applying the principles of public policy, no distinction could be made between voluntary meetings of this character and elections ordained by law. Mr. McCrary adopts the conclusions of this opinion in his work on Elections, and applies the doctrine to the sale of influence, as well as the sale of votes. Mr. Redfield, in commenting upon the same opinion in 13 Am. L. Reg. N. S. at page 610, says that the invalidity of contracts designed to control the freedom of elections results from the principles of common law, and that those relating to caucuses cannot be made an exception on the ground that such meetings are not recognized by the statute. We cannot doubt the correctness of this conclusion. The rule would largely fail of its purpose if not so applied. When the voters are unevenly divided into two parties, the nomination of the stronger organization is usually equivalent to an election. And when party action is less decisive the subsequent efforts of the voters are ordinarily confined to a selection from the candidates regularly presented. The individual voter of a large electorate can seldom give an effective expression to a choice that is not in line with the action of some party convention. To secure a free and exact expression of the sovereign will, there must be a proper selection of candidates, as well as an honest election. If the choice of delegates and the action of the nominating convention are improperly determined, the election ballots will fail to express the real judgment of the voters.

It is not claimed in argument, and no ground occurs to us upon which it could be claimed, that this contract was any the less obnoxious to the law because the purchased influence was to be exerted through the columns of the plaintiff's paper. A newspaper is understood to present the views of someone connected with its management, or views deemed consistent with some settled policy, and has a patronage and influence which are due to that understanding. As long as the editorial column is relied upon as a public teacher and adviser, there can be no more dangerous deception than that resulting from the secret purchase of its favor. We hold that the contract testified

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to and relied upon by the plaintiff is contrary to public policy, and therefore void.

Judgment affirmed.

NOTE.—Since the delivery of the above opinion, we have seen *Fitch* v. *De Young*, 66 Cal. 339, 5 Pac. 364, where it was held, upon views similar to those expressed in concluding the opinion, that an article charging a publisher with selling the support and advocacy of his paper for money is libelous.

W. H. COOK

v.

Fred A. HOWLAND, Secretary of State, *et al.*

(.....Vt.....)

Confining the right to act as agent for foreign insurance companies to residents of the state is not an unconstitutional impairment of the privileges and immunities of citizens of other states, since corporations are not within the protection of the provisions relating thereto, and persons seeking to act for them can acquire no greater rights than the corporations have.

(August 21, 1902.)

PETITION for a writ of mandamus to compel defendants as insurance commissioners to grant petitioner a license as insurance agent. *Dismissed.*

The facts are stated in the opinion.

Mr. **Hamilton S. Peck,** for petitioner:

The statute abridges the privileges and immunities of the petitioner, who is a citizen of the state of New York and of the United States.

Corfield v. *Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Ward* v. *Maryland*, 12 Wall. 430, 20 L. ed. 452; *Slaughter-House Cases*, 16 Wall. 97, 21 L. ed. 415.

A citizen of the United States has all the privileges and immunities of a citizen of any state, and, in addition, those which are conferred on him by the United States Constitution.

Laws enacted in the exercise of the police power, whether by a municipal corporation acting in pursuance of the laws of a state, or by the state itself, must be reasonable.

Re Wilshire, 103 Fed. 620; *Com.* v. *Alger*, 7 Cush. 85.

A nonresident who comes into this state to do business is a subject of the state in so far as he is bound to obey its laws.

Munn v. *Illinois*, 94 U. S. 145, 24 L. ed. 91; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 150, 62 Am. Dec. 625; *People ex rel. Fleischman* v. *Caldwell*, 64 App. Div. 46, 71 N. Y. Supp. 654, Affirmed in 168 N. Y. 671, 61 N. E. 1132; *Angove* v. *State*, 9 Ohio S. & C. P. Dec. 829; *Noel* v. *People*, 187 Ill. 587, 52 L. R. A. 287, 58 N. E. 616.

The Vermont statute says, in effect, to a citizen of the state: You may do insurance business in this state. It says to a citizen of New York, who desires to retain his residence there: You cannot come here and do the same business. It deprives the New York man of his property by depriving him of the means of acquiring it.

State v. *Pratt*, 59 Vt. 590, 1 Inters. Com. Rep. 299, 9 Atl. 556; *State* v. *Hoyt*, 71 Vt. 59, 42 Atl. 973; *State* v. *Cadigan*, 73 Vt. 245, 57 L. R. A. 666, 50 Atl. 1079; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

Mr. **Fred A. Howland,** for respondents:

One state can impose any regulation it chooses upon the admission to its territory of the corporations of other states, even to the extent of excluding them altogether.

6 Thomp. Corp. §§ 7876, 7877, 7884, 7887, 7898; *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

The right of the state to control the business of insurance within its borders goes even farther than the right to control foreign insurance corporations.

Nutting v. *Massachusetts*, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

Watson, J., delivered the opinion of the court:

Vermont Statutes provide (§ 4181): "A foreign insurance company shall not transact insurance business in this state, unless it first obtains license of the insurance commissioners, authorizing the company so to do. Before receiving such license, the company shall file with the secretary of state a certified copy of its charter and by-laws, and a statement under oath, of its president and secretary, showing its financial condition and standing, in accordance with blanks furnished by him." Section 4182: "If the commissioners are satisfied with such copies and statements and that the company has complied with the provisions of this title, they shall grant a license authorizing it to do insurance business by lawfully constituted and licensed resident agents only." Section 4193: "No person shall act as agent of a foreign insurance company, until he has filed with the secretary of state a certificate from the company or its general agent, authorizing him to act as such agent, and obtains a license from the commissioners. Upon filing the certificate, the commissioners shall issue a license to such person to act as an insurance

NOTE.—As to validity of statute declaring it to be unlawful for any person to solicit insurance within the state for nonresident persons without procuring from insurance commissioner certificate of authority, see, in this series, People v. Gay (Mich.) 30 L. R. A. 464.

As to restrictions on business of foreign insurance companies generally, see *note* to State *ex rel.* Richards v. Ackerman (Ohio) 24 L. R. A. 298, and State *ex rel.* Hoadley v. Insurance Comrs. (Fla.) 33 L. R. A. 288.

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agent in this state: Provided, the company for which such person acts is authorized to do insurance business in this state." The United States Life Insurance Company is an insurance corporation of the state of New York, and the petitioner is one of its duly authorized agents to transact such business in that state. The company has complied with the provisions of § 4181, and it has been licensed by the insurance commissioners to carry on its business in this state by lawfully constituted and licensed resident agents only, subject to the laws of the state, from the 1st day of April, 1902, to the 1st day of April, 1903; and it has been and now is transacting business under said license. The company constituted the petitioner, a resident and citizen of the state of New York, one of its agents, and requested the commissioners to issue a license to him authorizing him under the laws of this state, as agent for the company, and in its name and behalf, here to transact business of life insurance, so far as he may be authorized by the company; and the petitioner in his own behalf made a like request of the commissioners. The commissioners refused, and still refuse, thus to license the petitioner for the reason that he is not a resident of this state. The petitioner alleges and contends that so much of § 4182 as provides that a license issued to a foreign insurance corporation shall limit it in doing business to "lawfully constituted and licensed resident agents" is void, in that it invades the rights and privileges guaranteed in § 2 of article 4 of the Federal Constitution, and in § 1 of the 14th Amendment, by which the citizens of each state are entitled to all privileges and immunities of citizens of the several states. A corporation has legal existence only in the state of its creation. It may be permitted to do business in another sovereignty, or it may be entirely excluded therefrom. The question whether such permission shall be given rests wholly with the state which the corporation seeks to enter for that purpose, and, if permission is granted, it may be under such conditions and regulations as the state shall impose, providing matters of a Federal nature are not affected thereby, without invading the rights and privileges guaranteed by the provisions of the Constitution above referred to; for it is settled beyond question that a corporation is not a citizen within the meaning thereof. *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518. But it is urged by the petitioner that the United States Life Insurance Company has received its license to do business in this jurisdiction; that the petitioner is seeking relief in his personal capacity alone; and that a refusal to grant him a license, as requested, because he is not a resident of this state, when the law provides for issuing such license to a resident, is an abridgment of his rights and privileges as a citizen of one of the states within the inhibition of the Constitution. As has already been seen, the condition whereby the corporation is licensed to conduct business by resident agents only is valid and binding on the company in its corporate entity. It cannot be less so as to the agents of the company. *People* v. *Formosa*, 131 N. Y. 478, 30 N. E. 492. To license an agent who is a resident of another state to conduct the business of a foreign insurance corporation in this state would be to give him a right to manage the business of his agency in a way prohibited to his principal,—a position incompatible with the governing principles of the law of agency. Such a license to a nonresident agent would render ineffective the condition in the license to the company requiring it to do its business by resident agents. In *Hooper* v. *California*, before cited, the plaintiff in error was adjudged guilty in the state court of the misdemeanor of procuring for a resident of the state of California insurance from a foreign company which had not complied with the laws of that state. It was contended that the Penal Code of the state in this behalf was an infringement upon the interstate commerce clause of the Federal Constitution, and in violation of the 14th Amendment, within the meaning of the clause prohibiting states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. The court, speaking through Mr. Justice White, said: "She [the state] has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And as a necessary consequence of her possession of these powers she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company; and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in its own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States." And in *Noble* v. *Mitchell*, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110, —a case on writ of error to the supreme court of Alabama,—the action was to recover of the plaintiffs in error, a firm of insurance agents in that state, the amount of a loss under a policy of insurance procured by them from a foreign insurance corporation not licensed to do business within the state. By the laws of that state any person acting as agent for a foreign insurance com-

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pany, which has not received a license permitting it to transact such business therein, is liable personally to any holder of a policy so procured for any loss covered by it. The court, again speaking through Mr. Justice White, after referring to the case of *Hooper* v. *California* as showing the power of a state to determine and enforce the conditions on which such a company may be permitted to come within its territory to transact the business of insurance, said: "It inevitably results from this ruling that the state of Alabama, in virtue of the power possessed by it of excluding foreign fire insurance corporations from its jurisdiction, could lawfully punish or regulate, by the imposition of civil liability or otherwise, the doing of acts within the territory of the state calculated to neutralize and make ineffective the statute which prescribed conditions upon which alone the right existed in a foreign insurance corporation to do business within the state." Since a state has the right thus to punish or regulate the doing of acts contrary to the force of the conditions imposed, it must follow, logically, that it may refuse to license all such agents to transact business in the state for such corporation, as are not within the purview of the conditions, without depriving them of any rights under the constitutional provisions named.

Petition dismissed, with costs.

W. E. LAIRD, Assignee, etc., of Perry Manufacturing Company, *Appt.*,
v.
Fred H. PERRY *et al.*

(.....Vt.....)

Estates of a debtor and his wife by entireties, except her right of survivorship, pass by his assignment of all his estate, real and personal, for the benefit of creditors, under statutes making everything pass which might be taken in execution against him, and providing that neither the wife's separate property nor its products shall be liable for his debts.

(August 21, 1902.)

APPEAL by complainant from a decree of the Washington County Chancery Court dismissing a bill filed to reach property alleged to belong to plaintiff's assignee. *Reversed.*

The facts are stated in the opinion.

Messrs. **John H. Senter** and **Dillingham, Huse, & Howland,** for appellant:

The orator, assignee, has a right to charge, not only the right of survivorship existing in Fred H. Perry at the time of the insolvency proceedings, but he has the right in this proceeding to charge the use and occupation, rents and profits, of the real estate in question during the time of the joint lives of Fred H. Perry and his wife, Edna.

Corinth v. *Emery*, 63 Vt. 505, 22 Atl. 618; *Niles* v. *Hall*, 64 Vt. 453, 25 Atl. 479; *Baker* v. *Kilgore*, 145 U. S. 487, *sub nom.* *Neilson* v. *Kilgore*, 36 L. ed. 786, 12 Sup. Ct. Rep. 943; *Bennett* v. *Child*, 19 Wis. 362, 88 Am. Dec. 692.

Messrs. **H. C. Shurtleff** and **G. W. Wing,** for appellees:

The powers of an assignee in insolvency are strictly limited by statute.

Vt. Stat. 2141, 2142.

Neither the fee nor the usufruct of real estate deeded to man and wife jointly can be taken in execution for the sole debts of the husband.

Corinth v. *Emery*, 63 Vt. 505, 22 Atl. 618; *Baker* v. *Stewart*, 40 Kan. 442, 2 L. R. A. 434, 19 Pac. 904; *Brownson* v. *Hull*, 16 Vt. 309, 42 Am. Dec. 517; *Chandler* v. *Cheney*, 37 Ind. 391.

Watson, J., delivered the opinion of the court:

Before and at the time of the filing of the petition in insolvency the real estate in question was held by the defendants Fred H. Perry and Edna A. Perry, his wife, as tenants by entirety. It included their homestead. No claim is made that the property was thus held in fraud of creditors, but it is contended that, exclusive of the right of homestead and the right of survivorship in Edna A., the property passed to the assignee under the assignment to him of the estate of the debtor, Fred H., in the insolvency proceedings. The assignment conveyed to the assignee all the estate, real and personal, of said debtor, except such as was by law exempt from attachment; and it vested in the assignee all the property of said debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him at the time of the filing of the petition. Vt. Stat. 2096, 2098. By Rev. Laws, 2324, the rents, issues, and products of the real estate of a married woman, and moneys and obligations arising from the sale of such real estate, and the interest of her husband in her right in real estate which belonged to her before marriage, or which she acquired by gift, grant, devise, or inheritance during coverture, were, during coverture, exempt from attachment or levy of execution for the sole debts of the husband, except that the annual products could be attached or levied upon for certain debts therein specified. In *Corinth* v. *Emery*, 63 Vt. 505, 22 Atl. 618, decided in 1891, upon which defendants rely, estates by entireties were held to be within the scope of the provisions of this section, and that the estate of the wife, and her husband's interest therein, in her right, were protected from the husband's sole creditors. By Rev. Laws, 2325, no conveyance made during coverture by the husband of such rents, issues, and products, or of an interest in such real estate, as are mentioned in § 2324, was valid unless the same was by deed executed by the wife jointly with him. *Peck* v. *Walton*, 26 Vt. 82. By the revision

NOTE.—As to the nature of tenancy by the entireties, see *note* to Hiles v. Fisher (N. Y.) 30 L. R. A. 305.

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of the statutes in 1894 the law in this regard was repealed, unless it can be said that some of the provisions of those sections were retained in Vt. Stat. 2646, 2647. The former section has no application to the case at bar. It provides only that a married woman shall not become surety for her husband's debts except by way of mortgage, nor convey or mortgage her real estate except by deed duly executed by herself and husband. The latter section provides that all personal property and rights of action acquired by a woman before coverture or during coverture, except by gift from her husband, shall be held to her sole and separate use; and neither a wife's separate property, nor the rents, issues, income, and products of the same, shall be subject to the disposal of her husband, or liable for his debts. These provisions relate solely to the wife's separate property and the rents, issues, income, and products of such property. *Re Nelson*, 70 Vt. 130, 39 Atl. 750. That case was an appeal by the testator's daughter and her husband from a decree of the probate court establishing the will. It was heard on motion to dismiss the appeal as to the husband on the ground that he improperly joined therein. The testator was the owner of real estate at the time of his death. It was contended in support of the motion that by Vt. Stat. 2647, the wife was vested with the right to hold all her real estate to her sole and separate use; while against it the contention was that this section related solely to personal property. It was held that any real estate which the wife might take as heir of the testator would not be her separate property, and that her husband would be entitled to the rents and profits of it during coverture; hence, that he properly joined in the appeal. To reach this decision it must also have been held that the rents and profits of such real estate were not within the provisions of that section of the statute. The same section was recently under consideration in the United States district court, Wheeler, J., in *Re Rooney*, 109 Fed. 601,—a case in some respects very analogous to the one at bar. The question there was whether the products of the wife's land, conveyed to her without limitation as to use, passed to the trustee in bankruptcy of her husband as a part of his estate. It was held that the land was not her separate property, and that the products thereof were a part of the husband's estate, which passed to the trustee. Nor is the case of *Niles* v. *Hall*, 64 Vt. 453, 25 Atl. 479, an authority to the contrary; for the only question therein raised or determined is the constitutional one of the power of the legislature to relieve the products of the wife's real estate from liability for the husband's debts previously contracted. The wife's real estate, not her separate property, and the rents, issues, income, and products of the same, stand as at common law, and by it the husband's right of disposal must be determined. The rights of his creditors therein rest upon the common law, together with the provisions of § 1814, Vt. Stat., to which reference is again made farther on.

An estate by entirety is held by the husband and wife as one person, and under one title. The grant, gift, or devise creating the estate operates in such a manner as to give each the whole, and each is seised of the whole with a continuance of the estate in the survivor. *Corinth* v. *Emery*, 63 Vt. 505, 22 Atl. 618. It is not her separate property, for she is without the essential characterizing feature of holding it to her sole use to the exclusion of the marital rights of her husband. *Frary* v. *Booth*, 37 Vt. 78; *Hackett* v. *Moxley*, 68 Vt. 210, 34 Atl. 949; *Curtis* v. *Simpson*, 72 Vt. 232, 47 Atl. 829. In *Hackett* v. *Moxley* the real estate in question was held by the wife in fee at the time of her marriage, but not as her separate property. It was held that at common law, by her marriage, the husband took a freehold estate therein, and was entitled to the rents and profits during coverture. See also *Re Nelson*, 70 Vt. 130, 39 Atl. 750. That the husband may convey such an estate by his sole deed, when there is no statute to prevent, is beyond question. *Knappen* v. *Wooster*, Brayton (Vt.) 50; *Bruce* v. *Thompson*, 26 Vt. 741. And the same stands charged with his debts and demands, and may be taken in execution therefor at the election of the creditor, unless the debtor, his agent or attorney, exposes and tenders personal estate sufficient to satisfy the execution and charges. Vt. Stat. 1814; *Mattocks* v. *Stearns*, 9 Vt. 326; *Hyde* v. *Barney*, 17 Vt. 280, 44 Am. Dec. 335. The rule of common law that the husband, by the marriage, acquires a freehold interest, during the joint lives of himself and wife, in all the real estate of which she was seised at the time or may become seised during coverture, not to her separate use, is based upon the theory that the husband and wife are as one person in law, and that the husband contains within himself the entire legal existence of both. Bacon says that when a woman "took husband she had no separate property, but the whole power was lodged in the husband, and they were reckoned as one in interest. Therefore the husband had the right of possession, and the wife the right of propriety; or, in other words, the husband was seised in the right of his wife." 3 Bacon, Abr. title *Discontinuance*. This rule is equally applicable to estates by entirety as to those where the fee is in the wife alone. By it he takes the possession and usufruct of her real estate during coverture as marital rights, which rights are not diminished or abated by reason of his own interest in the same property as a tenant by entirety. The two interests are from different sources, are distinct in nature, and neither is a restriction upon the other. The husband has the right of possession and control of property so owned by himself and wife for their joint lives, and he may convey, lease, or encumber it by mortgage for the same period. It is also subject to attachment, and may be taken on execution by his creditors. In *Corinth* v.

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Emery it is said that "such an estate is the real estate of a married woman, although her husband is joined with her in the title. It is the real estate of each." In the same way it is the real estate of the husband, and he owns it in his own right. If he is considered as holding it in the right of his wife, he then has a freehold estate, which he holds in his own right as husband for his own life, paying no rents therefor. Let it be either way; his estate is within the provisions of Vt. Stat., 1814, and subject to attachment and execution for his debts. *Mattocks* v. *Stearns*, 9 Vt. 326; *Brownson* v. *Hull*, 16 Vt. 309, 42 Am. Dec. 517; *Bruce* v. *Thompson*, 26 Vt. 741. The rights and powers of alienation in the husband, and of attachment and levy of execution in his creditors, are limited only by the wife's contingent right to the property or income by survivorship. This right she takes, not as a new acquisition, but under the original limitation, and neither the husband nor his creditors can deprive her of it. It is laid down as an incident to such a tenancy that neither the husband nor wife can alien the estate without the consent and concurrence of the other, and that he cannot, by his sole conveyance, devest her estate. But this means only that the husband cannot alien the estate so as to prevent the wife's taking the whole after his death in case she survives him. In *Washburn* v. *Burns*, 34 N. J. L. 18, it is said: "It is true that the husband cannot alien any part of the estate which he holds in the same right with his wife. To do that would be to sever its unity, and thus destroy its peculiar characteristics. The reason he cannot do this is because it would convert the estate into a tenancy in common, and defeat the right of survivorship. But the husband has an interest which does not flow from the unity of the estate, and in which the wife has no concern. He is entitled to the use and possession of the property during the joint lives of himself and wife. During this period the wife has no interest in or control over the property. It is no invasion of her rights, therefore, for him to dispose of it at his pleasure. The limit of this right of the husband is that he cannot do any act to the prejudice of the ulterior rights of the wife." The principles here laid down are supported by our own decisions as far as they involve similar questions at common law. *Brownson* v. *Hull*, 16 Vt. 309, 42 Am. Dec. 517; *Davis* v. *Davis*, 30 Vt. 440; *Corinth* v. *Emery*, 63 Vt. 505, 22 Atl. 618. And they are in accordance with the great weight of decisions from the courts of other states, except so far as they have been controlled by statutes. *Den ex dem. Wyckoff* v. *Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388; *Pray* v. *Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824; *Bertles* v. *Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Fairchild* v. *Chastelleux*, 1 Pa. 176, 44 Am. Dec. 117; *Barber* v. *Harris*, 15 Wend. 615; *Bennett* v. *Child*, 19 Wis. 362, 88 Am. Dec. 692; *Ames* v. *Norman*, 4 Sneed, 683, 70 Am. Dec. 269; *Hall* v. *Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Hiles* v. *Fisher*, 144 N. Y. 306, 30 L. R. A. 305, 39 N. E. 337; *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695; *French* v. *Mehan*, 56 Pa. 286; *Washburn* v. *Burns*, 34 N. J. L. 18. There is nothing in the case touching the homestead which takes it out of the general provisions of the law upon that subject. It follows, therefore, that, exclusive of the right of homestead and the right of survivorship in the wife as tenant by entirety, the property in question passed to the assignee by the assignment of the husband's estate under the insolvency law.

The deed given to Shurtleff by the husband alone subsequent to the assignment conveyed nothing. As to the homestead it was void (*Martin* v. *Harrington*, 73 Vt. 198, 50 Atl. 1074), and as to the right of survivorship in the wife it was without force. Beyond this there was no property in the husband to convey. All else had passed to the assignee under the assignment. Since Shurtleff took no property or property rights under the deed to him, he conveyed none by his deed to the wife. The mortgage to Lowe, executed by both husband and wife, constitutes an encumbrance on the homestead and on the wife's right of survivorship, but beyond this it also is without force.

Pro forma decree dismissing the bill reversed, and cause remanded, with mandate that decree be rendered for the orator according to the views here expressed. Let the costs below be there determined.

WASHINGTON SUPREME COURT.

STATE of Washington, *Appt.*,
v.
A. G. BUCHANAN, *Respt.*

(.....Wash.....)

Forbidding the employment of females in certain establishments more than ten hours a day does not unconstitutionally deprive them of life, liberty, or property.

(September 9, 1902.)

APPEAL by the State from an order of the Superior Court for King County

NOTE.—As to limitation of hours of work for women, see also, in this series, Ritchie v. People (Ill.) 29 L. R. A. 79; and Wenham v. State (Neb.) 58 L. R. A. 825.

As to statutory limitation of hours of labor generally, see People v. Phyfe (N. Y.) 19 L. R. A. 141, and *note; note* to State v. Loomis (Mo.) 21 L. R. A. 796; Low v. Rees Printing Co. (Neb.) 24 L. R. A. 702; State v. McNally (La.) 36 L. R. A. 533; Holden v. Hardy (Utah) 37 L. R. A. 108, Affirmed in 169 U. S. 366, 42 L. ed. 780; State v. Holden (Utah) 37 L. R. A. 108; Short v. Bullion, B. & C. Min. Co. (Utah) 45 L. R. A. 603; and *Re* Morgan (Colo.) 47 L. R. A. 52.

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sustaining a demurrer to an information charging defendant with violation of a statute regulating the hours of employment of females. *Reversed.*

The facts are stated in the opinion.

Mr. **Walter S. Fulton,** for appellant:

By the general police power of the state, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made.

Thorpe v. *Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625; Cooley, Const. Lim. p. 706.

The right of contract is subordinate to any legislative enactment which has for its object the comfort, safety, or welfare of society.

Cooley, Const. Lim. p. 708; *Holden* v. *Hardy,* 169 U. S. 391, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; *Com.* v. *Hamilton Mfg. Co.* 120 Mass. 383; Parker & W. Public Health & Safety, § 260.

The legislature may lawfully determine that a limitation is necessary for the preservation of the health of employees.

Holden v. *Hardy,* 169 U. S. 391, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; *Com.* v. *Beatty,* 15 Pa. Super. Ct. 5; *Short* v. *Bullion-Beck & C. Min. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720; *Mobile* v. *Yuille,* 3 Ala. 140, 36 Am. Dec. 441; *State* v. *Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000; *State* v. *Whitaker,* 160 Mo. 59, 60 S. W. 1071.

The act is in no sense class or special legislation.

Sutherland, Stat. Constr. § 121; 28 Am. & Eng. Enc. Law, p. 148; *Brooks* v. *Hyde,* 37 Cal. 366; *State ex rel. Oblinger* v. *Spaude,* 37 Minn. 322, 34 N. W. 164; *Wheeler* v. *Philadelphia,* 77 Pa. 338; *Com.* v. *Hillside Coal Co.* 22 Ky. L. Rep. 559, 58 S. W. 441; *Schmalz* v. *Wooley,* 57 N. J. Eq. 304, 43 L. R. A. 86, 41 Atl. 939; *Allopathic State Bd. of Medical Examiners* v. *Fowler,* 50 La. Ann. 1358, 24 So. 809; *State* v. *Nelson,* 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22; *State* v. *Smith,* 58 Minn. 35, 25 L. R. A. 759, 59 N. W. 545.

Messrs. **Preston, Carr, & Gilman** for respondent.

Dunbar, J., delivered the opinion of the court:

This case involves the constitutionality of a law enacted by the legislature of 1901 (Sess. Laws, p. 118), entitled "An Act to Regulate and Limit the Hours of Employment of Females in Any Mechanical or Mercantile Establishment, Laundry, Hotel, and Restaurant: to Provide for Its Enforcement and a Penalty for Its Violation." Section 1, the subject of this discussion, is as follows: "That no female shall be employed in any mechanical or mercantile establishment, laundry, hotel, or restaurant in this state more than ten hours during any day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four." Section 3 provides that "any employer, overseer, superintendent, or other agent of any such employer who shall violate any of the provisions of this act, shall, upon conviction, be fined," etc. The information charged, in substance, the violation of this law. To this information a demurrer was interposed upon the ground that no offense was charged, which demurrer was sustained by the court. From such ruling and the judgment following this appeal is taken.

This act cannot be held to be special legislation, and, if it is obnoxious to the Constitution at all, it is so because it is an arbitrary restriction upon the fundamental right of the citizen (a woman in this case) to contract her labor, thereby violating § 3 of article 1 of the state Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law. It may be conceded without discussion that a citizen's right to contract his or her labor is a valuable property right, which cannot be restricted by the legislature, unless such restriction is necessary in the proper exercise of the police power of the state. Courts and law writers have found it difficult to furnish an exact definition of the term "police power," or to define its boundaries, and no other subject has been the source of so much important and earnestly contested litigation, for the citizen is jealous of what he considers to be his inalienable rights, and strenuously resists any encroachment upon his liberty; while the state, with its solicitude for the welfare of society at large, frequently finds it necessary—or at least thinks it does—to lay a restraining hand upon what is deemed by the citizen his private rights. Blackstone's definition of this power is, "The due regulation and domestic order of the kingdom, whereby the inhabitants of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." It has also been defined as a general system of precaution for the prevention either of crime or of calamities. It has been said to be the great power of necessity in the administration of governmental affairs. It is, in short, that power which enables the state to promote and protect the health, welfare, and safety of society; and it is essential to the very existence of government that all property should be held subject to such reasonable limitations and restraints in its enjoyment as will preclude it from acting injuriously upon the public welfare. Conceding that an arbitrary exercise of the legislative will, which, under the guise of a police power, restricts constitutional rights, cannot be maintained, we are of the opinion that the act in question was a legitimate exercise of the police power of the state, enacted for the welfare of society at large, and is there-

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fore constitutional. On this subject the authorities are somewhat divided, though we think the great weight of modern authority sustains statutes similar to the one under consideration. The case of *Seattle* v. *Smyth*, 22 Wash. 327, 60 Pac. 1120, is cited to sustain the theory of the unconstitutionality of this act. That was a *per curiam* opinion, without any discussion of the principles involved, and, while it cited with commendation the case of *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071, on the subject under discussion, the real point decided in *Seattle* v. *Smyth* was that an ordinance which makes it unlawful for any contractor upon any of the public works of the state to require or permit any day laborer or mechanic to work more than eight hours in any one calendar day was unconstitutional, on the ground that it interfered with the right of persons to contract with reference to their services. We think that all authority sustains this doctrine; but that and similar cases are not in point here, although the case cited, *viz.*, *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071, did hold that a statute of the character under discussion here was unconstitutional, on the ground that the police power could not extend beyond cases where the injury was sustained by the public, and not by the individual in question. While this proposition, in the abstract, is probably true, it is not practically stated, for practically, under our system of government, no one citizen stands segregated entirely from the citizens at large, but that which has a deleterious effect on one citizen to some extent deleteriously affects others. In any event, this court in *Ah Lim* v. *Territory*, 1 Wash. 156, 9 L. R. A. 395, 24 Pac. 588, took the opposite view on that question from the Colorado court. Ah Lim was indicted for violating a statute which provided that any person or persons who shall smoke or inhale opium shall be deemed guilty of a misdemeanor and it was contended that, inasmuch as the bad effects, if any, of such an indulgence, were visited only upon the person who inhaled or smoked the opium, it was not within the police power of the state to prohibit such smoking or inhaling, on the ground that it was interfering with inalienable rights,—the right that every man had to do what he would with his own which would not interfere with the reciprocal rights of others. In that case no special constitutional limitation or inhibition was pointed out with which the law was in conflict. The contention was based upon the broad ground that the right to liberty and the pursuit of happiness was violated, and this court held that whether the habit was detrimental to either the moral, mental, or physical well-being of one of its citizens to such an extent that he was liable to become a burden upon society was a question to be put on foot by the legislature, and a question to be determined by the legislature; and that, granting that it was a proper subject for legislative enactment and inquiry, no limit or control could be placed on the legislative discretion. In *Ritchie* v. *People*, 155 Ill. 98, 20 L. R. A. 79, 40 N. E. 454, it was held that an act prohibiting the employment of females in any factory or workshop for more than eight hours a day was unconstitutional, as it was an arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employee in a matter about which they were competent to agree with each other. This is the only case cited to us, or that we have been able to find, in which an act of this kind is decided to be unconstitutional by a court of last resort. But we are not inclined to follow the reasoning of the court in that case, although it is well considered and ably presented. But some of the cases that it cites to sustain the contention that the law was invalid do not seem to us to bear out the contention. For instance, *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737, where it was held, as it is universally held, that an ordinance making it a misdemeanor for any contractor to employ any person to work more than eight hours a day, where the work was to be performed under any contract with the city, was unconstitutional. The court in that case specially distinguished this kind of a case when it said: "If the services to be performed were unlawful, or against public policy, or the employment were such as might be unfit for certain persons,—as, for example, females or infants,—the ordinance might be upheld as a sanitary or police regulation." In referring to the case of *Ah Lim* v. *Territory*, 1 Wash. 156, 9 L. R. A. 395, 24 Pac. 588, it was said by the Illinois court: "Laws restraining the sale and use of opium and intoxicating liquor have been sustained as valid under the police power. . . . Undoubtedly the public health, welfare, and safety may be endangered by the general use of opium and intoxicating drinks. But it cannot be said that the same consequences are likely to flow from the manufacture of clothing, wearing apparel, and other similar articles." It must be borne in mind that Ah Lim was not indicted for procuring others to smoke opium, but for smoking himself, and we hardly see how the question of what the consequences would be from the manufacture of clothing or wearing apparel could affect the question of prohibiting the employment of females in the factory or workship where these articles were made. The statute was enacted, not because the manufacture of clothing or wearing apparel had any bad effect upon society, but because the employment of women for more than eight hours a day in that character of work would have a deleterious effect upon the employees, and in a degree upon society. In opposition to the doctrine announced in *Ritchie* v. *People*, it was held by the supreme court of Massachusetts in *Com.* v. *Hamilton Mfg. Co.* 120 Mass. 383, that a statute prohibiting the employment of women laboring in any manufacturing establishment more than sixty hours per

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week violated no right preserved under the Constitution to any individual citizen, and that such an act could be maintained as a health or police regulation. That case is directly in point, and was favorably referred to by the Supreme Court of the United States in *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, a case which came up from Utah, where it was held by the state court and affirmed by the Supreme Court of the United States that a statute limiting the period of employment of workmen in underground mines or refining of metals to eight hours a day, and making its violation a misdemeanor, was a valid exercise of the police power of the state. This case is in direct conflict with the doctrine announced in the cases of *Ritchie* v. *People*, 155 Ill. 98, 20 L. R. A. 79, 40 N. E. 454, and *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071, and, if not binding upon this court, should have great weight, for the reason that the constitutional right which is claimed to have been infringed by this act is identical with the provision in the 14th Amendment to the Constitution of the United States, *viz.*, that no state shall deprive any person of life, liberty, or property without due process of law. The rule is announced by Parker and Worthington on Public Health and Safety (p. 299), as follows: "The state may forbid certain classes of persons being employed in occupations which their age, sex, or health renders unsuitable for them, as women and young children are sometimes forbidden to be employed in mines and certain kinds of factories. And statutes are perfectly valid which provide that women or minors shall not be employed in laboring by any person, in any manufacturing establishment, more than a certain number of hours in any one day, with reasonable exceptions. Of such laws it has been said that they do not violate any constitutional rights." Mr. Cooley in his Constitutional Limitations (p. 744), says: "The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection." *Ritchie* v. *People*, noticed approvingly in *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, where it is said: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end." Accepting this statement of the law, we think it is easily ascertainable from a perusal of this act that its object was the public health, and that its provisions were appropriate, and adapted to that end. It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. It must logically follow that that which would deleteriously affect any great number of women, who are the mothers of succeeding generations, must necessarily affect the public welfare and the public morals. Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. In the early history of the law, when employments were few and simple, the relative conditions of the citizen and the state were different, and many employments and uses which were then considered inalienable rights have since, from the very necessity of changed conditions, been subjected to legislative control, restriction, and restraint. This all flows from the old announcement made by Blackstone that when man enters into society, as a compensation for the protection which society gives to him he must yield up some of his natural rights, and, as the responsibilities of the government increase, and a greater degree of protection is afforded to the citizen, the recompense is the yielding of more individual rights. Transportation companies are now controlled and restricted, where a few years ago they claimed the right to transact their business exactly as it suited their private interests. The practice of medicine is restricted and controlled; laws against quackery and empiricism are enforced without question. The sale of liquor, which formerly was a legitimate business, and which the citizen had a right to enter into as he did any other business, without any restrictions, has now become subject to the control of the state, or to actual prohibition at the will of the state. The changing conditions of society have made an imperative call upon the state for the exercise of these additional powers, and the welfare of society demands that the state should assume these powers, and it is the duty of the court to sustain them whenever it is found that they are based upon the idea of the promotion and protection of society.

We think no constitutional right is invaded by this law, and *the case will be reversed*, with instructions to overrule the demurrer to the complaint.

Reavis, Ch. J., and **Anders**, **Mount**, **Fullerton**, and **White**, JJ., concur.

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L. H. PRATHER, *Respt.*,
v.
City of SPOKANE, *Appt.*

(.....Wash.....)

1. **A city which voluntarily constructs a cinder bicycle path** along the side of one of its streets must construct and maintain it so that it will be reasonably safe for the ordinary use for which it is intended.
2. **The location of a bicycle path is not so far a governmental function** that the city making it will be relieved on that ground from liability for injuries caused by a location which is unsafe for the ordinary travel for which it is intended.
3. **That one using a bicycle path constructed by the city for that purpose might have used the street** without injury will not relieve the city from liability for injuries caused by the unsafe condition of the path.
4. **A city which locates a turn in a bicycle path at a street corner,** within 4 feet of the gutter of the cross street, into which persons using it are liable to ride and be injured, without any barrier, sign, or other means of notifying travelers of the danger, is liable to a traveler who, after dark, in the exercise of ordinary care, goes over the curb and is injured.

(September 2, 1902.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John P. Judson** and **A. H. Kenyon,** for appellant:

If municipal governments see fit to construct bicycle paths, the duty, responsibility, and liability to respond in damages is not measured by the law and rules fixing the responsibility and liability for failure to properly construct and keep in repair the streets and sidewalks.

15 Am. & Eng. Enc. Law, pp. 1145–1149.

In the exercise of discretionary powers, no liability can be based upon errors of judgment.

2 Thomp. Neg. pp. 731, 735; Shearm. & Redf. Neg. 2d ed. §§ 126–128; 2 Dill. Mun. Corp. 4th ed. § 949; *Johnston* v. *District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923; *Vanderhurst* v. *Tholcke*, 113 Cal. 147, 36 L. R. A. 267, 45 Pac. 266; *Weightman* v. *Washington*, 1 Black, 39, 17 L. ed. 52.

If reasonable men may differ as to whether or not the best method was adopted, no action can be sustained to recover damages sustained by reason of the method adopted to improve the street or construct the sidewalk.

Conlon v. *St. Paul*, 70 Minn. 216, 72 N. W. 1073; *Jordan* v. *New York*, 44 App. Div. 149, 60 N. Y. Supp. 696; *Teager* v. *Flemingsburg*, 22 Ky. L. Rep. 1442, 53 L. R. A. 791, 60 S. W. 718; *Hill* v. *Boston*, 122 Mass. 380, 23 Am. Rep. 332.

It appearing that the streets themselves were safe and unobstructed for the use of vehicles, it follows that they should be held to be in a reasonably safe condition for the bicycle.

4 Am. & Eng. Enc. Law, 2d ed. p. 16; *Leslie* v. *Grand Rapids*, 120 Mich. 28, 78 N. W. 885.

Riding without a light in a dark night at a great rate of speed is negligence of a character to prevent recovery.

Baxter v. *Cedar Rapids*, 103 Iowa, 599, 72 N. W. 792; 7 Am. & Eng. Enc. Law, 2d ed. pp. 375, 377; *Cook* v. *Fogarty*, 103 Iowa, 500, 39 L. R. A. 488, 72 N. W. 677.

The sidewalk, the curb, the gutter, were not in the traveled way. They were proper and necessary structures. Neither, nor all combined, nor one alone, made the street unsafe for ordinary use. They were there rightfully, and, like a telephone pole, they might prove dangerous if run into. Yet injuries resulting therefrom are not a proper basis for an action for damages.

Macomber v. *Taunton*, 100 Mass. 256; *Marshall* v. *Ipswich*, 110 Mass. 522; *Damon* v. *Boston*, 149 Mass. 151, 21 N. E. 235; *Hubbell* v. *Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858; *Monk* v. *New Utrecht*, 104 N. Y. 552, 11 N. E. 268; *Glasier* v. *Hebron*, 131 N. Y. 447, 30 N. E. 239; *Oliver* v. *Denver*, 13 Colo. App. 345, 57 Pac. 729; *Dougherty* v. *Horseheads*, 159 N. Y. 154, 53 N. E. 799; *Anderson* v. *Wilmington*, 2 Penn. (Del.) 28, 43 Atl. 841; *Atlanta* v. *Milam*, 95 Ga. 135, 22 S. E. 43; *Newton* v. *Worcester*, 174 Mass. 181, 54 N. E. 521; *Decatur* v. *Besten*, 169 Ill. 340, 48 N. E. 186; *Canavan* v. *Oil City*, 183 Pa. 611, 38 Atl. 1096; *Jordan* v. *New York*, 44 App. Div. 149, 60 N. Y. Supp. 696.

The street being safe for ordinary use, the city was not bound to erect barriers to prevent people from riding or driving against the curb or sidewalk.

Williams, Mun. Liability, § 114, p. 190; *Teater* v. *Seattle*, 10 Wash. 328, 38 Pac. 1006; *Spaulding* v. *Winslow*, 74 Me. 528; *Morse* v. *Belfast*, 77 Me. 44; *Urquhart* v. *Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Macomber* v. *Taunton*, 100 Mass. 256; *Lansing* v. *Toolan*, 37 Mich. 152; *Ford* v. *Des Moines*, 106 Iowa, 94, 75 N. W. 630; *Hubbell* v. *Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858; *Monk* v. *New Utrecht*, 104 N. Y. 552, 11 N. E. 268; *Damon* v. *Boston*, 149 Mass. 147, 21 N. E. 235; *Conlon* v. *St. Paul*, 70 Minn. 216, 72 N. W. 1073.

A municipality is under no obligation to light the highways or streets, and is not liable for injuries resulting from failure to light them, or from insufficient lighting.

15 Am. & Eng. Enc. Law, p. 441; *Lyon* v. *Cambridge*, 136 Mass. 419; *Freeport* v. *Is-*

NOTE.—As to right of cyclists to recover for injuries caused by defective highways, see cases in *note* to Jones v. Williamsburg (Va.) 47 L. R. A. 298; also Richardson v. Danvers (Mass.) 50 L. R. A. 127.

As to liability of city for injuries to bicyclist caused by defect in sidewalk, see Lee v. Port Huron (Mich.) 55 L. R. A. 308.

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bell, 83 Ill. 440, 25 Am. Rep. 407; *Indianapolis* v. *Scott*, 72 Ind. 196; *Miller* v. *St. Paul*, 38 Minn. 134, 36 N. W. 271; *Canavan* v. *Oil City*, 183 Pa. 611, 38 Atl. 1096; *Cook* v. *Fogarty*, 103 Iowa, 500, 39 L. R. A. 488, 72 N. W. 677; *Sparhawk* v. *Salem*, 1 Allen, 30, 79 Am. Dec. 702.

A street that is safe for any kind of an ordinary vehicle is, in contemplation of law, safe for the bicycle rider.

Morrison v. *Syracuse*, 53 App. Div. 490, 65 N. Y. Supp. 939; *Leslie* v. *Grand Rapids*, 120 Mich. 28, 78 N. W. 885; *Smith* v. *Henderson*, 54 App. Div. 26, 66 N. Y. Supp. 347.

Messrs. **C. S. Voorhees** and **Reese H. Voorhees**, for respondent:

The most insignificant amount of care and thought for the safety of those using the path would have so impressed upon the mind the inevitable disaster that awaited the rider if he passed the turn in the dark as to make it a matter of amazement to the thoughtful how this condition of things could have remained unrectified.

Brooks v. *Somerville*, 106 Mass. 271; *Ft. Wayne* v. *Coombs*, 107 Ind. 77, 57 Am. Rep. 82, 7 N. E. 743; *Houston* v. *Isaacks*, 68 Tex. 118, 3 S. W. 693.

This condition of the path, the gravelly, dangerous character of which is immediately apparent at the first glance, was allowed by the city to remain for six months without any effort at its amelioration.

Elster v. *Seattle*, 18 Wash. 304, 51 Pac. 394; *District of Columbia* v. *Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; *Sutton* v. *Snohomish*, 11 Wash. 24, 39 Pac. 273; *Alger* v. *Lowell*, 3 Allen, 402; *Davis* v. *Hill*, 41 N. H. 329; *Palmer* v. *Andover*, 2 Cush. 600; *Higert* v. *Greencastle*, 43 Ind. 574; *Ireland* v. *Oswego, H. & S. Pl. Road Co.* 13 N. Y. 526; *Chapman* v. *Cook*, 10 R. I. 304, 14 Am. Rep. 686; *Coggswell* v. *Lexington*, 4 Cush. 307; *Hayden* v. *Attleborough*, 7 Gray, 338; *Jones* v. *Waltham*, 4 Cush. 299, 50 Am. Dec. 783.

Where a city has exclusive control and management of its streets, with power to raise money for their construction and repair, a duty (when not expressly imposed by charter) arises to the public, from the character of the powers granted, to keep its streets in a reasonably safe condition for use in the ordinary modes of travel; and it is liable to respond in damages to those injured by neglect to perform such duty.

Sutton v. *Snohomish*, 11 Wash. 24, 39 Pac. 273; *Lorence* v. *Ellensburgh*, 13 Wash. 341, 43 Pac. 20; *Grove* v. *Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262; *Snook* v. *Anaconda* (Mont.) 66 Pac. 746; *Taake* v. *Seattle*, 18 Wash. 178, 51 Pac. 362; *White* v. *Ballard*, 19 Wash. 284, 53 Pac. 159; *Rowe* v. *Ballard*, 19 Wash. 1, 52 Pac. 321; *Hill* v. *Boston*, 122 Mass. 380, 23 Am. Rep. 332.

The principle that actionable negligence cannot be predicated of the plan itself does not go so far as to exempt from liability if that plan leaves the streets in an unsafe and dangerous condition for public use.

2 Dill. Mun. Corp. § 1024, note 1, p. 1294; *Lehn* v. *San Francisco*, 66 Cal. 76, 4 59 L. R. A.

Pac. 965; *Indianapolis* v. *Huffer*, 30 Ind. 235; *Gould* v. *Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822.

If this street was used as a street, and the public were invited to use it as such, it became the duty of the city to maintain it in proper repair, and to protect the life and limb of those whom it invited to travel upon it.

Taake v. *Seattle*, 18 Wash. 178, 51 Pac. 362; *Kelsey* v. *Glover*, 15 Vt. 708; *Providence* v. *Clapp*, 17 How. 161, 15 L. ed. 72; *Hutson* v. *New York*, 5 Sandf. 289, 9 N. Y. 163, 59 Am. Dec. 526; *White* v. *Ballard*, 19 Wash. 284, 53 Pac. 159; *Rowe* v. *Ballard*, 19 Wash. 1, 52 Pac. 321.

The traveling public have a right to suppose that there is no dangerous impediment or pitfall in any part of a street, without a light placed to give warning of it or a suitable railing to protect from it.

Durant v. *Palmer*, 29 N. J. L. 548; *Lusby* v. *Atchison, T. & S. F. R. Co.* 41 Fed. 184.

Mount, J., delivered the opinion of the court:

Action for personal injuries. Defendant below objected to the introduction of evidence on the part of the plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This objection was overruled, and defendant excepted. This ruling of the court is the only error assigned. The paragraphs of the complaint necessary to be considered are as follows:

"(3) That during all of said times, and for a long time prior thereto, there were within said city a certain street, running north and south therethrough, called and known as 'Division street,' and a certain avenue running east and west therethrough, called and known as 'Augusta avenue,' both of which said street and avenue being public thoroughfares belonging to and in the charge and control of said city.

"(4) That during all of said times, and for a long time prior thereto, the said city had made and constructed a certain public thoroughfare therein, called and known as a 'cinder path,' running north and along the east side of said Division street to the north side of said Augusta avenue at their intersection, and thence east on and along the north side of said Augusta avenue, over and upon which cinder path the said city invited and required all persons to travel who might travel on said street or avenue by means of bicycles, which cinder path was constructed by and under the direction of said city, and during all of said times, and for a long time prior thereto, was maintained by it for said purpose.

"(5) That during all of said times, and for a long time prior thereto, said cinder path, at the place where the same turned from said street east onto said avenue, was carelessly, negligently, and defectively constructed and maintained by said city, and dangerous to travelers thereon, in this: That said turn was a sharp right-angle turn, made within about 4 feet of where

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there existed the street gutter and board sidewalk, also constructed and maintained by said city for a long time prior to all of said times mentioned herein, at the northeast corner of the crossing of said street and said avenue, which street gutter was about 8 inches below said turn, from which gutter arose said board sidewalk about 1 foot in height, both of which said gutter and sidewalk lying immediately north of said turn and in line with said cinder path going north and transverse to the north and south line of said cinder path; that immediately upon turning east at said place said cinder path was constructed on ground which arose to an elevation of about 18 inches above said turn, and thence proceeded east at that elevation; that said cinder path at said place was lower than the adjacent parts thereof, and dim and indistinct, and on account of said construction and maintenance of said cinder path, curb, and gutter in the manner and under the condition hereinbefore described the use of said cinder path was dangerous and unsafe, and a person traveling north thereon by bicycle at any time in the dark of an evening could not see, or know from its appearance, that there was a turn in said cinder path at said place, nor see or know of said street gutter, or sidewalk beyond, and would be in danger of riding on past said turn into said gutter, and against said sidewalk.

"(6) That during all of said times, and for a long time prior thereto, to wit, for the period of six months, the said city negligently and carelessly failed, neglected, and refused to repair, remedy, or in any wise to correct said defective, dangerous, and unsafe conditions of said curb, gutter, and cinder path so constructed and maintained by it as aforesaid, and carelessly and negligently failed, neglected, and refused to place or maintain any barrier, sign, light, or other means at said turn or elsewhere to show or notify travelers on said cinder path where said turn was, or to protect such travelers from injury on account of said dangers and defects by running into said street gutter and against said sidewalk, and that because thereof, prior to the injury to this plaintiff herein recited, a great number of other persons had been injured at the same place and in a similar manner, and that because of said long continuance of said defective, dangerous, and unsafe conditions of said curb, gutter, and cinder path, and the occurrence of said injuries to other persons, defendant had notice of said defective, dangerous, and unsafe conditions, and ought to have known thereof.

"(7) That on the 3d day of November, 1899, at about 6 o'clock P. M., it then being dark, plaintiff was rightfully traveling on said cinder path on a bicycle, going north to his home in said city, having no knowledge or notice of any kind of any of said defects in or negligent construction of said cinder path, or said curb or gutter, or any danger therefrom, and on account of said negligent and defective construction of said cinder path, and through and because of the defective and negligent construction of said curb and gutter, and through and because of defendant's negligence in leaving said curb and gutter, constructed, as hereinbefore described, close to and in the line of said cinder path, as hereinbefore set forth, and through and because of defendant's neglect, failure, and refusal to repair, remedy, and correct said defective, dangerous, and unsafe condition of said curb, gutter, and cinder path, as hereinbefore set forth, and through and because of defendant's said negligence in failing to place or maintain proper or any such signs, barriers, lights, or other means of protection at said turn in said path, plaintiff rode his said bicycle into said street gutter and against said board sidewalk, throwing him with great violence upon and against said sidewalk, striking his head violently thereon, greatly bruising and cutting his head and face, causing injury to plaintiff's brain and nervous system, paralyzing the optic nerve of his right eye so as to cause atrophy of said optic nerve and blindness of said right eye, badly wrenching and spraining his left wrist and elbow, and causing him great and permanent general physical weakness. That on account of said fall plaintiff suffered great physical and mental pain and anxiety. That plaintiff's left arm has only partly recovered from said wrenching and spraining. That plaintiff's right eye has become practically permanently blind."

The negligence here alleged is: First, in the construction and maintenance of a dangerous way; and, second, negligence in failure to repair, remedy, or correct the danger by constructing a barrier, sign, light, or other means, so as to notify travelers of the danger. It is first argued by the appellant that the city was not required to construct these bicycles paths; that it was optional with the city to do so or not, as it chose; and that, therefore, the liability arising from a mandatory duty is not imposed upon the appellant. Conceding this to be the rule, it does not apply in this case, because it is alleged that the path was constructed. The city having exercised its option to construct the path, the same rules must apply to the method and care in the construction and maintenance, as apply where there is a duty imposed by law, *viz.*, to so construct and maintain the path or street or walk that the same may be reasonably safe for the ordinary use for which it was intended. *Sutton* v. *Snohomish*, 11 Wash. 24, 39 Pac. 273; *Lorence* v. *Ellensburgh*, 13 Wash. 341, 43 Pac. 20; *Taake* v. *Seattle*, 18 Wash. 178, 51 Pac. 362; *Rowe* v. *Ballard*, 19 Wash. 1, 52 Pac. 321; *White* v. *Ballard*, 19 Wash. 284, 53 Pac. 159.

It is next argued that the action is not based upon any defects in the construction of the path, but that the negligence consists in the location of the path at a sharp turn near the curb, the sidewalk, and gutter, and that this is a governmental duty, for which no action can be maintained for damages sustained by reason of the location of the improvement upon the street.

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But this court said in *Sutton* v. *Snohomish*, 11 Wash. 24, 39 Pac. 273: "In the first place, we are of the opinion that the laying out, repairing, and controlling of streets by a chartered municipal corporation does not call forth the exercise of strictly governmental functions. . . . But the duty to keep streets in repair is a municipal or ministerial duty, for a breach of which an action will lie in favor of a party injured thereby. *Denver* v. *Dunsmore*, 7 Colo. 328, 3 Pac. 705. In the second place, we think that where, as here, a city has exclusive control and management of its streets, with power to raise money for their construction and repair, a duty (when not expressly imposed by charter) arises to the public from the character of the powers granted to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and that it is liable to respond in damages to those injured by a neglect to perform such duty. There is undoubtedly a want of harmony among the decisions of the courts upon this question, but we believe the decided weight of authority, as well as sound reason, is in favor of the view above expressed." This rule has been followed by this court in the cases cited *supra*. It follows, therefore, that if the path in question was so constructed as to be unsafe for the ordinary travel for which it was intended, the city is liable to one who is injured using it in the ordinary way and not negligent himself.

It is also argued that the complaint shows that the streets themselves were safe and unobstructed for the use of vehicles; that a bicycle is a vehicle; and that the respondent was not obliged to travel the path, but might have used the street without injury. This may be conceded, and yet it does not relieve the city from liability. When the city constructed the cinder path, and "invited and required all persons who might travel on said street or avenue by means of bicycles" to go over and upon the path, persons so traveling had a right to assume that the same was safe for the use of bicycles in the ordinary way. *Taake* v. *Seattle*, 16 Wash. 90, 47 Pac. 220; 18 Wash. 178, 51 Pac. 362. The fact that other parts of the street were safe for bicycles would not relieve the city from liability where it had invited a particular kind of vehicle to go upon this particular way. The way must be made reasonably safe for the vehicle for which it is designed. A street may be safe for pedestrians, but where a sidewalk is provided therefor pedestrians may go upon the walk, and assume it to be safe. So, also, a sidewalk may be safe for wagons and other vehicles, but where a street is provided therefor they may assume the street is safe, and go upon the way provided. The same is also true of a path erected for bicycles. For an injury resulting in either case from a dangerous way negligently constructed or maintained the municipality is liable. *Rowe* v. *Ballard*, 19 Wash. 1, 52 Pac. 321.

It is alleged in the complaint at paragraph 5 that "said cinder path, at the place where the same turned from said street east onto said avenue, was carelessly, negligently, and defectively constructed and maintained by said city, and dangerous to travelers thereon, in this: That said turn was a sharp right-angle turn made within about 4 feet of where there existed the street gutter, and board sidewalk, also constructed and maintained by said city, . . . which street gutter was about 8 inches below said turn, from which gutter arose said board sidewalk about 1 foot in height, . . . and on account of said construction and maintenance of said cinder path, curb, and gutter . . . the use of said cinder path was dangerous and unsafe, and a person traveling north thereon by bicycle at any time in the dark of an evening could not see, or know from its appearance, that there was a turn in said cinder path at said place." By the sixth paragraph it is alleged that the city had notice of the dangerous and unsafe conditions, and neglected to repair or remedy the same, or to maintain any barrier, sign, light, or other means to notify travelers of the danger. In *Rowe* v. *Ballard*, 19 Wash. 1, 52 Pac. 321, this court said: "And we know of no law which will allow a city to dig an excavation or to establish or make any pitfall within its corporate limits, and maintain the same without guards or warnings of any kind to the traveling public, without being held responsible in damages to the parties who, without fault, fall into the same, even though such streets may not have been formerly graded." But is is said the complaint shows that the obstructions complained of were not located upon the path, but were outside thereof, and were of themselves necessary and proper. In *Alger* v. *Lowell*, 3 Allen, 402, the court says: "The true test, on the contrary, is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveler, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient." In *Davis* v. *Hill*, 41 N. H. 329, the court says: "It seems entirely clear, upon the authorities, that the want of a sufficient railing, barrier, and protection to prevent travelers passing upon a highway from running into some dangerous excavation or pond, or against a wall, stones, or other dangerous obstruction without the limits of the road, but in the general direction of the travel thereon, may properly be alleged as a defect in the highway itself." See also *Palmer* v. *Andover*, 2 Cush. 600; *Higert* v. *Greencastle*, 43 Ind. 574. From the foregoing rule it follows that, if the city was maintaining a dangerous and unsafe path for bicycles, which it invited to go upon the path, with knowledge and notice of the danger, and neglected to remedy the same, and to place and maintain any barrier, sign, or other means to notify travelers of the dan-

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ger, the city is liable to one who is injured, using ordinary care, while traveling thereon, and the complaint therefore states a cause of action.

The facts that the respondent was traveling thereon in the nighttime, or without a light, or that he was riding carelessly and negligently, or that he knew of the danger, or that he might have seen and avoided it, are all facts which do not appear in the complaint, but which were proper to be set up in defense, and which the jury, under proper instruction, were required to pass upon, and which we presume were set up and properly passed upon, because no question is raised or can be considered on this appeal except the one already considered.

For the reasons stated, *the judgment is affirmed.*

Reavis, Ch. J., and **Hadley, Anders, White**, and **Dunbar**, JJ., concur.

Henry LAWSHE, *Appt.*,
v.
TACOMA RAILWAY & POWER COMPANY, *Respt.*

(.....Wash.....)

A street-car passenger who is ejected from a car to which he is transferred because of a mistake not noticed by him in the transfer slip given him by the conductor to whom he paid his fare may recover substantial damages from the company, since it is responsible for the mistakes of its agents, and cannot require passengers to make technical examination of transfer slips.

(September 15, 1902.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County in favor of defendant in an action brought to recover damages for alleged wrongful ejection from defendant's car. *Reversed.*

The facts are stated in the opinion.

Messrs. **Hudson & Holt**, for appellant:

The carrier is responsible for the wrongful expulsion of a passenger.

Wilson v. *Northern P. R. Co.* 5 Wash. 621, 32 Pac. 468, 34 Pac. 146; 5 Am. & Eng. Enc. Law, 2d ed. pp. 602, 603; *Muckle* v. *Rochester R. Co.* 79 Hun, 33, 29 N. Y. Supp. 732.

The mistake in the transfer makes no difference.

Sloane v. *Southern California R. Co.* 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; *Louisville & N. R. Co.* v. *Gaines*, 99 Ky. 411, 36 S. W. 174; *Gulf, C. & S. F. R. Co.* v. *Holbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028; *Hufford* v. *Grand Rapids & I. R. Co.* 64 Mich. 631, 31 N. W. 544; *Ellsworth* v. *Chicago, B. & Q. R. Co.* 95 Iowa, 98, 29 L. R. A. 173, 63 N. W. 584; *Trice* v. *Chesapeake & O. R. Co.* 40 W. Va. 271, 21 S. E. 1022; *Laird* v. *Pittsburg Traction Co.* 166 Pa. 4, 31 Atl. 51; *Pennsylvania Co.* v. *Bray*, 125 Ind. 229, 25 N. E. 439; *Lake Erie & W. R. Co.* v. *Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Philadelphia, W. & B. R. Co.* v. *Rice*, 64 Md. 63, 21 Atl. 97; *Rouser* v. *North Park Street R. Co.* 97 Mich. 565, 56 N. W. 937; *Baltimore & O. R. Co.*, v. *Bambrey*, 2 Monaghan, 109, 16 Atl. 67; *Louisville & N. R. Co.* v. *Hine*, 121 Ala. 234, 25 So. 857; *Appleby* v. *St. Paul City R. Co.* 54 Minn. 169, 55 N. W. 1117; *O'Rourke* v. *Citizens' Street R. Co.* 103 Tenn. 124, 46 L. R. A. 614, 52 S. W. 873; *Gulf, C. & S. F. R. Co.* v. *Rather*, 3 Tex. Civ. App. 72, 21 S. W. 956; *Gulf, C. & S. F. R. Co.* v. *Copeland*, 77 Tex. Civ. App. 55, 42 S. W. 239; *Krueger* v. *Chicago, St. P. M. & O. R. Co.* 68 Minn. 445, 71 N. W. 683.

Messrs. **B. S. Grosscup** and **A. G. Avery**, for respondent:

A passenger may be required to show a proper ticket or pay fare, and if he fails to do either, although his failure is due to a mistake of an employee of the company and he has in fact contracted for passage, still he may be rejected.

Bradshaw v. *South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481; *Frederick* v. *Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531; *Hufford* v. *Grand Rapids & I. R. Co.* 53 Mich. 118, 18 N. W. 580; *Hall* v. *Memphis & C. R. Co.* 15 Fed. 57; *Poulin* v. *Canadian Pacific R. Co.* 17 L. R. A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 197; *Townsend* v. *New York C. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Shelton* v. *Lake Shore & M. S. R. Co.* 29 Ohio St. 215; *Pennsylvania Co.* v. *Hine*, 41 Ohio St. 276; *Chicago, B. & Q. R. Co.* v. *Griffin*, 68 Ill. 499; *McKay* v. *Ohio River R. Co.* 34 W. Va. 65, 9 L. R. A. 132, 11 S. E. 737; *McClure* v. *Philadelphia, W. & B. R. Co.* 34 Md. 532, 6 Am. Rep. 345; *Petrie* v. *Pennsylvania R. Co.* 42 N. J. L. 449; *Yorton* v. *Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482; *Mosher* v. *St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; *Peabody* v. *Oregon R. & Nav. Co.* 21 Or. 121, 12 L. R. A. 823, 26 Pac. 1053; *Woods* v. *Metropolitan Street R. Co.* 48 Mo. App. 125; *McGhee* v. *Reynolds*, 117 Ala. 413, 23 So. 68; *Heffron* v. *Detroit City R. Co.* 92 Mich. 407, 16 L. R. A. 345, 52 N. W. 802; *Mahoney* v. *Detroit Street R. Co.* 93 Mich. 612, 18 L. R. A. 335, 53 N. W. 793; *Van Dusan* v. *Grand Trunk R. Co.* 97 Mich. 439, 56 N. W. 848; *Keen* v. *Detroit Electric R. Co.* 123 Mich. 247, 81 N. W. 1084.

A ticket is conclusive, as between the conductor and the passenger, if upon its face it obviously does not entitle the passenger to a passage, even though the defect is due to a mistake of the ticket agent; and the conductor may rightfully eject the passenger if he refuses to pay his fare on demand.

Western Maryland R. Co. v. *Stocksdale*, 83 Md. 245, 34 Atl. 880; *Murdock* v. *Boston*

NOTE.—For other cases in this series as to wrongful ejection of passenger from street car because of mistake in transfer, see O'Rourke v. Citizens' Street R. Co. (Tenn.) 46 L. R. A. 614, and Kiley v. Chicago City R. Co. (Ill.) 52 L. R. A. 626.

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& A. R. Co. 137 Mass. 299, 50 Am. Rep. 307; *Trice* v. *Chesapeake & O. R. Co.* 40 W. Va. 271, 21 S. E. 1022; 4 Elliott, Railroads, § 1594; Hutchinson, Carr. 2d ed. §§ 580*h*-580*j*; *Pine* v. *St. Paul City R. Co.* 50 Minn. 144, 16 L. R. A. 347, 52 N. W. 392; *Kiley* v. *Chicago City R. Co.* 189 Ill. 384, 52 L. R. A. 626, 59 N. E. 794; *Ellsworth* v. *Chicago, B. & Q. R. Co.* 95 Iowa, 98, 29 L. R. A. 173, 63 N. W. 584; *Com.* v. *Power*, 7 Met. 596, 41 Am. Dec. 465.

Dunbar, J., delivered the opinion of the court:

Defendant, as a common carrier of passengers, operates in Tacoma a street car line on Pacific avenue, and issues transfers to various connecting lines also operated by it. Plaintiff became a passenger upon the Pacific avenue line, and requested a transfer to the I street line. By a mistake of the conductor, instead of being given this transfer he was given a transfer to another line. Not noticing the mistake, plaintiff presented this transfer to the conductor of the I street car, who refused to accept it and demanded fare. Plaintiff declined to pay fare, and was put off the car. He now sues for damages on account of the ejection. The complaint, which, in substance, embodied the statement made above, was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, judgment was entered, and from such judgment plaintiff appeals.

It is insisted by the respondent (defendant) that the carrier of passengers has a right to make reasonable rules and regulations for the conduct of its business, and that it is a reasonable regulation to require a passenger to procure and exhibit to the conductor a ticket evidencing his right to ride; that he must make his contract known to the conductor, and it can be so made known only by exhibiting the proper ticket; that if he fails to exhibit the proper ticket, although his failure is due to a mistake of an employee of the company, and he has in fact contracted for passage, still he may be ejected; and that his only remedy is to sue for the recovery of his fare. On this subject there seems to be a wide divergence of opinion, as indicated by the decisions. Respondent asserts that there is not an irreconcilable conflict of authority upon this subject; that the fundamental rules and the reasons underlying them support the doctrine that the appellant cannot recover under the circumstances of this case; and it is insisted that the appellant does not cite a single case exactly in point upon its facts with the case at bar. An examination of the authorities satisfies us that not only is there an irreconcilable conflict in the authorities, but that the weight of authority and the better reason sustain the appellant's right to recover; that, while the circumstances of the cases cited by appellant in most instances differ slightly from the circumstances of this case, the principle governing is identical. It is true that the company has a right to make regulations governing its traffic; but those regulations are for the benefit of the company, they are to a certain extent technical, and are understood only by the officers of the company and by travelers who are exceedingly familiar with them. In *Hufford* v. *Grand Rapids & I. R. Co.* 64 Mich. 631, 31 N. W. 544, which it is claimed overruled some of the earlier cases holding to the opposite doctrine, and which we think, in substance, does overrule them, it was held that plaintiff had a right to rely upon the agent's statements, and that the ticket so delivered by him was the evidence agreed upon by the parties by which the defendant should thereafter recognize the rights of the plaintiff in the contract thus made with the agent, and was conclusive upon the subject, and that passengers were not required to know the rules and regulations made by the directors of a railroad company for the control of the action of its agents and the management of its affairs. In passing upon the question, the court said: "There seems to be no question but that the plaintiff purchased his ticket of an agent of the company who had the right to sell the same and receive the plaintiff's money therefor; that the ticket covered the distance between the two stations, and was purchased by the plaintiff in perfect good faith; that the ticket was genuine, and was issued by the company, and one which its agents had the right to sell to passengers. The plaintiff had a right to rely upon the statements of the agent that it was good and entitled him to a ride between the two stations. It was a contract for a ride between the two stations, that the defendant's agent had a right to make, and did make, with the plaintiff. The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties by which the defendant should thereafter recognize the rights of plaintiff in his contract; and neither the company, nor any of its agents, could thereafter be permitted to say the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of the company for the control of the action of its agents and the management of its affairs." In this case the ticket was represented by the conductor to carry the passenger to a certain place, but was not in fact a ticket which would entitle a passenger to ride to such place. In further speaking of the right of the plaintiff to rely upon the representations of the conductor, the court said: "All sorts of people travel upon the cars; and the regulations and management of the company's business and trains which would not protect the educated and uneducated, the wise and the ignorant, alike, would be unreasonable indeed." In *Sloane* v. *Southern California R. Co.* 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320, it was held that, for the purpose of a right of action for the tort of a railroad company, it is not material that different acts of tort were committed by differ-

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ent agents of the railroad company; and the liability of the railroad company is the same where one conductor took up the ticket of the passenger, and required a change of cars, without giving to the passenger any evidence of the right of passage, and the conductor upon the other train excluded the passenger for failure to exhibit such evidence, as if both acts had been done by one conductor. The circumstances of the case were exactly parallel with the circumstances of the case at bar, excepting that in the former instance the passenger had no evidence of the contract, while in the case at bar the evidence was defective. A case exactly in point is *O'Rourke* v. *Citizens' Street R. Co.* 103 Tenn. 126, 46 L. R. A. 614, 52 S. W. 872, where it was held that a passenger who was ejected from a street car to which he had transferred from another car, because his transfer checks were improperly punched by the conductor of the first car, can recover therefor, where, on the refusal of the second conductor to accept the transfer checks, and before he was ejected, he made a statement to the conductor showing that the fault in the tickets was due to the negligence of the first conductor. In this case the authorities are collated on both sides of the proposition, a great majority being cited in favor of sustaining the right of recovery; and the court, in the course of its remarks, very pertinently said: "We concur in the latter view, and hold that a person who makes a valid contract is entitled to passage according to its terms, though the face of the ticket furnished him may not in any true sense express the contract. It is the contract, and not the ticket, that gives the right to transportation. The ticket is but an evidence of the contract, made out and furnished by the carrier; and, if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance." To the same effect are *Gulf, C. & S. F. R. Co.* v. *Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951; *Gulf C. & S. F. R. Co.* v. *Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239.

But outside of all authority, it seems to us that in accordance with the general principles of law the appellant should recover. It is too plain for argument that only the right to sue for the recovery of the fare, or a portion of the fare, received by the company will be totally inadequate, and, through the plain, everyday law governing agency, the company is responsible for the acts of its agent and for his mistakes. This mistake it was the duty of the company to correct. It must necessarily correct it through its agents. It makes no difference, in reason, that the agent who was called upon to correct the mistake was another and different agent from the one who made the mistake. They were both agents of the company, and the act of the first conductor was in effect the act of the second conductor, because the acts of both were the acts of the company; the company having, for its own convenience, intrusted its business to two agents instead of one. The contract was made when the passenger paid the fare, and it was a contract not with any particular agent of the company, but with the company through its agents. The first conductor, who made the mistake, was not the agent of the passenger, but was the agent of the company, and his mistake was therefore the mistake of the company. If any other rule prevailed, the result would be that the company would be allowed to deprive the passenger of part of the benefit of his contract on account of the mistake made by the company, and for which he was in no wise to blame, for he had a right to assume that the conductor furnished him with the transportation for which he asked and for which he paid; it being absolutely impracticable for passengers to make technical examination of the transfer slips which they receive. And he ought to have redress for the company's violation of the obligation which it assumed.

The cause will be reversed, with instructions to the lower court to overrule the demurrer to the complaint.

Reavis, Ch. J., and **Anders, Hadley,** and **White,** JJ., concur.

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TEXAS SUPREME COURT.

WAPLES-PLATTER GROCER COMPANY, *Appt.*,
v.
TEXAS & PACIFIC RAILROAD COMPANY *et al.*

(.....Tex.....)

1. **A claim against a railroad company** for unliquidated damages for breach of a shipping contract is not subject to garnishment.
2. **That a claim for unliquidated damages for breach of contract** has been reduced to judgment does not render it subject to garnishment pending an appeal therefrom.

(May 19, 1902.)

QUESTIONS certified for the opinion of the Supreme Court by the Court of Civil Appeals for the Second Supreme Judicial District, which arose upon an appeal by plaintiff from a judgment of the District Court for Tarrant County in favor of interveners in an action brought to subject to plaintiff's demand a claim which was alleged to be due from the defendant garnishee. *Answers favorable to appellees returned.*

The facts are stated in the opinion.

Mr. **R. W. Flournoy,** for appellant:

The judgment of a trial court is subject to garnishment on a writ issuing out of the same court, and the appeal then pending, or subsequently perfected, of the said judgment, will not defeat the lien of such gar-

NOTE.—*The garnishment of unliquidated claims.*

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I. *Scope.*

The subject of this note is the liability to garnishment process of a claim or demand which is uncertain in amount, apart from uncertainty in regard to validity, maturity, person, or other circumstance; and by "claim or demand" is meant a personal claim against an individual for money, as distinguished from a vendible interest in property. So, the equity of redemption of a mortgagor in the land is a vendible interest which is not a personal claim; but the right of a mortgagor of personalty to demand of the mortgagee the surplus of the proceeds upon the sale of the mortgaged chattel is a personal claim, and is within the scope of the note. And "unliquidated" is here limited so as to exclude a claim the eventual value of which is uncertain merely because it may be satisfied only in part, as, for instance, a claim in a certain amount against an assignee in insolvency; or a claim for the amount of a legacy, against an executor, which may not be payable in full owing to the prior claims of debts and other legacies, on settlement of the estate; and by "garnishment" is meant whatever is included by that word in the jurisdictions in which the term exists in legal use, whether limited to a legal, as distinguished from an equitable, process, or including a special statutory process in equity to subject claims which are beyond the reach of the legal statutory process; and whether or not the term is limited in any jurisdiction to attachment upon original process or to attachment in aid of execution, or whether it includes both remedies, as is generally the case. In this way a creditors' bill is excluded, except in so far as "equitable garnishment," *eo nomine*, takes its place. In five states, however,—New York, Massachusetts, New Hampshire, Maine, and Vermont,—garnishment does not exist under that name. In Connecticut it was formerly known as the factorizing process. In Massachusetts, Maine, New Hampshire, and Vermont its place is taken by the trustee process, cases under which are accordingly included; and in New York its function is performed simply under the name of attachment, of property capable of manual delivery, and of claims, as property not capable of manual delivery, in the hands of third persons. In New York, also, since the statutory proceedings supplementary to execution are merely a simple substitute for the creditors' bill (Duffy v. Dawson, 2 Misc. 401, 21 N. Y. Supp. 978), cases arising out of such proceedings are excluded; and in Pennsylvania, since, under the four statutes providing for the different kinds of attachment, the proceedings and rules are similar, cases arising under all four statutes are included.

II. *Generally.*

There are several, though not universal, rules as to what claims are the subject of garnishment. By a rule existing in many states no equitable claim, whether liquidated or not, is garnishable; this is sometimes owing to the phraseology of the statute, which shows that the proceeding is purely legal in its intent, and sometimes owing to the conflict of jurisdiction which might be caused by the adjudication of

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nishment. On affirmance of the judgment in the appellate court the plaintiff in garnishment is entitled to enforce his lien under the writ, against the garnishee.

Tex. Rev. Stat. art. 219; *Kreisle* v. *Campbell*, 89 Tex. 104, 33 S. W. 852; *Davis* v. *King* (Tenn. Ch. App.) 56 S. W. 1041; *Brooklyn Phenix Ins. Co.* v. *Willis*, 70 Tex. 15, 6 S. W. 825; 14 Am. & Eng. Enc. Law, 2d ed. p. 764.

A demand which will support an attachment or garnishment founded thereon is also subject to garnishment, and the degree of the certainty required of the obligation is the same in the one case as in the other; and a demand arising out of contract, and capable of liquidation by reference to fixed standards of value, is sufficiently certain for the purposes of either case.

Stiff v. *Fisher*, 2 Tex. Civ. App. 346, 21 S. W. 291; *Hochstadler Bros.* v. *Sam*, 73 Tex. 315, 11 S. W. 408; *Fleming* v. *Pringle*, 21 Tex. Civ. App. 225, 51 S. W. 555; 14 Am. & Eng. Enc. Law, 2d ed. p. 761, ¶ 3.

Gaines, Ch. J., delivered the opinion of the court:

The court of civil appeals of the second supreme judicial district has certified for our decision the following questions:

"On April 28, 1898, L. C. Downtain instituted suit in the district court of Eastland county against the Texas & Pacific Railway Company for damages in a cattle shipment, securing a judgment in his favor on the 28th day of March, 1899. From this judgment on May 20, 1899, the railway company perfected an appeal to this court upon a sufficient supersedeas bond. January 20, 1900, the said judgment of the district

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equitable claims in a court of law. Cases to this effect appear at the beginning of the division of this note headed, *Unliquidated claims in equity, infra*, V.

A similiar rule in many jurisdictions, when not modified expressly by statute, excludes all claims against the representatives of a decedent, and is based upon the same fear of conflict of jurisdiction between courts of law and probate courts, as well as of the inconvenience resulting from interference with the administration of the estate. In some cases, however, this is merely an incident of another rule which excludes from garnishment, upon the general ground of public policy, funds in the custody of the law, or in the hands of public officers, such as sheriffs and clerks of court. And in several states the garnishment statutes compel the garnishee to answer upon oath the amount of his indebtedness to the principal debtor (as in Georgia, Indiana, Kentucky, Louisiana, Mississippi, Ohio, Tennessee, and Texas), in which case, if the amount of the claim is uncertain, as is declared in the opinion in WAPLES-PLATTER GROCER CO. v. TEXAS & P. R. Co., it is impossible for the garnishee to make any answer upon which judgment against him can be rendered;—thus excluding from the operation of the process all claims which are not certain, or at least ascertainable, in amount. In other states (for instance, in Wisconsin, Kansas, and New England generally, except Connecticut) there is a rule which excludes "contingent" claims, sometimes by the expression, and sometimes by the construction of the statute; but this rule, while apparently necessarily excluding claims which are contingent only as to amount, is sometimes applied to cases where the only contingency is whether anything will ever be due upon the claim, and if anything, a previously ascertained amount. Cases of this class, therefore, are not within this note; as, for instance, where a seaman's wages in a certain sum are not payable until the ship comes to port, the claim is "contingent" until then, for the ship might founder (Wentworth v. Whittemore, 1 Mass. 471), and therefore not subject to attachment process. Many cases, however, involving contingencies both as to amount and as to final liability, are treated in this note, although the decision is often based upon only the latter contingency,—whether anything will be eventually payable.

In many states, also, there is the strict general rule, founded upon the phraseology of the statute, that a claim may not be garnished unless the principal debtor could at common law recover upon it against the garnishee in an action either of debt or *indebitatus assumpsit*. This rule, it will be seen, would necessarily exclude from the operation of the process all claims, whether in tort or contract, as well as claims in equity, which are unliquidated in amount, and are not certain, as *id certum est quod certum reddi potest*, in the sense of being ascertainable by calculation, and so would require the services of a jury to determine them. Cases applying this rule are: Walke v. McGehee, 11 Ala. 273; Loftin v. Shackleford, 17 Ala. 455; Harrel v. Whitman, 19 Ala. 135; Cook v. Walthall, 20 Ala. 335; Self v. Kirkland, 24 Ala. 275; Lundie v. Bradford, 26 Ala. 512; Hall v. Magee, 27 Ala. 414; Nesbitt v. Ware, 30 Ala. 69; Powell v. Sammons, 31 Ala. 552; Price v. Masterson, 35 Ala. 483; Godden v. Pierson, 42 Ala. 370; Henry v. Murphy, 54 Ala. 246; Mayberry v. Morris, 62 Ala. 113; Jones v. Crews, 64 Ala. 368; Henderson v. Alabama Gold L. Ins. Co. 72 Ala. 32; Alexander v. Pollock, 72 Ala. 137; Avery v. Lockhard, 75 Ala. 530; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; Hurst v. Home Protection F. Ins. Co. 81 Ala. 174, 1 So. 209; Teague v. Le Grand, 85 Ala. 493, 5 So. 287; Archer v. People's Sav. Bank, 88 Ala. 249, 7 So. 53; Stuckey v. McKibbon, 92 Ala. 622, 8 So. 378; Nicrosi v. Irvine, 102 Ala. 648, 15 So. 429; Cunningham v. Baker, 104 Ala. 160, 16 So. 68; Hassle v. God Is With Us Congregation, 35 Cal. 378; Redondo Beach Co. v. Brewer, 101 Cal. 322, 35 Pac. 896; Troy Laundry & Machinery Co. v. Denver, 11 Colo. App. 368, 53 Pac. 256; Glass v. Doane, 15 Ill. App. 66; Webster v. Steele, 75 Ill. 544; Wilcus v. Kling, 87 Ill. 107; Burgess v. Capes, 32 Ill. App. 372, Affirmed in 135 Ill. 61, 25 N. E. 1000; Lorenson v. Rusk, 67 Ill. App. 532; Williams v. Gage, 49 Miss. 777; Eddy v. Heath, 31 Mo. 141; Paul v. Paul, 10 N. H. 117; Hugg v. Booth, 24 N. C. (2 Ired. L.) 282; Keyes v. Milwaukee & St. P. R. Co. 25 Wis. 691.

The reason for this rule lies in the fact that the statute in effect generally limits the process in one way or another to "debts," and that those two forms of action are the appropriate means of collecting a debt,—the action of debt, to enforce the debt itself, which must be for a sum certain, and the action of *indebitatus assumpsit*, to recover in damages the amount of the demand, which is not upon an express promise to pay a certain or any other sum; and in this action the jury would, according to the evidence, give a verdict for the whole or a part of the sum demanded.

In this way the comparative terminology of the various statutes (for garnishment is purely

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court was affirmed here, which, so far as appears from the record, concluded this litigation, save that motion for rehearing was filed in this court, which was overruled on February 17, 1900. On January 20, 1900, the date the judgment of the district court was affirmed, as stated, L. C. Downtain for a valuable consideration, by parol, transferred the judgment in his favor to James & Hughes, proprietors of the Eastland County Bank, in Eastland, Texas. In August, 1898, the appellant herein, the Waples-Platter Grocer Company, in a certain suit instituted by it against said L. C. Downtain in the district court of Eastland county, Texas, caused to be duly issued and served upon the Texas & Pacific Railway Company a writ of garnishment founded upon a sum certain for the recovery of which the suit against Downtain had been instituted. On the 20th day of March, 1899, the Waples-Platter Grocer Company recovered judgment in its said suit against Downtain, which is still unsatisfied, in an amount in excess of the amount for which the Texas & Pacific Railway Company is liable upon said judgment in favor of Downtain. The Waples-Platter Grocer Company also caused to be duly issued and served upon the railway company other like writs of garnishment on the 7th day of April 1899, and on the 5th day of February, 1900. Subsequent to all the dates mentioned the railway company answered, substantially setting up the facts as agreed upon, and prayed that the court determine to which party it should pay the amount for which it was indebted, James & Hughes having in the meantime intervened; and the trial court concluded and adjudged, in effect, that the appellant

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a statutory remedy) becomes important in determining, according to the authorities, what claims or demands are or are not so unliquidated or contingent as to be beyond the reach of the process under any statute. So, in eleven states, Alabama, Arkansas, Connecticut, Illinois, Kentucky, Mississippi, North Carolina, Tennessee, Texas, West Virginia, and Wisconsin, the limiting term is "indebted;" in California, Colorado, England, Missouri, Montana, Nevada, it is "debts;" in Georgia, Indiana, Iowa, Kentucky, and Virginia, "debts," or "indebted;" in the District of Columbia, Maine, Massachusetts, and Vermont, "credits;" in Michigan and Nebraska, "credits," and "indebted;" in New Mexico and Washington, "debts," and "credits;" in New Jersey and Ohio, "rights and credits" and "indebted;" in Louisiana, "credit or right," "rights of action," "indebted;" in Maryland, "any kind of property or credits;" in Minnesota, "indebted," and "indebtedness;" in New Hampshire, "rights or credits . . . by reason of contracts;" in New York, "personal property," and "debt or demand;" in Rhode Island, "debtor;" in South Carolina, "debts," and "debtor;" in Wyoming, "all property, moneys and credits," and "indebted;" and in Pennsylvania, where there are four different attachment statutes: in foreign attachment, "personal estate;" in domestic attachment, "money or other effects:" in the act of 1869 (also domestic attachment), "rights in action or other property:" and in attachment execution, "debts and deposits."

III. *Claims in tort.*

Claims for damages in tort, which are necessarily unliquidated, have invariably been decided, under the garnishment or attachment statutes of the various states, to be outside of their intent, and therefore not subject to such process. The cases under this head, therefore, are principally important as indicating what claims are to be considered as claims in tort.

In Despatch Line of Packets v. Bellamy Mfg. Co. 12 N. H. 205, 37 Am. Dec. 203, the question decided was whether a mortgage of real estate to the trustees was valid, but the court said that if they took possession as trespassers on the supposition that the mortgage was invalid, they could not be charged as trustees of the owner of the land to whom the wrong was done.

And under the Ohio statute (Code, § 194) by which only "lands, tenements, goods, chattels, stocks, . . . rights, credits, moneys, and effects of the defendant" were garnishable, and by which the garnishee was required (§ 214) to "disclose the amount owing by him to the defendant, whether due or not," it was held that a claim in tort was not garnishable; but the liability of the garnishee to the debtor must be for a claim or debt or demand arising upon contract, judgment, or decree. Squair v. Shea (1876) 7 Ohio Dec. Reprint, 71.

And in Keyes v. Milwaukee & St. P. R. Co. 25 Wis. 691, where property had been bona fide taken from the defendant under claim of title by the garnishee company, so that its only liability was for conversion, the court said that it would seem that such an unliquidated claim for the conversion of property was so clearly within the rule excluding the process of garnishment as to leave little or no doubt; but added that if the garnishee were liable it must be because the claim was, within the meaning of the statute, in the nature of a debt due from it to the defendant; and in that case the garnishee was entitled on the facts to a set-off to an amount exceeding the value of the property taken by it.

The plaintiffs in a Mississippi case were employed by the defendants as attorneys to institute suit against a railroad for damages, and were later informed that their services were not required; they sued the defendants for their services, levied an attachment in chancery (under Miss. Code, § 486), and garnished the railroad company as the debtor of the defendants for the amount of the damages sustained by them. It was held that such a liability was in its very nature not subject to garnishment at law or in equity; the garnishee could not answer, when the amount which it owed, if anything, was unknown and could not be known until a judgment was rendered in the principal case. Blair v. Kansas City M. & B. R. Co. (1898) 76 Miss. 478, 24 So. 904.

So, under the Alabama statute (Code, § 2994) providing that an unliquidated demand having in it no element of contract, or unliquidated damages, or the right of action for a tort, is not the subject of garnishment, where property was taken from the defendants by a chief of police, the rule excluding claims in tort from garnishment was applied, and he was held not to be liable as their garnishee, since there was no relation between them of debtor and creditor, and the only relation to them that he did bear was that of tort feasor also, since there was no contractual relation between them, he was not garnishable as having their goods in his possession. Cunningham v. Baker, 104 Ala. 160, 16 So. 68.

And where a defendant, in expectation of death, indorsed a note to one later served as trustee, with instructions to collect it, pay cer-

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company acquired no right by the service of its said writs of garnishment, and that interveners, James & Hughes, were entitled to recover of the Texas & Pacific Railway Company the sum of $137.85, with interest at the legal rate from the date of the judgment, which was July 24, 1901. From the judgment so rendered this appeal has been duly prosecuted.

"In view of the decision of the court of civil appeals for the third district in the case of *Kreisle* v. *Campbell* (Tex. Civ. App.) 32 S. W. 581, and of what is said by your honorable court in the same case as shown in 89 Tex. 104, 33 S. W. 852, we deem it advisable to certify to your honors for decision the questions: (1) Whether, pending said appeal therefrom, the said judgment in favor of Downtain was subject to appellant's said writs of garnishment. (2) If not, whether the claim of the judgment debtor, Downtain, against the garnishee, the Texas & Pacific Railway Company, as stated and shown in the agreed statement of facts, is a demand of such character as to be subject to garnishment, even before the judgment which determined his rights thereon."

The nature of the claim of Downtain against the Texas & Pacific Railway Company appears from the following statement of the agreed case, upon which the case was tried and which the court of civil appeals have transmitted to us as a part of their certificate: "The judgment in favor of said Downtain against said railway company was obtained in a suit for damages to cattle in transit owned by the said plaintiff and transported by the said defendant, and was recovered on allegations of dimin-

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tain claims from the proceeds, and use the rest as he thought best, and later revoked his authority as to the rest, but the trustee, after taking judgment on the note, assigned the judgment contrary to the defendants instructions; since the only remedy of the defendant against him would be in tort for the conversion of the judgment, the defendant's creditor could not hold him as trustee; he could be properly summoned as such trustee only when he was indebted to the principal debtor, or held funds so as to render him liable in assumpsit. Paul v. Paul, 10 N. H. 117.

So a trustee, the mortgagee of the defendants' chattels, and having the goods in possession, from whom they were taken away by a deputy sheriff before he was served as trustee, and who then commenced an action of trover against the deputy sheriff and by compromise recovered only part of their value, was held not chargeable, on account of the goods taken from his possession before he was served with process, as for negligence, that being tort, nor for unliquidated damages from breach of contract, nor for negligence in failing to pursue the deputy sheriff to the full amount of the value of the goods. Kidder v. Page, 48 N. H. 380.

A similar case is Rundlet v. Jordan, 3 Me. 47. The defendant indorsed and delivered to the trustees his son's note for $640, being indebted to them for $230, and they agreed to pay him the balance of the note when it was collected: and upon judgment being rendered against the son and execution only partly satisfied, the plaintiff in the attachment maintained that the trustees had rendered themselves liable to the defendant for their negligence in not using all legal means in enforcing the judgment against the son, but the trustees were not chargeable as such; the claim against them was not a "credit" under the statute. No debt could exist till the damages were ascertained by judgment.

Where the garnishee in satisfaction of a debt had assigned to the firm of the principal debtor certain fi. fas. owned by him which were then in the hands of his attorney subject to his lien for the whole amount, a condition of the assignment being that there should be no liability to the assignees on the part of the assignor; since the assignees would have no right of action based on the assignment unless for deceit or false representations, the assignment of the fi. fas. to the principal defendant would not make the garnishee his debtor, for, even if the right of action against the garnishee in favor of the principal defendant were assignable, it would only be for liability in tort; and the garnishee was required, under the statute, to answer as to the indebtedness and as to assets or property in his hands, and not as to the torts which he might have committed against the defendant. Bates v. Forsyth, 69 Ga. 365.

And a trustee to liquidate the debts of the defendant, who was in financial difficulties, upon being garnished, and a reference being had to determine the state of the account between them, and the amount of the unliquidated balance, if any, which was due from the garnishee to the defendant, was held not to be liable, as garnishee in such a proceeding, to a surcharge for any negligence in the management of the moneys in his hands as trustee. Grimm v. Sarmiento, 18 Phila. 318.

Where a railroad company took the defendant's land without compensation, and was garnished as the debtor of the defendant, who later instituted proceedings in tort against the railroad company and assigned his claim to a third party before getting a judgment, the claim against the railroad company was not garnishable before judgment, since there was no fixed standard by which the damages, which were purely speculative, could be liquidated; and when the judgment was entered the claim had been assigned. Selheimer v. Elder, 98 Pa. 154.

And it was held in Getchell v. Chase, 37 N. H. 106, that one who sold land to the defendant by quitclaim deed, without fraud, but also without title, was not liable to the defendant for the consideration paid, and so was not chargeable as his trustee. He could not be charged unless the defendant had a right of action against him for some indebtedness or property in his possession; and so not on account of a tort in which the claim was for unliquidated damages only.

The case of New Haven S. B. Saw-Mill Co. v. Fowler, 28 Conn. 103, is not a case of garnishment, but is of that class of cases which belong to what has been called the root of the remedy by attachment, of which garnishment is a branch; the question decided was as to what kind of claims can be enforced by foreign attachment, and not what kind can be subjected to that process; but the phraseology of the Connecticut statute of foreign attachment is similar in both cases, in defining what claims can be enforced by attachment, and what claims are the subject of attachment, and for this reason the decision is important in deciding the second question under the law of Connecticut, and has often been cited on this point. The Sawmill company was sued by Boggs & Co,

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ished market value in the said cattle by reason of neglect of the said defendant company in the handling and transporting same." From this statement it is evident that Downtain's cause of action was for unliquidated damages for the breach of a contract. It is well settled that a demand growing out of a tort is not subject to garnishment; but upon the question whether a cause of action for unliquidated damages resulting from a breach of a contract is so subject there is a conflict of authority. Since the writ of garnishment is a creature of statutory law, it may be that the diversity of opinion upon the question grows out of the difference in language in the statutes which have been severally construed by the courts. However that may be, we are of the opinion that the weight of authority and the better reason support the rule that, when the damages are unliquidated and in their nature uncertain, the demand is not subject to garnishment. *Capes* v. *Burgess*, 135 Ill. 61, 25 N. E. 1000; *Hugg* v. *Booth*, 24 N. C. (2 Ired. L.) 282; *Paul* v. *Paul*, 10 N. H. 117; *McKean* v. *Turner*, 45 N. H. 203; *Leefe* v. *Walker*, 18 La. 1; *Selheimer* v. *Elder*, 98 Pa. 154. The sound basis for the rule is that the garnishee is required by the statute to answer under oath "what, if anything, he is indebted" to the defendant; and it is unreasonable that he should be compelled to swear to the amount of a demand which is not capable of being ascertained by a calculation made from *data* furnished by the contract itself, considered in connection with the nature of the breach. In *Hugg* v. *Booth*, 24 N. C. (2 Ired. L.) 282, Chief Justice Ruffin, of North Carolina, speaking of a statute of that state, says:

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and judgment against it was recovered. It paid the judgment to the sheriff, and immediately began suit against Boggs & Co. for damages from their negligence in towing a raft of logs belonging to the company, by which negligence it was lost, and factorized the sheriff for the amount due, under the execution in the earlier suit. It was held that, under the statute, the process of foreign attachment is provided for the benefit of "creditors" against their "debtors," and that this claim for negligence of the plaintiff against Boggs & Co., though unliquidated, made them the "debtors" of the plaintiff. (So decided on another part of the same statute than that on which Knox v. Protection Ins. Co. 9 Conn. 430, 25 Am. Dec. 33 [*infra*, IV. b, 5], was decided.)

Yet a later Connecticut case—Holcomb v. Winchester, 52 Conn. 447, 52 Am. Rep. 609—is inconsistent with this decision, and no mention is made of it in the opinion. The town had been sued by the principal defendant for damages for personal injuries from a defective sidewalk, and it was held that there was no existing "debt" from the town to the principal defendant, and hence the town was not chargeable as his garnishee, since "debt" as used in the law of garnishment . . . includes only legal debts or causes of action for which debt or assumpsit may be maintained, but never includes claims for torts."

So, where a constable entered into an agreement with another person for the sale of property of the defendant upon which he had levied upon plaintiff's execution, and after delivering the goods failed to recover the price from the vendee, he was not chargeable as trustee of the defendant as on his liability for a breach of his official duty, since the defendant's only claim against him was in tort, *ex delicto*, even if it were in an amount fixed beyond a doubt, which was not certainly so; it was neither goods, effects, nor credits of the principal debtor, and it must be a debt or fiduciary obligation on the part of the trustee, and not a mere tort or breach of duty. Hemmenway v. Pratt, 23 Vt. 332.

And a New Jersey case—Lomerson v. Huffman, 25 N. J. L. 625—is to the same effect. There the claim was in effect for the neglect of a constable to execute a writ or to collect money due on execution, and it was held that there was involved no indebtedness to the principal defendant, who could not sue the constable for money had and received for he had never received the money; if the constable, through negligence or neglect of duty, had lost the purchase money, he would have been liable to an action for the wrong, but he could not have been indebted to the defendant until he received the money; the liability for neglect of duty did not create an indebtedness, or a right or credit, which was liable to be seized or taken under the attachment.

The rule is the same where as between the tort feasor and the person to whom the wrong was done the latter might at his option either hold the tort feasor to his liability in tort, or, waiving the tort, treat the tort feasor as his debtor, since the creditor of the wronged person is not at liberty to exercise this option in his place, and so evade the general rule as to garnishment of claims in tort, substituting therefor a liquidated claim *quasi ex contractu*.

So, in Lewis v. Dubose, 29 Ala. 219, perishable property of the principal debtor was seized and sold by the garnishee, the clerk of the court, under a void attachment, and process of garnishment did not lie against the proceeds of the property in the hands of the officer, since, although the principal debtor might waive the tort and sue in assumpsit for the proceeds, the plaintiff, a third person, could not exercise this option.

And in Johnson v. Lamping, 34 Cal. 293, decided on the authority of the preceding case, the garnishee had taken judgment against the principal defendant, and under the execution bought in its mines and worked them, and later the judgment was appealed from and modified, so that the garnishee was in fact a tort feasor. It was held that a creditor of the judgment debtor could not hold the garnishee for the amount of the product of the mine, since he was not allowed to waive the tort and treat the garnishee as the defendant's debtor for the amount of the gold got from the mines.

So it is said in Mayberry v. Morris, 62 Ala. 113, that only when there is a sum of money due by an agreement, expressed or implied, capable of recovery in an action of assumpsit or debt will garnishment reach it. "The goods of a debtor may have been tortiously taken and converted under circumstances which give him the right to recover them back, or to recover damages of the tort feasor, or to waive the tort and in an action for money had and received to recover of him the money into which he may have coverted them, the law implying a promise to pay it. This demand, although in an enlarged sense a debt, and though, if the election is made to pursue an appropriate remedy, the relation of tort feasor is changed into that of a debtor, is not subject to garnishment." (Compare Edson v. Trask, 22 Vt. 18, *infra*, IV. a.)

And claims for money extorted as usury, al-

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"The attachment could only be served on one 'indebted,' and the judgment was to be 'upon his examination only,'—which yet more clearly evinces that it could only apply to such demands of which the garnishee could conscientiously and with reasonable certainty state the amount on his oath, and not to a case of uncertain damages, of which there is no standard until assessed by a jury." In *Hochstadler Bros.* v. *Sam*, 73 Tex. 315, 11 S. W. 408, it was held that a demand for unliquidated and uncertain damages for breach of a contract would not support an attachment; and the ground for the conclusion was that it was not contemplated that a plaintiff should swear that the defendant was indebted to him in a certain sum when the nature of his case was such that he could not definitely ascertain the amount of his demand. If the plaintiff in such a case is not permitted to make oath to the amount of his demand and to sue out an attachment, for a stronger reason, we think, a garnishee should not be required to answer as to an indebtedness, when it is impossible for him to ascertain the amount thereof from the terms of the contract and the fact of the breach. For these reasons, we answer the second question in the negative.

We are also of opinion that it results from the foregoing conclusion that a like answer must be given to the first question.

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though not strictly claims in tort, are treated as in the same class.

The defendant had sued the garnishee to recover money paid by him for usury,—an unliquidated amount,—and it was held not subject to garnishment, the court saying: "It is a well-established principle that a mere liability of the garnishee to an action on the part of the defendant for damages not liquidated, as for negligence, fraud, wrongful conversion, or for the recovery from a creditor of usurious interest paid him by a debtor, cannot be the foundation of a judgment against the garnishee." Ransom v. Hays, 39 Mo. 445.

And the same result is reached in Vermont, although the amount of the claim is liquidated. Barker v. Esty, 19 Vt. 131; Fish v. Field, 19 Vt. 141. In the former case it was decided that the claim for usury under the statute was not a credit, but a matter of punishment; and that what was due on a penal statute for money obtained from one by force or fraud, or what resulted from the sale of chattels taken by force and sold for money, could not be considered "credits intrusted" within the fair construction of the statute providing for the trustee process, although in all these cases an action of assumpsit or debt might be maintained, and for money.

The question when a claim in tort not garnishable because unliquidated becomes so certain in amount as to be liable to this process has been variously answered; but the great weight of authority is to the effect that, even after a verdict fixing the extent of liability of the garnishee to the principal debtor, the claim is not a debt subject to garnishment until judgment has been entered.

So, in Detroit Post & Tribune Co. v. Reilly, 46 Mich. 459, 9 N. W. 492, a verdict for libel was decided not to be garnishable until judgment had been entered. This case was based on Hill v. Bowman, 35 Mich. 191, deciding that a disputed claim for damages sounding in tort is not a debt until judgment.

To the same effect is *Ex parte* Dearborn, 31 N. B. 363. The court in this case, however, takes occasion to say that a verdict for a debt would not be any less attachable than the debt before verdict.

And in England a verdict for breach of promise of marriage was held in a bankruptcy case not to be a debt. *Ex parte* Charles, 14 East, 202, 1 Rose, Bankr. 372, 16 Ves. Jr. 256. And a verdict in an action of trespass before judgment is entered is not a debt subject to attachment. Shaw v. Shaw, 18 L. T. N. S. 420. But a judgment in malicious prosecution, ordered entered by the judge, was attachable before actually entered. Holtby v. Hodgson, L. R. 24 Q. B. Div. 103.

A proper solution of the question is found in Davenport v. Ludlow, 4 How. Pr. 337. The amount of a verdict for assault and battery, before judgment, was paid by the defendant to the sheriff upon an execution against the plaintiff. The plaintiff, after judgment had been entered, assigned his judgment to his attorneys, and they issued execution for the amount of it, and a motion to set aside this second execution was denied, the court saying that the verdict did liquidate the damages, but did not change their character as to liability to execution; and presumably the defendant had to pay twice.

In Thayer v. Southwick, 8 Gray, 229, Southwick had recovered a verdict in tort, and trustee process was served on the defendant, the city of Boston, before judgment was rendered; whereupon the trustee paid the judgment to plaintiff in the earlier action, the principal defendant. Shaw, Ch. J., said: The original cause of action did not render the city liable as trustee because it was a cause of action arising from tort; the verdict did not convert it into a debt; no action of debt would lie on it; it could not constitute a debt till judgment should be rendered on it; but when judgment was rendered on it it was too late for the city to plead it or otherwise bring it to the notice of the court; and the city owed the principal nothing when the trustee writ was served on them.

Where between the times of the service of process and the disclosure of the trustee the principal defendant got a verdict against the trustee, the record not showing of what kind, but judgment was not rendered when the disclosure was made, and the trustee disclosed also that he intended to appeal, it was held that if the recovery was for slander, or for assault and battery, or for any cause of action for which unliquidated damages are to be allowed, no trustee process could be maintained, while, if the action was brought for the recovery of a debt, the trustee process might well lie; and the trustee was discharged. Foster v. Dudley, 30 N. H. 463.

In Georgia a verdict in tort for damages is not assignable or garnishable before final judgment is entered, although a claim in tort is by statute (Code, § 2243) a chose in action. Gamble v. Central R. & Bkg. Co. 80 Ga. 595, 7 S. E. 315.

Jones v. St. Onge, 67 Wis. 520, 30 N. W. 927, is to the effect that a verdict in tort, which "ripens into" a money judgment after garnishment but before judgment in the garnishment suit, is garnishable though contingent at the time the papers were served. But in Lehmann v. Farwell, 93 Wis. 185, *sub nom.* Lehmann v. Deuster, 37 L. R. A. 333, 70 N. W. 170, where a verdict for personal injuries resulting from negligence was garnished before judgment, it was said that a mere claim for personal injuries is not subject to garnishment, and the verdict

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The demand, being uncertain, is not made certain until the amount is fixed by a final judgment of the court; that is to say, a judgment not merely final in the sense that an appeal lies therefrom, but a judgment final in the sense that it has reached that stage in judicial procedure when it can neither be set aside nor reversed upon appeal. In the case of *Texas Trunk R. Co.* v. *Jackson Bros.* 85 Tex. 605, 22 S. W. 1030, Chief Justice Stayton, speaking for the court, says: "We are of opinion that appeal or writ of error, whether prosecuted under cost or supersedeas bond, during pendency, deprives a judgment of that finality of character necessary to entitle it to admission in evidence in support of the right or defense declared by it; and from this necessarily follows the insufficiency of a plea in bar based on it." In the case of *Kreisle* v. *Campbell*, 89 Tex. 104, 33 S. W. 852, this question came before us upon an application for a writ of error; but, since the judgment was sustainable upon another ground, we did not find it necessary to decide the point, and its determination was expressly waived. The court of civil appeals for the second district, however, in that case held in accordance with our opinion. 32 S. W. 581.

We answer both questions in the negative.

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does not turn it into a debt, nor into an absolute liability, and that Jones v. St. Onge did not really support the contrary doctrine.

And where, in the same state, a judgment in tort for personal injuries in favor of a judgment debtor was reversed after the service of process of garnishment, it was held that the reversal left the case in the same condition as if no judgment had been rendered,—that is, it was again a mere unliquidated claim for damages for personal injuries, not assignable and not garnishable; and that the statute (Rev. Stat. § 2769) providing that "no judgment shall be rendered upon a liability of the garnishee arising . . . by reason of any money or any other thing owing from him to the defendant unless, before judgment against the defendant, it shall have become due absolutely and without depending on any future contingency," was a complete bar to the garnishment action, because, long before the claim against the garnishee had become due absolutely and beyond any future contingency, the plaintiffs in the principal action had perfected their judgment. St. Joseph Mfg. Co v. Miller, 69 Wis. 389, 34 N. W. 235.

But apparently in Pennsylvania (Landey v. Hefley, 11 W. N. C. 238) and Missouri (Schubert v. Herzberg, 65 Mo. App. 578) a verdict in tort is garnishable although assigned before the attachment. In the latter case, before verdict was rendered in the tort action the plaintiff assigned the judgment to his attorneys, and under a statute including as subject to garnishment such debts as the garnishee may come to owe the defendant at any time between the service and the answer of the garnishee, the verdict being merged in the judgment before the answer of the garnishee, it was held that, although a mere claim of damages for a personal tort was not assignable, the assignment of the judgment before it came into being was effective; the plaintiff had an involuntary assignment by garnishment, and the attorneys had a later voluntary assignment, leaving the two claimants in the same position; but before the action was begun the attorneys had agreed with the plaintiff to take 40 per cent of the judgment as payment for their services and this amounted to an equitable assignment of that proportion, and the creditor of the defendant was in no better position than the defendant.

The effect on the liability to garnishment of an unliquidated claim of an appeal from a judgment or verdict for the plaintiff is not within the scope of this note; but there are two cases in which this point is presented, also deciding as to the liability of tort claims in general.

In Dibrell v. Neely, 61 Miss. 218, after a judgment in trespass had been entered the creditors of the plaintiff served their writ of garnishment on the judgment debtor; but before the service of the writ he had moved for a new trial and obtained it, and it was held that until final judgment the defendant in the tort action could not be held to be the plaintiff's debtor so as to be chargeable as garnishee.

And in Kreisle v. Campbell (Tex. Civ. App.) 32 S. W. 581, the defendant in an action for personal injuries was garnished after the judgment had been appealed from, and it was decided that the effect of the appeal was to deprive the judgment of its finality and to keep alive the case as one of tort as it existed before the judgment; the claim was in tort sounding solely in unliquidated damages, and therefore not subject to garnishment before its merger in the judgment. This case was affirmed on another point in 89 Tex. 104, 33 S. W. 852.

It is also to be noted that a judgment debt was anciently not subject to attachment in England, "for a duty which accrueth by matter of record cannot be attached by the custom of London" (Floud's Case [1584] 1 Leon. 29), as was formerly the case in Massachusetts (Prescott v. Parker, 4 Mass. 170); and there are two Arkansas cases to the same effect, the ground being that to make a judgment debtor liable would subject him to two executions for the same debt. Trowbridge v. Means, 5 Ark. 135, 39 Am. Dec. 368; Tunstall v. Means, 5 Ark. 700.

IV. *Claims on contract.*

a. *Damages from breach of definite contract.*

The English rule as to the attachment of claims for damages from breach of contract under the common-law procedure act of 1854, chap. 125, which empowers a judge "to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt" is laid down in Jones v. Thompson, 4 Jur. N. S. 338, 1 El. Bl. & El. 63, 27 L. J. Q. B. N. S. 234. The defendant had obtained a verdict against the garnishees in an action for unliquidated damages from the breach of a contract, but the judgment had not been signed. It was held that although the verdict made the damages liquidated they were not a debt; and that the sum recovered by a verdict does not become a debt until judgment has been signed.

The case of Ten Broeck v. Sloo (1855) 13 How. Pr. 28, seems to show the rule in New York as to the attachment of this kind of claim; for although this case was one arising in proceedings supplementary to execution, all claims or debts which are subject to execution are also subject to attachment (Patterson v. Perry, 10 Abb. Pr. 82), and hence the same principles would apply,—at least inclusively. The defendant disclosed upon his examination an interest in a contract the right to which was being prosecuted by him in equity in a Federal

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court, and he maintained that the defendants in that action were accountable to him on the contract for his interest and for other sums for their misfeasance or malfeasance in relation to the contract. The court said in its decision: "It may be that . . . [supplementary proceedings and the judgment creditors' action] do not reach any action for a tort, or for any wrong or injury which is not founded on contract, and in which damages could not be ascertained, except through the intervention of a jury. . . . But the action in the United States court is in a suit in equity, and is founded on a contract only, and nothing can be recovered except the precise [unliquidated] sum which this defendant will show that he could have obtained if the defendants in that suit had fully carried out their agreement. Nothing like punitive damages will be given." And generally, as to the "property" which was subject to execution (under § 292, Code Proc. which included "money, goods, chattels, things in action, and evidences of debt"), it was said: "The words 'chose in action' might be broad enough to include even actions for damages in torts, were it not that they probably have never been regarded strictly as property, nor as assignable. . . . But neither of these reasons will apply to a right of action founded on a contract, and in which nothing can be recovered except profits actually made, or which would have been made but for the fault of the parties who are accountable. That right is property which will pass to executors and which may be assigned, and is recoverable without leaving the amount to the discretion of a jury."

But in North Carolina, where a garnishee contracted to sell the defendant tinware at wholesale rates, taking therefor certain notes of a person insolvent at the time of the garnishment, under a statute (1793, chap. 389; Rev. Stat. chap. 6) authorizing the garnishment of any person indebted to the defendant, and providing that the garnishee shall be summoned to answer "what he is indebted to the defendant, or what effects of his he hath in his hands," it was held that the demand of the defendant against the garnishee for the breach of his contract to supply the goods was not such a debt as could be garnished. Only a demand could be attached which was a debt in a legal sense at the time of the service, and for which an action of debt or *indebitatus assumpsit* would lie. "The intention of the legislature was only to embrace the cases in which the demand may be easily ascertained; . . . but that can never be said of a demand arising out of the breach of a special agreement which sounds altogether in damages, about the amount of which persons might differ and which might . . . be varied by circumstances not known even to the garnishee, but to the other contracting party only." Hugg v. Booth (1842) 24 N. C. (2 Ired. L.) 282.

So, in Leefe v. Walker, 18 La. 1, the defendants had a two-thirds interest in a cargo, the other one third belonging to the captain of the vessel, and the whole was in the hands of the garnishees of the defendants; and, as between the two claimants of the property (the defendants and the captain, who intervened), a claim by the plaintiff that the defendants ought not to be charged for the unnecessary delay of the voyage as against the other claimant (apparently an unliquidated claim for damages from breach of contract), it was held that, since the defendants had not "complained" of it, their creditors could not "attach their action for damages." It was also held that an attachment on the two-thirds interest of the defendants in the cargo was not available to the plaintiff unless he proved that there was a surplus of profits after paying the expenses and losses of the venture.

Lundie v. Bradford, 26 Ala. 512, based on Cook v. Walthall, 20 Ala. 334 (*infra*, IV. b, 9), was a case where a garnishee had agreed, in consideration of a note of the defendant for $51, and $150 in cash paid him, to enter a claim in a land office for the defendant, and did so, but the claim was not effective; and, since the defendant could not maintain either debt or *indebitatus assumpsit* for the breach, the garnishee was not chargeable as such.

So, where a plaintiff alleged that the garnishees had made with the defendants a distinct agreement to perform a certain covenant upon a definite contingency, that the contingency arose, and the garnishees failed to perform their covenant, and thereupon became liable to the defendants, at least for the sum of $425, and the covenant was shown to be to loan the defendants $500 upon the contingency which it was alleged had happened, the court said that the suit was based upon an entire misapprehension; if the garnishees were guilty of a breach of contract, defendants had their remedy in an action for damages, if any were thereby occasioned; and, unless such damages were ascertained and fixed by judgment or otherwise, no indebtedness existed, and the garnishees were not liable to garnishment. Smith v. Wallace (1890) 82 Ill. App. 145.

And a subscriber to shares of stock in a railroad company for which he had not paid, summoned as trustee of the company, was held not chargeable as its debtor, since the measure of damages in an action against him by the railroad company would be the difference between the agreed price and the market price at the time of the breach of contract, and hence the damages were unliquidated. Rand v. White Mountains R. Co. 40 N. H. 79. (This decision was doubted by Bellows, J., in McKean v. Turner, 45 N. H. 205, *infra*, IV. b, 5.)

But a claim (the one sued upon as the ground for an attachment) for damages for the breach of a contract to sell the plaintiff, for $1,850, a note for $2,000, was held, in Dirickson v. Showell, 79 Md. 49, 28 Atl. 986, not to be an unliquidated claim since the measure of damages was the difference between the two sums, the court saying that the fact that less than was claimed in an attachment may ultimately be recovered in no manner seems to show that the amount which is claimed is unliquidated damages.

And Stiff v. Fisher (1893) 2 Tex. Civ. App. 346, 21 S. W. 291, is a similar case with the same result. There was a contract by which Stiff, the defendant, was to deliver a certain number of cattle at a certain place and time to the plaintiff Fisher. No cattle were delivered, and Fisher sued to recover the money paid and the difference between the contract price and the market value of the cattle, at the same time suing out an attachment, and the question was whether this demand was a debt which would support the attachment. It was held, principally on the opinion of Washington, J., in Fisher v. Consequa, 2 Wash. C. C. 384, Fed. Cas. No. 4,816 (*infra*, IV. b, 1), that it was a debt, applying the rule in that case. The demand must arise out of a contract, without which no debt can be created, and the measure of damages must be such as the plaintiff can aver by affidavit to be due; the distinction between Stiff v. Fisher and Fisher v. Consequa being that in the latter case the defendant had agreed expressly to pay this difference between the contract price and the market value.

It is at first difficult to reconcile with this decision the case of WAPLES-PLATTER GROCER CO. v. TEXAS & P. R. CO., but the earlier case can

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be distinguished. Stiff v. Fisher is to the effect that a claim for the difference between the contract price and the market value of cattle (although depending on one apparently uncertain amount) is not unliquidated, but is a debt; while WAPLES-PLATTER GROCER CO. v. TEXAS & P. R. CO. decides that a claim for damages amounting to the difference between the market value of cattle at two different times (depending upon two similarly uncertain amounts) is not liquidated; and in deciding that such a claim is not garnishable the case is based squarely and reasonably on the ground that a garnishee could not answer, under the statute, "what, if anything, he is indebted to the defendant" upon such a claim. In Stiff v. Fisher the measure of damages was such that a garnishing creditor of the plaintiff could aver by affidavit the amount due. In WAPLES-PLATTER GROCER CO. v. TEXAS & P. R. CO. the measure of damages was not such that the garnishee could make oath as to the amount of his liability, even aside from the open question as to whether or not that liability was a "debt" within the established meaning of the term.

And it is altogether likely that, even under the rule laid down in Stiff v. Fisher, the claim in the principal case would not be held to be so certain in amount that Downtain, the plaintiff in the original action, "could aver by affidavit the amount due him" in order to obtain an attachment against the railway company. (The first question certified to the supreme court by the court of appeals in the principal case is not within the scope of this note. The question of the effect of a pending appeal upon the claim sought to be garnished is distinct from the question what claims are so liquidated as to be garnishable. The appeal may go to the right to recover any sum at all, and does not necessarily involve the amount of the claim.)

In Burgess v. Capes (1890) 32 Ill. App. 372, Affirmed in 135 Ill. 61, 25 N. E. 1000, the garnishees had sold a horse to the defendant with warranty, and had contracted to take it back and furnish another if it proved unsatisfactory; a breach of warranty was alleged. The garnishment statute subjected to this process choses in action in the garnishee's "possession, custody, or charge, or from him due and owing to the said defendant" (Rev. Stat. chap. 62, § 5); and it was held, although a chose in action was defined to be "a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with a contract, but which cannot be enforced without action," that this was not a garnishable claim, because it was unliquidated; and that the chose in action, subject to garnishment "in the possession, custody, or charge" of the garnishee, meant a chose in action belonging to the defendant and held by the garnishee against third persons; and the court doubted the right of the plaintiff to elect for the defendant which remedy he would choose,—to sue for damages or for another horse. (Compare, as to the last point, Johnson v. Lamping, 34 Cal. 293; Lewis v. Dubose, 29 Ala. 219; Mayberry v. Morris, 62 Ala. 113, *supra*, III.)

Somewhat similar is Edson v. Trask, 22 Vt. 18, in which a conditional vendee, who contracted to sell to a third person certain property, the title to which remained in his vendor, promised to deliver it at a certain time, and received the consideration, was held chargeable, as trustee of his vendee for the amount of the price paid him, when he was unable to deliver the property owing to its having been reclaimed by the owner; and the fact that his vendee, who had paid for the stove, had a choice of remedies, either to recover the exact amount paid in an action of general assumpsit, or to sue in special assumpsit for damages generally,—an unliquidated amount presumably more than the amount of the price paid,—did not prevent the second vendee's creditor from holding the trustee for the actual and certain amount of the consideration received by him. Kidder v. Page, 48 N. H. 380, *supra*, is a similar case.

b. *Contract to pay unliquidated amount.*

1. *Generally.*

Read v. Hawkins (1635) Rolle Abr. 552, is a very early case clearly showing the difference between liquidated and unliquidated claims as subject to attachment. The report is: If A sells certain stockings to B on a contract by which B is to give £10 to A, and if he resells the stockings before the next August that he will pay 2 pence more for each pair of stockings; the £10 is attachable by a foreign attachment for an action of debt for it, but the 2 pence for each pair of stockings is not attachable because that rests solely in damages to be recovered by an action on the case, and not by an action of debt, since it is payable only on a possibility.

Fisher v. Consequa (1809) 2 Wash. C. C. 382, Fed. Cas. 4,816, based on the Pennsylvania statute of 1705, is a leading case in this country, on the question of what is a "debt" of such a character as to be the ground for an attachment; and in this case Washington, J., seems to have originated the test, applied in Pennsylvania cases and others, (*infra*, IV. b, 5) as to whether the contract on which a supposed garnishable claim is based contains some "standard referable to the contract itself," by which the amount of the claim can be definitely ascertained. In this case the defendant, a Canton merchant, agreed to deliver to the plaintiff teas of a certain quality, and upon failure to do so to pay the difference in value between teas of such quality and of such as should be delivered. The plaintiff swore that the difference amounted to a certain sum, and the court held that whatever the difference was the defendant was, of course, to that amount "indebted" to the plaintiff. This decision that an obligation in such an unliquidated amount was a debt is of the greatest importance, since in the statutes of most of the states the phrase which is used to describe the claims which are subject to garnishment is "debt," or "indebtedness." And in distinguishing Fisher v. Consequa, in a later case, Clark v. Wilson, 3 Wash. C. C. 560, Fed. Cas. No. 2,841, where there was a breach of a charter party by the defendant, who refused to employ the ship, involving damages necessarily unliquidated, it was held that such a claim was not a ground for a foreign attachment; and Washington, J., said that "the principle decided in that case [Fisher v. Consequa] was that a demand arising *ex contractu*, the amount of which was ascertained, or which was susceptible of ascertainment, by some standard referable to the contract itself, sufficiently certain to enable the plaintiff by affidavit to aver it or a jury to find it, might be the foundation of a proceeding by way of foreign attachment, without reference to the form of action or to the technical definition of debt, the expression used in the law."

Peter v. Butler, 1 Leigh, 285, was a similar case, also belonging to the "root" of the question. The claim involved was against a bailee for the value of flour destroyed by the burning of the defendant's warehouse, and hence an unliquidated claim; and this was held to be a "debt" and sufficient ground for a foreign attachment.

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A case very close to the line is Case v. Dewey, 55 Mich. 116, 20 N. W. 817, 21 N. W. 911. The defendant was to sell sheep to the garnishee by the pound, and the sheep were being actually driven on the scales to be weighed in order to determine the amount to become due when the garnishment process was served upon the vendee; and the garnishee, the sale not being complete at the moment of the service, was not a debtor so as to be chargeable.

Under a contract between the defendant and the trustees the defendant was to sell goods for them on commission, which was to become due only upon goods the price of which was actually paid to the trustees; and accordingly the trustees were not chargeable for the defendant's commission for goods sold, but not paid for, since, whether the goods sold would be paid for, or how much of them would be paid for, was such a contingency as might prevent the defendant from having any claim whatever, or right to call the trustees to account or settle with him. Jordan v. Jordan, 75 Me. 100.

So, where the defendant entered into a contract with a garnishee company by which he was to solicit subscriptions for its capital stock and receive as his commission $1 for each share subscribed for, and 3 per cent of the whole amount of the subscriptions which should be paid in, until it was determined what amount would be realized from the subscriptions there were, under the statute, no "rights or credits" of the defendant in the hands of the company subject to garnishment; there was no ascertained or ascertainable amount due the defendant for his commissions under the contract. Maryland Agricultural College v. Baltimore & P. R. Co. 43 Md. 434.

And a subscription to stock payable on call for which no demand had been made was not subject to garnishment. It could not be known that calls ever would be made, and hence no legal liability was shown which would maintain debt or *indebitatus assumpsit*. Teague v. Le Grande, 85 Ala. 493, 5 So. 287.

And where the defendant owed the garnishees a certain amount, and they employed him at a stated salary with the agreement that they should take out from the amount due him to apply on his debt the surplus over the necessary expenses of his family, no judgment could be taken against the garnishee; the amount was uncertain, and, as in the last case, the defendant could not have maintained debt or *indebitatus assumpsit* for any amount. Hall v. Magee, 27 Ala. 414.

Rowell v. Felker, 54 Vt. 526, is based expressly upon the case of Downer v. Topliff, 19 Vt. 399 (*infra*), which is to the effect that uncertainty merely as to the amount of a claim does not make it "contingent" under the Vermont statute. The later case was for rent payable to the defendant, subject to allowances, for various matters, to the tenant trustee; and it was maintained that the amount to become due at the end of the year to the defendant from the trustee could not be determined in advance, since it depended upon several different contingencies; but the amount was settled by the commissioner, and the amount so ascertained was held subject to trustee process. This seems to violate the rule that rent to become due in the future is not an attachable claim, and also the rule that a claim, to be attachable, must be *debitum in præsenti*, though *solvendum in futuro*.

And where the defendant sold a contingent interest in the business to the garnishee, who agreed to pay therefor the defendant's expenses to California, this uncertain claim was held in an early Illinois case—Moeller v. Quarrier (1853) 14 Ill. 280—to be garnishable under Ill. Rev. Stat. chap. 45, p. 63, § 1, subjecting "the lands, tenements, goods, chattels, rights, credits, money, and effects of said debtor of every kind," although it was (1) uncertain in amount, (2) contingent, and (3) not yet due.

But where by a contract with other persons the defendant was to receive a certain proportion of the net proceeds of a real estate and loan business during a certain period, it was held that so long as the contract continued in force, and until the collection of all outstanding credits was finished so that it could be ascertained whether or not the net profits were in excess of the sums drawn by each of the parties to the contract, the interest of the defendant under the contract was uncertain in amount, if it had any existence, and hence the other parties to the contract were not chargeable in a proceeding for garnishment in equity, since equitable garnishment and garnishment under the Missouri statute proceed upon the same principles, and such an interest was not regularly garnishable, being contingent upon the happening of a future event. Stevenson v. McFarland (1901) 162 Mo. 159, 62 S. W. 695.

And Reinhart v. Hardesty, 17 Nev. 141, 30 Pac. 694, is to the same effect. There a grantee of land undertook to pay as part of the consideration a part of the crops for several years, and his obligation to the grantor was not a debt subject to garnishment, since, owing to a contingency, it might never be payable: it was also uncertain in amount, but this point was not expressly touched upon.

And in Walke v. McGehee, 11 Ala. 273, on the ground that a demand to be garnishable must be such that the creditor could maintain upon it an action of debt or *indebitatus assumpsit*, it was held that upon the agreement of the garnishee to pay the defendant one half the rents of certain land if the defendant supplied certain proofs as to the title, the proof not being given, no debt arose from the garnishee to the defendant subject to garnishment.

So, where a lessee of land the amount of which was unknown, at a certain amount of rent per acre, was garnished as the debtor of his lessor, who had previously assigned his lease, it was held, simply on the ground that the interest of the equitable assignee should be protected, that the lessee was not chargeable as the debtor of the assignor. Carr v. Waugh, 28 Ill. 418.

Roberts v. Drinkard, 3 Met. (Ky.) 309, was a proceeding in equity to attach a debt due to a nonresident; the debtor was summoned as garnishee, and was also made a defendant in the action. His answer showed that he had bought from the principal debtor his interest in a tract of land the amount of which was not known, being an undivided twelfth-part subject to a dower right, and that for this he was to pay $40 per acre whenever he should obtain title and possession of it. Upon this answer, the court rendered judgment for the plaintiff, in which, after ascertaining the amount of the plaintiff's demand, it was recited that the garnishee "will be indebted to defendant . . . in a larger sum than the above, but the same is not yet due, therefore it is adjudged that defendant . . . pay to plaintiff his debt and costs." It was held that the judgment was error. The amount of the debt and the time at which it would become payable were uncertain, both depending upon future contingencies, and the court had no power to render a personal and final judgment for a fixed and certain sum which was not then due and might never become due. The court in such a case could have done nothing more than to make such interlocutory order, in the form of an injunction or

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otherwise, as would have protected the rights of the plaintiff, retaining control of the case for such further and final judgment as the facts afterwards to be developed and shown by additional pleadings might authorize.

But where, pending an action to determine the rights of the parties under a continuing contract to supply ore, the amount becoming due for the ore from time to time was ordered paid into court,—it being maintained that the party to whom the payments were to be made was insolvent and a nonresident,—in order that the other party might be secured for any sum to which it might establish a right to a set-off or recoupment by way of damages, and attachment was sued out and laid on the funds in the hands of the clerk of the court, it was held that in New Jersey the fact that the funds were in the custody of the law did not prevent their being lawfully attached, and the rights and interests of the defendant, though uncertain in amount, were held subject to the attachment. Trotter v. Lehigh Zinc & Iron Co. (1886) 41 N. J. Eq. 229, 3 Atl. 95.

Mutual Reserve Life Asso. v. Phelps (1900) 103 Fed. 515, on the other hand, reaches a contrary result on rather similar facts. A member of a mutual life insurance association, who had secured judgment against it for the recovery of the amount of his payments, obtained an order diverting by garnishment in equity the mortuary calls and premiums afterwards to become due to the defendant from the persons insured; but it was held, in an action brought by the insurance association in the Federal court for an injunction to restrain the original plaintiff and the receiver, appointed in the earlier action, from reducing to possession any of the complainant's revenues or income, that the credits sought to be diverted to the original plaintiff's judgment were a trust fund for the payment of the losses of the contributors to it, and hence were not subject to the process.

Marrett v. Equitable Ins. Co. 54 Me. 537, was a case of a note, given by the trustee to the defendant insurance company in which he was insured, for a certain sum and such additional premiums as might become due on his policy; this was held not to be a contingent claim, and so was subject to foreign attachment, no additional premium having become due; there might be something more due, but at the time of the service a certain sum was absolutely due; and the fact that by the agreement between the parties that in case of loss by the trustee and payment of it before the time of the maturity of the note the amount of the note might be set off against the amount of the loss did not make it contingent; such uncertainty was only as to the time of payment.

But in Massachusetts, where the defendants owed the trustee a certain sum and gave him a draft for a certain larger sum, the trustee promising to account to them for the proceeds of the draft when collected, and the defendants were to pay the cost of the collection, it was held that this was a contingent claim before the collection; and it was apparently, also, unliquidated. Frothingham v. Haley, 3 Mass. 70.

In Davis v. Ham, 3 Mass. 33, the principal defendants were ship owners and contracted with the trustees to carry money for them to Calcutta and invest it there and receive, themselves, a certain share of the net proceeds. This also was held a contingent claim and not a "credit," under the Massachusetts attachment statute. It was uncertain whether anything would ever be due, and if there were no profits nothing would be due. But the decision was not upon the ground that the claim was unliquidated.

Willard v. Sheafe, 4 Mass. 235, upon the same statute (1794, chap. 655), was very similar. The trustee left goods belonging to himself, the defendant, and another, in the hands of foreign merchants to be sold for them, and was served with trustee process before any proceeds of the sale were received by him from the merchants. This also was a "contingent" claim.

So, in Williams v. Marston, 3 Pick. 65, the defendant as a broker bought certain fruit for Baker, and was to have a third of the net profits of the resale; and one Thacher took the fruit to sell on commission, and some was sold by Thacher and some by his various consignees; but when the trustee process was served on Baker and Thacher not all the proceeds had been received. It was held that Baker was not chargeable as trustee; it was contingent whether he would become indebted to the defendant, as the price for which the fruit was sold had not been received (and might not all be collected).

And where the answer of garnishees admitted having an open account with the defendants, the result of which depended upon voyages to foreign countries, and alleged that until these voyages were ended it was impossible to determine which way the balance would lie or what the balance would be, the garnishees were discharged upon their disclosure. On such a state of facts it could not be said that there was at any moment a debt owing from the garnishees to the defendants within the meaning of the Pennsylvania attachment execution act of 1836. Kerr v. Diehl (1844) 2 Clark (Pa.) 325. The court said: "If we speculate upon probabilities, which are very strong in this case, there will eventually be a balance in the hands of the garnishees belonging to the defendants, but we cannot even take upon ourselves the responsibility of saying that such will be the case."

In Richardson v. Elmit (1876) L. R. 2 C. P. Div. 936 L. T. N. S. 58, the metropolitan board of works, the garnishees, had given the defendant, in accordance with the statute, "notice to treat" for the sale of his land, which under the statute, in case of no agreement as to price, would be condemned, the value to be ascertained by a jury. Here it was held that there was no debt either owing or accruing. The defendant might not be able to show title. It was like a claim for unliquidated damages, and nothing that could be accurately described as a debt.

But in Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co. 62 Iowa, 494, 17 N. W. 737, where a railroad company entered into a contract with a third person by which he was to buy or obtain by condemnation for the railroad company its right of way, and land was condemned belonging to the judgment debtor, who appealed from the award, and, after the railroad company was garnished as to such additional sum claimed by him, the company's agent under the contract then paid the owner $50 additional,—it was decided that the company was still garnishable as to the $50 so ascertained and admitted to be due, and paid by its agent to the owner, instead of the garnishing creditor, and the act of the agent removed the contingency as to the amount of the claim.

On the other hand, where the defendant was in possession of land under some claim of title, but the legal title was in the garnishee, who sold to a third person for a certain sum, directing him to pay the defendant out of the purchase price a sum not exceeding $1,000 in satisfaction of her claim, which payment was to be good *pro tanto* as payment to the gar-

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nishee, and the purchaser accordingly did pay the defendant $300, it was held that there was no indebtedness of the garnishee to the defendant for which he could be charged; there was no admission by the garnishee of indebtedness to the defendant of any sum, and there was no valid contract subsisting between the parties for the payment of any money. Goode v. Barr, 64 Wis. 659, 26 N. W. 114.

Where the plaintiff claimed that the garnishees were indebted to the defendant on an attachment bond for damages caused by a wrongful attachment, and that the damages amounted to $5,000, the court held the proceeding "premature, because the liability for the alleged damage is not ascertained, and can be ascertained only in the suit for that purpose. The garnishment process was not intended, and cannot be used, to litigate and settle side issues." Peet v. McDaniel, 27 La. Ann. 455.

But in Vermont when an attaching plaintiff had executed a bond to indemnify the constable for having attached certain property of doubtful ownership, and a third person, the real owner of the property, obtained judgment against the constable for taking it, the claim of the constable against the attaching creditor could be reached by trustee process, although before judgment against the constable it was merely a contingent claim and as such excluded from the operation of the trustee process by express statute; when upon recovery against the constable a clear cause of action arose upon the bond the obligation became certain as to the liability, and "uncertain only as to the amount" for which the trustee might be ultimately subjected; and it was like any other indebtedness where the amount claimed is susceptible of dispute and controversy. Downer v. Topliff (1847) 19 Vt. 399.

And a verdict in attachment execution finding that the money in the hands of the garnishee belonged to the defendant, but not finding how much was in his hands, was such that a judgment could not be entered on it, and the judgment was reversed. Poor v. Colburn, 57 Pa. 417.

But when a man takes an absolute deed or bill of sale of all his debtor's property with a secret defeasance back, and, acting under such deed or bill of sale, takes possession of the property and sells it as his own and as if he were the absolute owner, and the property is worth twice his debt, or its value is largely in excess of it, and he refuses to state its value or what it sold for, he will be garnishable as the debtor of his grantor or assignor. Meigs v. Weller, 90 Mich. 629, 51 N. W. 681.

But in the case of a garnishment against a city to subject funds due and to become due, while the work was going on, to the defendant, a contractor on a city sewer, the judgment of garnishment was set aside, not on the ground that the amount was uncertain or contingent, but upon grounds of public policy which would inhibit a process diverting moneys appropriated to a public work for the public health, and, generally, the garnishment of a municipal corporation. Pringle v. Guild (1902) 118 Fed. 655.

In Moses v. McMullen (1867) 4 Coldw. 242, there was an attempted evasion of liability by the garnishee, apparently making the amount due the defendant an unliquidated sum. The garnishee's answer stated that, as the secretary of a railroad company, he had in his hands $160 paid to him for clay taken from land of the defendant, but that the defendant and his employer, the railroad company, had agreed to make a division of the land, and that when title should pass there would be more owing to the defendant. It was held that the garnishee was required by the statute (Tenn. Code, § 3088, subds. 1, 2) to answer whether he was indebted, or whether he had any property, debts, or effects belonging to the defendant, and if so the kind and amount; and that the answer admitting the present debt was a present fulfillment of the requirement; and judgment was given for the $160.

2. Claims subject to lien.

In an action against building contractors, the owners, after being garnished, paid out to subcontractors on the building sums not subject to any lien. It was held that since the certain amounts so paid out of the unascertained amount due the defendants were not subject to lien, and were due to the defendants, they were subject to the garnishment, and the garnishees accordingly had paid in their own wrong; the court saying that in order that an indebtedness may be liable to garnishment it must be shown to be absolutely due as a money demand unaffected by liens or prior encumbrances or conditions of contract. Scales v. Southern Hotel Co. 37 Mo. 520.

This case was followed by Heege v. Fruin, 18 Mo. App. 139. There the garnishees were contractors, and under their contract with the defendant, a subcontractor, they might pay his workmen their wages or the material men their claims, in order to avoid interference. The plaintiffs contended, when the contractors had paid the defendant's amount after being garnished, that they could lawfully pay only where there was a lien, but it was held that payment to the defendant was contingent and subject to the conditions of the contract, and so was not a "money demand, unaffected by liens or prior encumbrances or conditions of contract," as in Scales v. Southern Hotel Co. 37 Mo. 520.

To the same general effect is Vollmer v. Chicago & N. W. R. Co. 86 Wis. 305, 56 N. W. 919. A railroad company was garnished as the debtor of its contractor, and under a statute was directly liable, under certain circumstances, to the employees of its contractor, for their wages. It was held that the company was not chargeable as garnishee for the amount due the contractor. The company had the right to withhold so much of its indebtedness to its contractor as was necessary to pay the laborers under the statute, and it could not be deprived, without its consent, of such a right, either by the act of the contractor, or by garnishment in a suit against him. "Where . . . the amount of the indebtedness which the garnishee is ultimately liable to pay to the principal defendant depends upon contingencies, such garnishee can only be held liable for so much as shall remain due to such principal defendant upon the determination of such contingencies."

And on an unfinished logging contract by which payment was to be made only when it was known that all claims for labor had been paid by the contractor, and a certain proportion of the unknown amount of the final payment was to be retained until the performance of a certain part of the contract, and the employer might apply the final amount due to the payment of any liens on the property, the employer was held not to be liable as garnishee at a time when nothing was expressly due. Kiely v. Bertrand (1887) 67 Mich. 332, 34 N. W. 674.

So, where railroad contractors who were garnished as the debtors of their subcontractors had reserved to themselves by the contract with the defendants the right, at their option, to discharge their obligation to them by payment directly to the workmen employed by the

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defendant, and were also bound by their contract with the railroad to discharge all claims of men who were employed in the construction of the road, they were held not chargeable as garnishees when the amount so due the subcontractors was not ascertained at the time of the garnishment. Drake v. Harrison, 69 Wis. 99, 33 N. W. 81.

3. Claims subject to forfeiture.

Where a defendant contracted to construct a building for the garnishee, and by the contract was to pay a certain sum per day as a forfeit for failure to complete the building on a certain day, and the building was not yet completed at the time of the garnishment, the garnishee was not charged as for a debt to the contractor, for the sum was uncertain; there was nothing absolutely due him at the time of the service of the garnishment, and whether anything would ever become due depended upon a contingency. Bishop v. Young, 17 Wis. 47.

And in Eikel v. Frelich, 1 Tex. App. Civ. Cas. (White & W.) § 1117, p. 628, a similar conclusion was arrived at. There was a contract to build a house for the garnishees, who answered that by the terms of the contract if the house was not finished by a certain day the defendant, the contractor, was to forfeit $5 a day, and process was served before completion, and also before completion the garnishees were compelled to pay the defendant's workmen enough to absorb the difference between the amounts paid on the contract and the total amount to be due. The garnishees were discharged, since the obligation was contingent upon the completion of the contract, and since if the contract be of such a nature that it is uncertain whether anything will be due in virtue of it, a claim upon it cannot be attached as a debt.

In Hopson v. Dinan, 48 Mich. 612, 12 N. W. 875, also there was a construction contract with a similar forfeiture; the building had not been finished, and it did not appear that it ever would be finished. There was no garnishable indebtedness; and it was even uncertain on the proof whether the garnishee owed anything.

The Michigan statute (Pub. Acts 1879, chap. 256, p. 270) provides that the garnishee shall "be liable on any contingent right or claim against him in favor of the principal defendant;" and in the case of Webber v. Bolte (1883) 51 Mich. 113, 16 N. W. 257, the principal defendant had contracted to build for the garnishees a church, which was to be completed by a certain day, with a forfeiture if the work was not done by the time stipulated. When the garnishment suit was begun the garnishees had made large payments on estimates as the work progressed, in accordance with the contract, and the building had not been completed, and they accordingly insisted that nothing was due the defendant, but the plaintiffs contended that the garnishees were chargeable for anything that might subsequently become due to the defendant in accordance with the contract, under the statute allowing garnishment of contingent claims. The court, however, in an opinion by Cooley, J., decided that this was not a "contingent" claim under the statute. While admitting that the claim was literally contingent, it insisted that it was not within its reason or intent, since to permit garnishment upon claims such as the one in question would be an unwarrantable interference with the contracts of third parties, and must in many cases deprive them of substantial rights; that it would be especially mischievous in the case of building contracts, for if payments upon estimates could be garnished in advance, performance would be rendered impossible; and the plaintiffs were entitled to reach only what was due, if anything, at the time when process was served. Kiely v. Bertrand (1887) 67 Mich. 332, 34 N. W. 674, follows this decision.

4. Claims subject to estimate.

In Williams v. Androscoggin & K. R. Co. 36 Me. 201, 58 Am. Dec. 742, by a contract between the defendants and the trustee for the construction of a railroad, the trustee was to pay each month for three fourths of the amount of the work done in the preceding month according to the estimate of the engineer, the remainder of the amount earned each month to be due when the whole was completed; and process was served on the trustee before completion; the remainder, being the amount due since the last certificate of the engineer, was held not subject to foreign attachment.

But where by a similar contract 90 per cent of each month's work was to be paid on the 15th of the month on the estimate and certificate of the engineer, the trustee, served June 4th, was held to be chargeable for the amount due for the work in May, although at the time of service of process the estimate for the month's work was not completed, under the statute of Maine (Rev. Stat. chap. 86, § 61) providing that "any money . . . due absolutely . . . may be attached before it has become payable; but the trustee is not required to pay or deliver it before the time appointed therefor by the contract;" although the claim was thus unliquidated at that time, there was nothing further for the contractor to do to be entitled to payment, and the amount due was not subject to any contingency. Ware v. Gowen, 65 Me. 534.

And under the Illinois statute (Rev. Stat. 1874, chap. 62, § 6) embracing money due or owing, not only at the time of the service of the attachment, but at any time after, or money which might thereafter become due, in the case of a building contract by which the garnishees were to pay the principal debtor upon instalments representing 80 per cent of the amount of work done according to the architect's certificate, some of which instalments had been paid, where they had reserved the right to make alterations, the amount of payment for which was to be determined by the architect, and were garnished before the day when the building was to be completed, it was held that they were chargeable as debtors of the contractor, although there was no evidence that the building had been completed, and the amount due the defendant had not been ascertained by the architect. Wilcus v. Kling, 87 Ill. 107.

So, where all that remained to be done by the contractors on a construction contract in order to entitle them to be paid was the production of the engineer's certificate that the work was completed, the other party could be garnished as their debtor, since all that remained was to make such calculations as were necessary to ascertain the amount due. Miller v. Scoville, 35 Ill. App. 385.

Similarly, where the principal debtor, a construction company, had contracted with the owner of a building to do work upon it, and was to receive a certain sum for each foot of tile laid by it, upon the architect's certificate at stated times, of the amount done, and the amount due at the time of the service of the warrant of attachment and notice was attached on a day after the certificate had been made, it was held that the amount due by the certificate, and also the amount due according to the oath of the architect after the certificate and before the service of the attachment, was subject to the process, although this amount was

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unascertained when the warrant was served. Edison Electric Illuminating Co. v. Guastavino Fire Proof Constr. Co. (1897) 16 App. Div. 350, 44 N. Y. Supp. 1020.

But in the case of a contract between the defendant subcontractor and the garnishee contractor, where payments were to be due thirty days after the certificate of the engineer that the work had been completely finished in every respect, it was held that no garnishment was possible until this certificate was supplied; for the creditors of the defendant could not be allowed to give their estimate of about what the work amounted to, since the amount of such indebtedness could only be shown by the engineer's certificate, even although the debt to the defendant were greatly in excess of the claim of the garnishing plaintiff. St. Joseph Iron Co. v. Halverson, 48 Mo. App. 383.

5. *Claims on unadjusted insurance losses.*

Unadjusted claims for losses on fire-insurance policies have in several jurisdictions been treated as debts and subject to garnishment or foreign attachment, generally on the ground that the contract of insurance itself contains the standard by which the amount of the loss may be accurately determined, in accordance with the principle laid down in Fisher v. Consequa, 2 Wash. C. C. 382, Fed. Cas. No. 4,816, *supra*, IV. b, 1.

Knox v. Protection Ins. Co. (1833) 9 Conn. 430, 25 Am. Dec. 33, may, perhaps, be considered the leading case on this subject, and it is in accordance with the earlier case mentioned. This case was decided under a statute providing that "where debts are due from any person to an absent or absconding debtor" such debts may be attached; and the court said: "It would be an extremely narrow construction of these words to limit them to liquidated debts. The object of the statute is to secure for the benefit of the creditor all the property of the debtor, —all his goods, effects, and credits. The defendants [the garnished insurance company] owe the absent debtor for a loss; they do not adjust it, but say they will not be responsible for it to his creditors. They are liable to pay him money, and they will pay only when the damages are liquidated. It can be recovered in the same form of action, *viz.*, assumpsit. Had the damages been ascertained, there could have been no difficulty; but in that case there would have been only indebtedness;" and the company was held chargeable as garnishee.

And Field v. Insurance Co. (1861) 4 Phila. 286, Affirmed in Girard F. & M. Ins. Co. v. Field, 45 Pa. 129, is to precisely the same effect. In the lower court the case was decided on the authority of West v. Franklin F. Ins. Co. 2 Clark (Pa.) 70 (a case decided upon the same facts, and affirmed in 8 Watts & S. 350, upon the ground that before the answer of the garnishee was filed the loss had been adjusted).

In Field v. Insurance Co., *supra*, it is said: "Wherever a demand is capable of being referred to some definite standard,—in other words, wherever there is a fixed and certain measure of damages,—then, as it seems to us, it ought to be considered as sufficient to constitute a subject-matter of the process." And upon appeal to the supreme court it was said: "There is close affinity between the root and the branches of the remedy by attachment. In the former, as in the latter, unliquidated damages in tort are not within it, nor a claim for damages arising from a mere breach of contract. . . . [Citing Fisher v. Consequa, 2 Wash. C. C. 382, Fed. Cas. No. 4,816.] . . . We cannot come to the conclusion that every unliquidated claim is without the reach of the attachment process. The reason of the exception has sufficient ground to operate on in the exclusion from it of such claims as are contingent and such as possess no fixed standard for liquidation, like torts or damages for breach of contract. These are demands, but not definite enough to be classed as 'personal estate,' 'goods and chattels,' and 'goods and effects,'" under the statute.

The same rule obtains in Illinois, Mississippi, and North Carolina. In the case of a policy unadjusted at the time of the garnishment, giving to the company an option "to repair or replace" the property, a stock of merchandise, the indebtedness was held not to be contingent from the fact that the amount was unadjusted, since the policy furnished the standard to settle it: nor from the fact that the company had an option to pay in merchandise rather than in money. Hanover F. Ins. Co. v. Connor (1886) 20 Ill. App. 297.

And even where the unadjusted claim was disputed by the company, which, however, was held to have forfeited by its conduct the right to an appraisal, it was garnishable. Glens Falls Ins. Co. v. Hite (1898) 83 Ill. App. 549.

And in Crescent Ins. Co. v. Moore, 63 Miss. 419, it was held that an insurance company may be garnished as the debtor of a person whom it has insured, after the loss has occurred, whether the claim for such loss has been adjusted or not.

Sexton v. Phœnix Ins. Co. (1903; N. C.) 43 S. E. 479, is to the same effect.

But in New Hampshire such a claim before adjustment is not subject to the trustee process: "A claim for unliquidated damages, whether caused by tort or breach of contract, cannot be reached by the trustee process." McKean v. Turner, 45 N. H. 203.

Bucklin v. Powell (1880) 60 N. H. 119, is in accord, but in that case the principal defendant lost his right of action by lapse of time.

Where, however, the loss was adjusted between service of the writ and the disclosure, by agreement between the principal defendant and the trustee insurance company, the latter was chargeable. Gove v. Varrell, 58 N. H. 78.

But in Louisiana, where the answer of the garnished insurer showed the issuance to the judgment debtor of a policy on his goods: that the stock was burned, but that the loss had not been adjusted,—it was held that the amount owing must be shown; the attaching plaintiff could acquire no other or greater rights than the defendant, and could not obtain judgment against the garnishee without performing the condition precedent to recovering the debt; and the judgment ordering the garnishee to deposit the amount of the loss with the sheriff within ten days, or, in default, that it be condemned to pay the amount of the plaintiff's judgment, was set aside. Katz v. Sorsby, 34 La. Ann. 588.

In cases where the writ of garnishment is served, not only before the claim is adjusted, but also before proof of loss is made in accordance with the terms of the policy, the claim is clearly not garnishable.

So, even under a statute (Ala. Code, § 3269) providing that the garnishee shall answer "whether he was indebted to the defendant at the time of the levy of the attachment . . . or at the time of making his answer, and whether he will not be indebted in future to him by a contract then existing," the company was not chargeable. Hurst v. Home Protection F. Ins. Co. (1886) 81 Ala. 174, 1 So. 209.

And in an action in New York on an insurance policy, where the defense was that the claim had been attached by trustee process in

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Massachusetts by a creditor of the plaintiff in that state as a debt from the defendant to the plaintiff, but before proof of loss was made, this was held to be no bar, since at the time of the service of the attachment nothing was due by the contract, and the claim was unliquidated and unadjusted. Douglas v. Phenix Ins. Co. 43 N. Y. S. R. 309.

But Brooklyn Phenix Ins. Co. v. Willis, 70 Tex. 12, 6 S. W. 825, decides that a claim for an insurance loss is garnishable before proof of loss is made, even although the policy contains a stipulation that proof of loss must be made before the insurer shall be liable to pay, and therefore no suit could then be maintained on the policy; since in Texas "garnishment is not, strictly speaking, an action, . . . but is more in the nature of a bill of discovery, and may be filed in anticipation that a debt or other obligation will mature at some future time."

Under a statute in Minnesota (Comp. Laws, § 5306, Sess. Laws 1866, p. 217, § 7) providing that a garnishee shall not be charged as for a debt to the defendant "unless at the time of the service of the summons the same is due absolutely and without depending on any contingency," an unadjusted insurance claim garnished before proofs were furnished was contingent and not the subject of garnishment. It might never be payable, owing to the assured defendant not complying with the conditions of the policy through the whole period from the making of the contract to the time when the proofs were furnished; as, for example, swearing falsely, which would avoid the policy. Gies v. Bechtner, 12 Minn. 279, Gil. 183.

And where a policy contained provisions that the loss should be payable sixty days after due notice, ascertainment, and satisfactory proof of loss had been received by the company; and also that it should be optional with the company to replace the property destroyed within a reasonable time,—the insurer, garnished before adjustment or proof of loss, was not chargeable; "a liability might arise in the future after proofs of loss had been served and the time had elapsed within which the option to replace the goods might be exercised, but these were contingencies which might never happen." Dowling v. Lancashire Ins. Co. 89 Wis. 96, 61 N. W. 76.

But it seems that the insurance company may waive the requirement of proofs of loss upon attachment. Campbell v. Home Ins. Co. (1869) 1 S. C. N. S. 158, was an action on a loss which was attached in New York before adjustment and before the preliminary proofs had been made, and the fact of this attachment was alleged as a defense, and it appeared that the company had waived proof of loss. It was held that the objection that the debt was not due because the proofs had not been duly presented was untenable; the clause demanding proofs was intended solely for the benefit of the insurer, and the insured had no interest in the performance of that act sufficient to sustain a claim that he had been prejudiced by the company waiving such proofs in behalf of his creditors.

And where no sufficient proof was given of waiver of proof of loss the claim was contingent, and not garnishable. Lovejoy v. Hartford F. Ins. Co. 11 Fed. 63.

Where the insurer has by the terms of the policy an option to replace the goods destroyed, not exercised at the time of the service of the writ, it is generally considered that there is no absolute liability making the insurer chargeable as garnishee. Godfrey v. Macomber, 128 Mass. 188; Martz v. Detroit F. & M. Ins. Co. 28 Mich. 201; Dowling v. Lancashire Ins. Co. 89 Wis. 96, 61 N. W. 76; Hurst v. Home Protection F. Ins. Co. 81 Ala. 174, 1 So. 209.

But in Crescent Ins. Co. v. Moore, 63 Miss. 419, where the company had an option to repair, rebuild, or replace the property with other of like kind and quality, giving notice of its intention within thirty days after the receipt of proof of loss, which had been furnished, but the garnishment had been served before the thirty days had expired, the company was chargeable. And to the same effect is Hanover F. Ins. Co. v. Connor, 20 Ill. App. 297.

On the analogy of the cases of garnishment of unadjusted losses of fire insurance, where a judgment debtor had taken out a policy of life insurance, the full amount of which was to be paid the insured in thirty years, or, in the event of his death before that time, to his representatives; and by the terms of the policy if the premiums were duly paid for the first two years a paid-up policy, payable at the same time as the original policy, should be issued for an amount proportioned to the number of annual premiums paid; and, an attachment execution being issued after the two years had expired, the insurance company was garnished,—it was held that the amount then due as upon a paid-up policy was subject to the attachment (citing Girard F. & M. Ins. Co. v. Field, 45 Pa. 129), since the liability for some amount was fixed, and, the only matter to be ascertained being the amount of the loss, only the time of payment was uncertain. Tradesmen's Nat. Bank v. Cresson (1891) 10 Pa. Co. Ct. 57. In this case, however, by the agreement of the parties that if the plaintiff should prevail the judgment should be that the garnishee should issue a full paid policy to the plaintiff, the question as to what form the judgment should take was removed, and the court thereby avoided the apparently insuperable difficulty of determining how to enter judgment for the payment of money at a time impossible to state, the death of the insured.

A similar and very recent case is Columbia Bank v. Equitable Life Assur. Soc. (1903) 80 N. Y. Supp. 428. This was an action brought in aid of an attachment against a life insurance company as the debtor of the principal defendant, who was insured under a tontine policy providing that it should have no cash surrender value before the completion of the tontine dividend period, after which the insured was to have an option to elect whether he would take the amount of the surrender value in cash, an annuity, or a paid-up policy; and the warrant of attachment and notice were served upon the company on the day of the completion of the tontine period. It was held that under the New York Code (Code Civ. Proc. § 648) authorizing an attachment upon a cause of action arising upon contract which belongs to the defendant, before the exercise by the insured of his option there was no cause of action or demand in favor of the defendant against the insurance company which would be subject to the attachment.

It is to be noted that in England a verdict upon a fire insurance claim attached before the judgment was signed was not garnishable, even although it was a liquidated sum before the action was begun. Dresser v. Johns, 5 Jur. N. S. 1262, 28 L. J. C. P. N. S. 281, 6 C. B. N. S. 429. It made no difference whether the sum was liquidated or unliquidated before the judgment; "the costs remained to be ascertained after the verdict, which fixes what is due from the defendant, . . . and the verdict may be set aside."

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6. Claims to surplus on pledge.

In the case of claims to unliquidated surplus arising upon contract of pledge, or deposit, or chattel mortgage, or in the case of an assignment for creditors, there is again much difference of opinion, but the weight of authority inclines toward making such claims subject to garnishment.

But uncertain claims to surplus from contract of pledge are often held not to be within the garnishment statutes.

One holding cotton belonging to the defendant to secure advances made for him was served with process of garnishment as his debtor, and later sold the cotton, applying the proceeds on his own claim, and paid the surplus to a third person claiming to be the assignee of the defendant. It was held, under the strict Alabama rule, that at the time of the garnishment the garnishee was not indebted to the defendant as for the surplus, which was an unascertained amount, and when he had sold the cotton, and ascertained the amount of the debt to the defendant, the defendant was no longer the owner of it. Roby v. Labuzan, 21 Ala. 60, 56 Am. Dec. 237.

And where a bank was garnished as the debtor of the defendant, who had delivered to it accounts receivable to cover balances, and at the time of the answer of the garnishee not all the accounts had been collected, the defendant's claim to an eventual surplus was held subject to a contingency which might never arise. Zeltman v. Commercial Bank, 67 Mo. App. 672.

And in Wilson v. Wood, 34 Me. 123, a similar claim was declared to be contingent, and not garnishable. The defendant indorsed and delivered to the trustee a note for a larger amount than his debt, taking back an obligation of the trustee to pay the surplus when collected; if the note had never been, and could not have been, collected, the principal would have had no claim upon the trustee, who was therefore not absolutely indebted, under the statute.

So in Williams v. Gage, 49 Miss. 777 (*infra*, IV. d), a pledge was held not garnishable until it should be ascertained to what the surplus amounted.

But in an action brought by the assignee of a bank against a creditor which had attached the claim of the plaintiff's bank against another bank as its pledgee, to a surplus remaining after the satisfaction of the debt out of the property pledged, it was held that the right of the plaintiff's bank to compel its pledgee to account to it as to the pledged property, and to receive the surplus of the proceeds of collection after satisfying the pledgee's claim for advances, was the subject of attachment. Warner v. Fourth Nat. Bank, 115 N. Y. 251, 22 N. E. 172.

So, it was held in Ætna Ins. Co. v. Bank of Wilcox, 48 Neb. 544, 67 N. W. 449, that unsecured creditors may garnish a secured creditor, and compel it to account for any surplus remaining after the discharge of the principal debtor's debt.

The same result is reached in New England Marine Ins. Co. v. Chandler, 16 Mass. 275. The debtor of a bank transferred to its cashier certain shares of stock as collateral, and the cashier was held chargeable as trustee for the surplus to become due to the debtor after the sale of the stock to settle the debt, the court saying: "The present plaintiffs have attached the surplus in the only way in which it could be attached, it being lawfully in the hands of the trustee. The action must be continued in order that the trustee may complete the execution of the trust by selling the property and paying the debt due to the bank; and at the next term he will be able to show for how much he is chargeable in this suit." This was decided on the authority of Stevens v. Bell, 6 Mass. 339, *infra*, IV. b, 8.

So, in another case of a pledge from which indebtedness to the defendant could accrue, it was held that the court would grant a continuance of the garnishment proceeding for further answer; and when later the garnishee should file an additional answer showing a sale of the pledged property and a surplus arising therefrom, a debt would exist subject to garnishment. Security Loan Asso. v. Weems, 69 Ala. 584.

And where a defendant assigned to the garnishee a check for more than the amount of his debts to the garnishee, who transferred it to a third person for a "valuable consideration," but had yet received nothing upon it when he answered, it was held that he should not be discharged before the contingency by which he might have funds in his hands as surplus belonging to the defendant had been determined. Weil v. Posten (1883) 77 Mo. 284.

The case of Winslow v. Fletcher (1885) 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250, is somewhat similar to the last case, but is not properly a case of garnishment of a claim, but rather of an interest. This was an action to recover money due, the defendants being nonresidents, and service on them was made only by serving as garnishee an insurance company, which held, with full power to sell, certain stock belonging to the defendants as collateral security for a loan, the stock being considerably in excess of the loan, and the defendants appeared only to plead to the jurisdiction. It was held that the defendants' equitable interest in the stock could not be reached by foreign attachment, since whatever liability there was hinged upon two contingencies: that the stock should be sold by the garnishee, and that it should bring enough to leave a surplus after paying its claim against the defendants; and if the defendants redeemed the stock they would be entitled to an unconditional retransfer of it to them.

And a similar interest was attached in Simpson v. Jersey City Contracting Co. (1900) 47 App. Div. 17, 61 N. Y. Supp. 1033; but there it was held that the levy under the attachment was valid; the pledgee, being in possession of the stock as bailee, became the trustee for the pledgeor, first, to pay the debt, and second, to pay over the surplus to the defendant; and when the pledgee, having the evidence of ownership of the stock, should transfer it to the sheriff after payment of the amount of the loan, a good title to the stock would be transferred from the sheriff to the purchaser under an execution to be issued in a judgment in the action, if one should be obtained.

So, in Nebraska the interest of a pledgeor of chattels may be garnished in the hands of the pledgee, either before or after judgment. Burnham v. Doolittle, 14 Neb. 214, 15 N. W. 606.

Where a trustee disclosed that the defendant owed him a debt and had given him security therefor by the pledge of a note for a larger sum than the debt, and that he had since sold the note after protest for the amount of the debt, it was held that he should be charged as trustee for the difference between the amount of the debt and the face of the note, unless he showed that the sale was made for the highest price that could be obtained by reasonable effort, since the disclosure indicated that he had converted the note to his own use in such a manner as to make himself accountable for its value. Peaslee v. Doane, 39 N. H. 466.

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And where the principal debtor, being indebted to a third person who demanded security for the debt, induced the trustee to give the creditor his own notes for the amount of the debt, and the principal debtor thereupon gave the trustee a deed of certain land under an agreement that the trustee should sell it when he had a good opportunity and apply the avails to the trustee's liability on the notes, paying the balance, if there were any, to the principal debtor; and the land was sold, but the trustee received therefor part payment in cash less in amount than the amount of his liability on his notes, and the rest in notes running to his own order which had not been collected; although the trustee contended that he was not chargeable because the notes had not been collected, and he had not received money enough to reimburse himself for his payments on his own notes for the principal debtor's benefit; and that he held the notes received as consideration for the land as security for the benefit of the principal debtor, and as his agent as far as any excess was concerned,—the trustee was held to be chargeable, although the amount of the surplus for which he was charged was unknown, depending upon the value of the notes, which was uncertain until collection. The court admitted that one cannot be made liable as trustee for notes held by him for the benefit of another and as his agent; but here the notes were payable to the order of the trustee himself, and were his own property. Smith v. Wiley, 41 Vt. 19.

But in Howard v. Card, 6 Me. 353, the trustee's answer showed that the defendant was indebted to him in a certain amount, and that before the service of the process upon him he had pledged to him as collateral therefor certain furniture valued at about twice the amount of the debt; but that there was no agreement that the pledgee might sell the furniture pledged to satisfy the debt; and it was held that he could not be adjudged trustee until it could be known that there was a surplus, which could only be ascertained by sale, and he had no right to make a sale.

And the trustee cannot be charged because the principal debtor has claims against third persons and liens upon their funds in the trustee's hands; the trustee in such case has no effects of the principal debtor, and is not in law accountable to him. His claim upon the fund is wholly contingent upon the failure of the indebted party to pay the debt from other means and in a more direct manner, and it is one which such party can defeat, and which the defendant cannot transfer without also transferring a debt to which it is incident. Pickering v. Wendell (1850) 20 N. H. 222. The court said: "The effect of sustaining this attachment would be to appropriate the property of . . . [the principal defendant's] debtors to pay his debts without making them parties to any proceedings instituted for that object. They should be summoned as trustees, if such a purpose is entertained. If . . . [the principal defendant] has a claim against them, . . . the amount does not appear, nor can it be settled in a suit in which they are not parties."

7. Claims to surplus on deposit.

The same rules seem to govern cases of garnishment of claims to surplus arising from a deposit of funds to cover contingent liabilities.

Thus, where money was deposited with the trustees of a college by the father of students as security and as advances for their board, etc., the trustees were held not chargeable as garnishees of the depositor for the amount, even though the books of the college showed an apparent balance in favor of the depositor at the time of the service of the process; the garnishees could not have paid over to the plaintiff such moneys without breach of trust. The money was paid for a special purpose, but if it were shown that the special purpose was at an end, and that it had absorbed a certain sum only and left a balance, then for such balance the garnishees would be responsible. Poe v. St. Mary's College, 4 Gill, 499.

But a surety upon a bond, summoned as the trustee of his principal on account of property deposited with him to secure him against his liability on the bond, which was for an annuity to a third person, was allowed to deduct from the amount of the proceeds of the property in his hands the supposed amount of his future liability estimated from the probability of life of the annuitant. Ripley v. Severance (1828) 6 Pick. 477, 17 Am. Dec. 397.

And a later case shows the distinction in Massachusetts between claims for uncertain amounts when something will be absolutely due, as in Ripley v. Severance, and claims which are "contingent" under the Massachusetts statute, in the sense that it is uncertain whether anything will ever be due. (Faulkner v. Waters, 11 Pick. 473.) The defendant and the trustees had entered into a contract by which the defendant was to be employed by the trustees in manufacturing, and was himself to deposit with the trustees a certain sum of money to indemnify them against loss; and the trustees were not chargeable, since it was "contingent" whether any of it would ever become due to the defendant.

But a surety on an injunction bond, who took a bill of sale of certain personal property of his principal, the defendant, as indemnity against loss as surety, was held liable as his garnishee for the proceeds on the future sale of the property after satisfying his own claim by way of indemnity, although the amount was not yet ascertained. Davis v. Wilson, 52 Iowa, 187, 3 N. W. 52.

The same principle was applied to somewhat different facts in the case of Des Moines County v. Hinkley, 62 Iowa, 637, 17 N. W. 915 (*infra*, IV. c). A contractor made an equitable assignment of his current claims upon a building contract, to a bank, which credited the amounts received to his account, on which he drew, and, the bank was held chargeable for as much of the deposit as was not required to cover its advances, although the amounts finally to become due had not been adjusted.

The case of Dunlop v. Paterson F. Ins. Co. 12 Hun, 627, Affirmed in 74 N. Y. 145, 30 Am. Rep. 283, is not very satisfactory as an adjudication upon this point. In the lower court the decision was to the effect that a sum of money deposited with the clerk of a court in lieu of a bond on appeal may be attached as to the residuary rights of the party depositing it subject to the contingency of the result of the appeal, the opinion saying that whatever rights, reversionary or otherwise, the defendant had therein were property, and that there was no reason why they should not be attachable at the suit of the creditor; but the case was affirmed on the ground that the claim had been adjusted and liquidated by stipulation. This stipulation, however, was made after the levy of the attachment, so that the rule laid down by the lower court would seem still to obtain.

Where the trustee had taken a conveyance of certain property of the principal defendant to cover his liabilities for the latter's debts he was held chargeable for the amount for which the property was sold by him, subject to the deductions, to be ascertained, for all sums which he

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had paid, and after the mutual demands had been adjusted. Stedman v. Vickery, 42 Me. 133.

And where a contractor entered into a contract with a town to build a road, and another person became his surety for the completion of the road, the contractor agreeing, in order to indemnify his surety, that the money received on the contract should be paid to him to cover his risk and to pay for the materials supplied, and the surety was served as his trustee at a time when there was a balance due the contractor, but the road had not been finished,—it was held that the trustee was chargeable, for there was an absolute liability on his part to account for the money received, and the only contingency was as to the time when, and the manner in which, he should account, and this did not affect the debt itself: the test whether anything was absolutely due was satisfied. Downer v. Curtis, 25 Vt. 650.

8. Claims to surplus on chattel mortgage.

A typical case under this head is Glass v. Doane, 15 Ill. App. 66. The principal defendant, becoming insolvent, by an instrument under seal assigned to the garnishee all sums of money due upon his open book accounts, with full power to collect them, intending thereby to effect a conditional sale to the garnishee in the nature of a mortgage and security for his debt to him, and the assignee was held chargeable as garnishee for the amount of the surplus to accrue for the benefit of the assignor above his debt, since, although an equitable claim is not garnishable, here the assignor could maintain against him an action for money had and received as well as a bill in equity to account for any surplus to be ascertained.

So, in a similar case where the defendant had mortgaged his stock of goods to the garnishee to secure future advances, with an agreement for their sale by the mortgagee and deposit of the proceeds in bank to the satisfaction of the mortgagee's advances with his costs, charges, and expenses, the mortgagee was liable as garnishee to the creditors of the defendant to the amount of the mortgagor's interest in the property in excess of the advances made and the liabilities incurred by the garnishee, although at the time of the garnishment the amount of such interest was necessarily unknown because some part of the stock remained unsold; the amount of the interest of the defendant in the goods in the hands of the garnishee being then very much more than sufficient to cover the claim of the plaintiff in the garnishment action. McCown v. Russell, 84 Wis. 122, 54 N. W. 31.

And where a creditor of a mortgagor had the chattels themselves attached in the possession of the mortgagee, who later regained possession of them by replevin from the officer who executed the attachment, it was held that a lien was created by the attachment covering the entire interest of the mortgagor, and that the plaintiff could subject to his claim any surplus remaining in the hands of the mortgagee after the satisfaction of the mortgage, resulting from his sale of the property in accordance with it, although in the meanwhile the mortgagor had assigned to the mortgagee his interest in any such surplus between the service of the attachment and the sale of the property. Carty v. Fenstemaker, 14 Ohio St. 457.

And Root v. Davis, 51 Ohio St. 29, 23 L. R. A. 445, 36 N. E. 669, is a similar case, but there the debt to the mortgagors was garnished, instead of the goods being attached. The chattel mortgagees, holding the property of their mortgagors, were garnished by several creditors, and the mortgagors later sold to the plaintiffs in this action who brought replevin against the mortgagees. It was held that the defendants were properly garnished as to the surplus due the mortgagors after the satisfaction of the mortgage on default, that being a "credit" of the mortgagors, although an unliquidated amount.

So, where a chattel mortgagee had taken possession of chattels on default, an dthe value of the goods was in excess of the amount of the debt, service of garnishment upon the mortgagee while in possession of the goods took effect as a lien, from the time of the service of summons, as to the surplus of the value of the goods over the amount of the debt; and the levy of an attachment on the goods after the service of garnishment created only an inferior lien. R. T. Davis Mill Co. v. Bangs, 6 Kan. App. 38, 49 Pac. 628.

And a mortgagee, who had the chattels sold after being garnished as to the mortgagor's claim, applied the proceeds on the debt, and had a surplus, was charged. The garnishment could not be defeated merely because the garnishee was a mortgagee in possession of the property, and the amount of the mortgagor's interest undetermined at the time the summons was served. Swofford Bros. Dry-goods Co. v. John S. Brittain Dry-goods Co. 9 Kan. App. 1, 57 Pac. 235.

So, in Brunswick Bank v. Sewall, 34 Me. 202, notwithstanding the statute (Rev. Stat. § 86, chap. 55) providing that a debt to be liable to the trustee process must be due absolutely, and not depending upon any contingency at the time of service of process, where the mortgagee of goods the possession of which was reserved for a limited time in the mortgagor, assigned the mortgage to another, who stipulated that in consideration of the release of the mortgagor's right to possession he would sell the goods, and, after deducting his own claim, pay the surplus to the mortgagor, the assignee, being served with trustee process before assuming possession, and later taking possession, selling the goods and ascertaining the surplus, was charged therefor as trustee.

Doane v. Garretson, 24 Iowa, 351, is to much the same effect. There the plaintiff sought to subject by garnishment of the assignee of a mortgage of personalty any property or credits of the mortgagor in his hands; and the garnishee contended that since he had possession of the goods under the mortgage, with conditions, broken, his title thereto became absolute and complete, and that he was in no sense a debtor of the mortgagor. It was held that even after conditions are broken the mortgagor has an equity of redemption in the property, and is entitled to recover from the mortgagee, in case of sale, any surplus remaining after payment of the debt; and hence, that the assignee's title under the mortgage is not so absolute that he cannot be required on garnishment to account either for the surplus of the property or its proceeds after payment of the mortgage debt, as the property or credits of the mortgagor in his hands.

And in Nebraska a creditor may attach the interest of the mortgagor of chattels in the hands of the mortgagee by garnishment, upon which such interest may be ordered paid over to the attaching creditor. Faulkner v. Meyers, 6 Neb. 414; Burnham v. Doolittle, 14 Neb. 214, 15 N. W. 606.

But in Curtis v. Raymond Bros. 29 Iowa, 52, a creditor of a chattel mortgagor garnished the mortgagees, who had never had possession, and the property exceeded in value the amount of their claim. It was contended that because they had failed to take possession of the prop-

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erty after garnishment, and to account for its proceeds, they should be charged; but it was decided that in the absence of fraud they were under no obligation to take possession of the property for the benefit of the attaching creditor, and were not liable.

So, where a mortgagee of chattels which were not in his possession was garnished as the debtor of the mortgagor, and the value of the property did not definitely appear, he was discharged, on the authority of Curtis v. Raymond Bros. 29 Iowa, 52. First Nat. Bank v. Perry, 29 Iowa, 266.

In Missouri this interest or right to surplus is not garnishable. In such a case whether the mortgagee would ever owe the mortgagor anything would depend entirely upon the future contingency whether there were any surplus remaining after satisfying the debt and costs of sale. Beckham v. Carter, 19 Mo. App. 596; Zeltman v. Commercial Bank, 67 Mo. App. 672.

So, even where the garnishee sold the chattels after garnishment, and a surplus resulted, at the time of the garnishment nothing was due: the sale might have produced less than the mortgage. There was no *res* to attach. McCord & N. Mercantile Co. v. Bettles, 58 Mo. App. 384. In this case, however, the court stated that if jurisdiction of the principal defendant had been obtained by personal service, any goods, moneys, or effects of the defendant in the hands of the garnishee before his answer would be garnishable under the statute.

In Cutler v. James Goold Co. 43 Hun, 516, the plaintiff had bought a carriage of the defendant and given back a chattel mortgage, and the defendant later wrongfully resumed possession, brought an action against the plaintiff in another matter and obtained a warrant of attachment which was levied upon the carriage, and at the time of the sale of the carriage under the terms of the mortgage the sheriff was present and by virtue of the warrant demanded and received payment to him of the surplus of the proceeds, after satisfying the mortgage. The plaintiff then brought this action to redeem the property, and it was held that the equitable interest of the plaintiff in the equity of redemption, or the surplus arising on the sale, was not reached by the levy of the attachment, and judgment in favor of the plaintiff was affirmed.

Where personal property was sold on conditional sale, and the vendor retook possession when the vendee absconded, leaving the property unprotected, it was held that a creditor of the vendee could not by garnishment of the vendor obtain an adjustment of any balance due to the vendee from the vendor by the terms of the contract on the settlement of the accounts between them; and it was decided that the proper course for the creditor to pursue would have been to offer to redeem the property if it was worth more than the amount still owed, whereupon, if the tender were accepted by the vendor, he could have the property levied upon and sold as the vendee's property; and if the vendor refused to accept the tender, or if he and the creditor could not agree upon the amount due, the creditor would have a right to commence proceedings in equity against the vendor and the vendee, and thus obtain suitable relief. Woodruff v. M. G. McDonald Furniture Co. (1895) 96 Ga. 86, 23 S. E. 195.

So, in Colorado (Metzler v. James, 12 Colo. 322, 19 Pac. 885) the equity of redemption in chattels is reached by garnishment; the creditor offers the mortgagee the amount due on the chattels, whereupon he is required to deliver them to the officer holding the execution, who will then sell them like other goods on execution.

In Torbert v. Hayden, 11 Iowa, 435, an action of replevin brought by a mortgagee of chattels against a sheriff, who took them under garnishment for a debt of the mortgagor, it was intimated that the mortgagee, holding the legal title, might be garnished and required to answer the amount of his claim yet unpaid and the amount and value of the property which he held as security for it; and, if this were above the amount of his claim, that he should be held responsible from the service of the garnishment for the sale or disposition of any property thus mortgaged, over and above the payment of his claim.

This decision, however, was discussed and doubted in Fountain Bros. v. Smith, 70 Iowa, 282, 30 N. W. 635, which decided that an unconditional money judgment could not be rendered, in a garnishment action against a mortgagee of chattels, as to his debt to the mortgagor for the excess of the value of the mortgaged goods over the mortgage debt when the garnishee had not the goods in his possession. And this case was decided partly upon the authority of Hawthorn v. Unthank, 52 Iowa, 507, 3 N. W. 518, where the garnishee answered that at the time of the garnishment he had in his possession, of the property of the judgment debtor, one horse of the value of $75, one wagon of the value of $75, and a harness of the value of $10, and that he held a chattel mortgage on them for the sum of $45, which was past due, whereupon judgment was rendered against him for $115 as holding property of that value. It was held upon appeal that the court could not make the holding of the property by the garnishee a money demand without giving him an opportunity to discharge it by surrendering the property, upon provision being made for the payment of his lien; such a judgment would make the garnishee a purchaser of the property whether willing to purchase or not.

But where the garnishee denied any liability, yet admitted that he took a mortgage from the judgment debtor upon a stock of goods, and it appeared that the value of the goods was more than four times the amount of the debt, judgment was entered that the garnishee surrender to the sheriff enough of the goods to satisfy the plaintiff's judgment, which was much less than the apparent difference between the amount of the mortgage debt and the value of the goods; and that in the event that the garnishee fail to deliver the goods the plaintiff recover from him the amount of the judgment. This judgment was affirmed on the ground that the "court was justified in finding that there was an excess of goods in the hands of the mortgagee, over and above reasonable security for his claim, sufficient in value to satisfy the plaintiff's judgment." Wingrove v. Haines (1898) 7 Kan. App. 269, 53 Pac. 881.

Stevens v. Bell, 6 Mass. 339, an early Massachusetts case, was an action of trover brought by the assignees, who were to account for the surplus, if any, of certain personal property assigned to them to secure them against liabilities assumed for the assignors, against a deputy sheriff who had attached and taken the property, in an action brought by other creditors of the assignors on the ground that the assignment was void for fraud. The plaintiffs recovered, the assignment being valid, since the assignees were expressly accountable for an eventual surplus, which could be secured by an attachment of the suit of any other creditor.

But where the defendants had made a mortgage to the garnishee it was held that, as it did not appear that there was or would be a surplus left in the hands of the garnishee after

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paying the debts secured and the costs and expenses connected therewith, the garnishee was not, therefore, liable to the plaintiff in any amount. Younkin v. Collier, 47 Fed. 571.

Where a mortgagee of a stock of goods and book accounts placed his agent in charge of them to sell the goods and collect the accounts, and while the sales and collection were going on and enough had been realized from them to satisfy the mortgage debt the agent was garnished as the debtor of the mortgagors, it was held that at the time of the service upon him the agent had such control of the property as made him liable as the mortgagee would be. Bragunier v. Beck & C. Iron Co. (1889) 41 Kan. 543, 21 Pac. 640.

In cases where the residuary rights of a mortgagor of land consist in a personal claim against the mortgagee for any surplus, rather than in a simple equity of redemption, the same rules would seem to apply as generally in the case of chattel mortgages.

So, where the plaintiff, upon garnishment of a sheriff acting under a deed of trust executed as security for a loan by the plaintiff's judgment debtor, showed that the garnishee necessarily would have in his hands a large surplus, although uncertain in amount, arising from the sale of the land under the deed of trust after the payment of the debt, fees, advertisements, taxes, etc., which surplus was largely in excess of the amount necessary to satisfy the plaintiff's claim, it was held that he had established a prima facie case against the garnishee. Sands v. Berkley (1901) 88 Mo. App. 54.

And Brown v. Campbell (1893) 100 Cal. 635, 35 Pac. 433, is practically to the same effect. This was an action against trustees under a deed of trust or mortgage to recover a certain surplus in their hands arising upon the sale of his mortgaged land. The defendants answered, and alleged that a third person claimed the amount, and were allowed to pay it into court, and the third party was interpleaded. The intervener had served an attachment upon the property in an action against the plaintiff's assignor, and alleged that the assignment to the plaintiff was void as to creditors; the question was whether the intervener acquired a lien upon the fund by reason of the attachment of the property before the sale. It was held that the right reserved in the mortgagor constituted an equitable interest in the land, which was attached, and when the land was later sold under the trust deed the attachment immediately fastened upon the surplus moneys realized by the sale, and the intervener, by virtue of the attachment proceedings, acquired the right to subject the surplus proceeds arising from the sale of the land to the satisfaction of his judgment; the attachment of the interest in the land was in legal effect an attachment of the surplus money arising from a subsequent sale.

Bissell v. Strong (1830) 9 Pick. 562, on the other hand, represents the ordinary rule as to the liability of a mortgagee of land in such cases (which, however, are not properly within the scope of this note). The defendant granted land to the trustee by an absolute deed, but as security for the debt, and the defendant's equity of redemption was attached; but it was held that the process of foreign attachment did not extend to lands held by the trustee in trust or as collateral security, or by a conveyance fraudulent as against creditors, although credits might arise out of the real estate thus held, as for rents and profits of land held in trust or as security, or for the proceeds of the land itself, sold by the trustee for the benefit of the principal; but he was not chargeable for the value of the land which he might hold in trust or as security, although the value of the land might exceed the amount of the debt secured; he could not be made liable for the surplus value of the land, for this would be to compel him to become a purchaser without his consent (compare Hawthorn v. Unthank, 52 Iowa, 507, 3 N. W. 518, *supra*); but if the debt had been fully paid, and a demand had been made for a reconveyance, upon the trustee's refusal he might, perhaps, be held as debtor to the principal to the amount of the value of the land.

9. *Claims to surplus on assignment for creditors.*

In cases under this head there is no more general uniformity in subjecting claims to surplus than in the preceding cases; but it is to be noted that by the contract of assignment there is an absolute, unconditional promise to pay over to the assignor the surplus, if any, which may result after the performance of the purpose of the contract; the claim is not contingent in the sense of being subject to the possibility of redemption in the case of pledge, or of default in the case of chattel mortgage. Where it appears that some amount is certain to remain as surplus for the benefit of the assignor the claim to it is generally garnishable.

So, where a debtor assigned his real and personal estate to the trustee for the payment of certain preferred creditors the trustee was held chargeable for the amount of surplus (although unascertained) which should remain after the payment of the preferred debts; and the case was continued till the value of the property should be ascertained. Webb v. Peele, 7 Pick. 247, 19 Am. Dec. 284.

But in a similar case (Guild v. Holbrook, 11 Pick. 101), also an assignment of real and personal estate, the court held that the assignees could not be charged as trustees of the real estate upon their promise to sell and pay over the proceeds, since there might be several contingencies that would prevent their owing the money; as they might be superseded in the trust before any sale was made; and if they had actually sold the land and taken notes for the price, which were unpaid at the time of the service of the process, they could not be charged as trustees; there must be a certain debt to be attached, and the contingency must affect only the time and the amount.

And where an insolvent firm, who were indebted to the principal defendants, conveyed their property to the persons summoned as trustees in trust to collect and sell it for the benefit of certain creditors other than the defendants, and at the time of the service of process the property had not been entirely liquidated so as to leave a surplus, it was held that until the trust was fully executed the defendants had no right of action against the trustees, and no legal right or interest to any part of the funds in their hands; and even if the defendants could have compelled the execution of the trust in equity a merely equitable right is not attachable by trustee process. Massachusetts Nat. Bank v. Bullock, 120 Mass. 86.

And in Maine the same distinction prevails as that indicated in the preceding Massachusetts cases.

The defendants conveyed certain property to the trustee in order to secure to several persons the amount of their debts, which were less in amount than the value of the property conveyed to the trustee, who agreed to account for any surplus, and at the time of the service of the process on the trustee the property had been placed in the hands of an auctioneer to be sold. Although it was insisted that the interest of

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the defendants was contingent, the court held that it was not such a contingency that upon certain events happening the trustee would not be at all indebted to the principals; he was certainly indebted to the principals if the amount realized for the property conveyed exceeded the amount of the debt secured; and such a contingency could not prevent the trustee from being accountable for the amount actually received by him. Lane v. Nowell (1838) 15 Me. 86.

And this case is to be contrasted with Libby v. Brainard, 63 Me. 65. There the defendant sold to a firm certain property upon an agreement that the firm should manufacture it and apply the proceeds, first, to two debts of the defendant, and for the remainder an equivalent interest in the firm was to be granted him; and the agreement contained the mode of ascertaining the extent of the defendant's interest from the proportion borne to the whole assets of the firm by the excess of the property sold over the debts. It was held that the only interest left in the vendor, aside from what he might have as a member of the firm, was a mere contingent interest in the surplus of the proceeds, not liable to attachment in a trustee process, it not appearing that any surplus was certain to arise.

In Texas (Moody v. Carroll [1888] 71 Tex. 148, 8 S. W. 510) a creditor of one who had made an assignment for the benefit of certain other creditors, who attempted to attach the property assigned in the hands of the assignee on the ground that the assignment was void as against creditors, was not allowed to recover; but the court stated that in such case generally the garnishment proceedings should be allowed to stand until the preferred creditors were paid, so as to give the garnishing creditor any precedent rights he might have over other garnishments against any fund or property which might remain in the hands of the assignee after he had executed his trust.

And this case is expressly followed in Carter Bros. v. Bush (1890) 79 Tex. 29, 15 S. W. 167, as to what is stated to be the correct practice in such a case. In Carter Bros. v. Bush an embarrassed firm had assigned their assets, goods, and credits, the goods to be sold and the credits collected so far as necessary for the payment of certain creditors and the surplus to be returned to the assignors; an unsecured creditor garnished the assignee, who answered denying indebtedness and alleging that the debts secured by the assignment were greater in amount than the value of the property, which allegation the plaintiffs contested, and prayed that the case be continued until the trust should be fully administered, and that the garnishee be then required to answer as to any surplus which might remain; the trial court thereupon determined from the evidence that the assets were not more than sufficient to pay the debts secured, and discharged the garnishee. It was held upon appeal that the proceeding should have been delayed or continued until the garnishee had fully executed his trust, and that a supplemental answer should then be required of him; since to try the issue as to any alleged excess in value of the property over the amount secured would result in injustice to either one party or the other.

The same rule would seem to prevail in New Mexico. Perea v. Colorado Nat. Bank, 6 N. M. 1, 27 Pac. 322, decides that where a garnishee who had received property to pay certain debts of the defendant answered that he was not indebted, and the jury in the garnishment action brought in a verdict that the garnishee had sufficient property of the defendant to pay the plaintiff's execution, but not finding the amount of the garnishee's indebtedness, the verdict should be set aside; but the claim itself to the surplus was attachable.

In Pennsylvania, where assignees for the benefit of certain creditors were garnished for a debt of the assignors, the plaintiff had the burden of proving that the garnishees had assets in their hands liable to attachment; the garnishees were then liable only to an account; and it was clearly the duty of the plaintiff to make out a case of indebtedness, at least sufficient to enable him to recover in an action of assumpsit. On the settlement of the account it might turn out that nothing was due to the plaintiff; and where there was no evidence of an actual settlement, or that there was any balance due, there was no liability of the garnishees in money until this was determined. Caldwell v. Coates (1875) 78 Pa. 312.

So, where a garnishee took an assignment of certain of the defendant's property, agreeing to pay therefor certain debts of the defendant and to apply the residue, if any, on a debt owing to him by the defendant, he was not chargeable as garnishee, since it appeared that the residue after paying the other debts was not enough to pay his own. Chapin v. Jackson, 45 Ind. 153.

And where one of the beneficiaries under an assignment for certain creditors serves an attachment on the assignees in order to acquire a lien in advance of other creditors, the assignees cannot be charged, since there can be no surplus in their hands in which the attaching creditor could have any interest, as his own claim would be paid before any surplus could arise. Clark v. Ward, 12 Gratt. 440.

And in the case of an assignment for the benefit of such creditors as should execute discharges the assignee is not garnishable, in Rhode Island, at the suit of creditors who did not execute a discharge; in the absence of misconduct the debtor could bring no action against the assignee, and his only claim was one in equity to subject to his claim any surplus that might remain, and a mere equitable claim cannot be attached. Smith v. Millett, 11 R. I. 528.

A somewhat similar case was one where the plaintiff's attachment was levied upon the defendant's property, and garnishment process was served upon the justice of the peace having control of the property under two earlier attachments, and the plaintiff notified the garnishee that he claimed the surplus from the sale of the property after the earlier attachments were satisfied; but the garnishee, as justice of the peace, paid the surplus to later creditors; and it was held on the authority of Walke v. McGehee, 11 Ala. 273 (*supra*, IV. b, 1), that since the defendant could not recover on such a claim against the garnishee, the facts showed no debt which could be reached by garnishment. Cook v. Walthall, 20 Ala. 335.

Under the New York law of attachment, where a sheriff brought an action to enforce a claim belonging to the principal defendants, who had sold personal property to the defendants in the sheriff's action for a certain amount, some of which was to be applied upon a claim between them, and it was agreed that the balance might be paid to the creditors of the vendors, but the sheriff's complaint alleged merely that the defendants were "indebted to [the principal defendants] in a large amount," but did not state the amount, which was not denied in the answer,—judgment was directed for the plaintiff sheriff for the amount of the judgment in his hands in the attachment suit. Kelly v. Babcock, 49 N. Y. 318.

(These cases of garnishment of unliquidated surplus to arise upon the sale and liquidation

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of property assigned for the benefit of certain creditors are to be distinguished from the case of attempted garnishment, by one of the beneficiaries under an assignment in trust, of the fund in the hands of the trustee or assignee; as in Coffield v. Collins, 26 N. C. [4 Ired. L.] 486, *infra*, V. b.)

10. *Claims on quantum meruit.*

Where the defendant contracted with the trustee to repair his building, the defendant to receive a certain sum when the work was completed, and the trustee was served with process before the work was completed, but the contract had not been abandoned by the defendant, it was held that nothing was due on the claim subject to trustee process. The defendant could maintain no action against the trustee either on the express contract, because he had not performed his part of it, or upon a *quantum meruit*, since at the time of the service of the trustee process there had been no abandonment of the contract by the principal defendant and no acceptance of the work by the trustee. Otis v. Ford, 54 Me. 104.

So, where the defendant contracted with the trustee to "run enamel on about 100 dozen button plates" it was held to be an entire contract, and no *pro rata* amount was subject to trustee process until the contract was completed. Robinson v. Hall, 3 Met. 301.

Similarly, a contract for the construction of a sewer by the defendant for the garnishee at a specified price per lineal foot was held to be entire, so that the garnishee, which was served with the writ before the completion of the sewer, was not indebted at that time, and was not chargeable. Coburn v. Hartford, 38 Conn. 290.

And in the case of a contract abandoned before completion, it was held that since the contract was entire, and hence the defendant could not recover even a *pro rata* compensation for the work actually done, he had no cause of action, and the trustee was not chargeable for any amount. Kettle v. Harvey, 21 Vt. 301.

But where the defendant, without right, and by means of a trespass, took from a stranger's quarry a quantity of granite, dressed it, and delivered it to the trustee, laying it down for him as a walk on his land, and received from the trustee his agreed compensation after the trustee had been served with process, it was held that the latter was chargeable as for a debt to the defendant, but only for the increased value of the stone owing to the quarrying, dressing, delivering, and laying of it; and a finding of commissioners, based apparently on this theory, was accordingly not disturbed. Jackson v. Walton (1853) 28 Vt. 43.

Yet a claim in a suit for damages for extra work done by the defendant for the garnishee railroad company was held to be neither money, nor debt, nor book account, under the South Carolina statute, and was, hence, of too uncertain a character to be attached. Burrill v. Letson (1844) 2 Speers L. 378.

And in the case of a contract between the defendant subcontractor and the garnished contractor, by which certain amounts were to be paid thirty days after the certificate of the engineer had been made that the work had been completely finished in every respect, no garnishment was possible until this was settled, for the creditors of the defendant could not be allowed to give their estimate of about what the work amounted to, since the amount of such indebtedness under the contract could only be shown by the engineer's certificate: even although the amount of the debt to the defendant appeared to be greatly in excess of the claim of the garnishing plaintiff against the defendant. St. Joseph Iron Co. v. Helverson, 48 Mo. App. 383.

So, in the case of a similar contract to construct for the garnishee a hoisting plant, which was abandoned before being completed, the garnishee was not liable, since, as it was not even substantially completed, the contractor could not recover either on a *quantum meruit* or a *quantum valebat*, and the defendant's creditors could have no greater rights. John Pritzlaff Hardware Co. v. Berghoefer, 103 Wis. 359, 79 N. W. 564.

But where the answer of the garnishees admitted that the defendant had worked for them a certain length of time, and had not been paid, and on the trial the plaintiff offered opinion evidence to show that the services of the defendant were fairly worth a certain amount, a judgment discharging the garnishees was reversed. Zanz v. Stover, 2 N. M. 29.

And a garnishee cannot be charged upon evidence merely that the defendant has been performing a contract for him, and that the books of the garnishee show that a balance remains unpaid to the defendant upon the contract, it not appearing that the balance has ever become a debt against the garnishee, or that the contract has been accepted as completed. Hewitt v. Wagar Lumber Co. 38 Mich. 791.

11. *Claims to support.*

Indefinite obligations to support a debtor, not involving the payment of money, have invariably been held not to give rise to any garnishable claim on the part of the obligee.

So, where the defendant had conveyed certain property to her son in consideration of his promise to support her for the rest of her life, giving her a home with him, furnishing her board, clothing, medicine, etc., during her natural life, and to have her decently buried, the son was not so indebted as to be garnishable; the plaintiff could not be put in a position superior to that of the defendant, and the defendant herself could not at any time recover anything against the garnishee except upon the happening of the contingency of a breach of the contract upon his part; and where it is uncertain or contingent whether the garnishee will ever owe the defendant money he cannot be charged as such. Butler v. Billups (1897) 101 Ga. 102, 28 S. E. 615.

And an obligor on a bond to support the defendant during life is not subject to trustee process, since the duties undertaken are of a personal nature, and can in no way be varied by the defendant or her creditors; the only way to attach the obligation would be to substitute the plaintiff for the defendant. Briggs v. Beach, 18 Vt. 115.

So, in the case of an agreement between the principal debtor and his son by which he was to work for the son and the latter was to support him and his family, and if the value of the father's labor were in excess of the cost of such support the excess should be paid by the son to the creditors of the principal debtor, the son was not chargeable as trustee for the value of his father's labor, the agreement not being fraudulent. Worthington v. Jones, 23 Vt. 546.

The result was the same where the principal defendant was supported by the trustee and worked for him, but his services were worth more than his board. The trustee was held not to be liable for the amount of the difference, not on the ground that the amount was unliquidated, but because the arrangement was such that there was no expectation that there should be any such payment. Cobb v. Bishop, 27 Vt. 624.

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Where, however, the defendant assigned all her property to the trustees in consideration of their promise to support her for life, the whole property, since the assignment was fraudulent as to creditors, was liable to attachment. Crane v. Stickles, 15 Vt. 252.

In the same way, where a father assigned all his property to his son in consideration of the latter's promise for future support, and the son agreed as a part of the contract to pay a debt of the father to a third person, the son was chargeable as trustee for the debt in a suit brought by that person against the father. Corey v. Powers, 18 Vt. 587.

But in the case of a bond for the payment of certain amounts of money and of provisions at certain times of the year to the obligee during his life, where at the time of service of the writ upon the obligor all amounts due had been paid, he was not chargeable as trustee, since any further claim was contingent, and nothing more might ever become due. Sayward v. Drew, 6 Me. 263.

Where, however, the defendant took a written promise of the trustee to pay her $45 annually so long as she should live, "and at that rate for any part of a year," the trustee was chargeable for the proportion of the $45 which was due on the day of the service of the summons. Sabin v. Cooper, 15 Gray, 532.

But where the trustee had made his bond to one of the principal defendants, conditioned to pay him a certain sum quarter-yearly, to be applied by the obligee, according to his judgment and discretion, to the maintenance of a third person during the latter's life, the trustee was not chargeable, either as to his obligee, or as to the beneficiary, since he was not the trustee of the obligee, who was not to receive the money for his own use, and since the beneficiary could not maintain any action against him for any amount. Brigden v. Gill, 16 Mass. 522. (For cases of a trust to support, see *infra*, V. b.)

12. *Claims payable in goods.*

Demands which may be discharged in other things than money are not properly debts, at least until default is made in payment, and therefore naturally would not be subject to garnishment under statutes limiting that process to debts, nor would they be attachable as the property of the debtor; yet there are authorities holding the contrary, even under statutes limiting the process to such claims as are debts.

Where a garnishee disclosed that he owed the defendant 1,500 acres of land warrant and 800 and odd dollars payable in whisky, the court was doubtful what judgment could be given against the garnishee, since it was manifestly unjust to make him pay money when his creditor would be bound to receive property. M'Minn v. Hall (1814) 2 Overt. 328.

So, where a garnishee was indebted to the defendant in a certain sum to be paid "in store accounts" he was not subject to garnishment upon it. The court had no authority to change the liability of the garnishee to make him liable as for a money demand. Smith v. Chapman, 6 Port (Ala.) 365.

And a contract by which the garnishee was to buy of the defendant his interest in a tan yard, and pay therefor by delivering to the defendant certain notes made by him payable to others, which the garnishee expected to get at a discount, was not a money contract, and so would not warrant a judgment against the garnishee. Mims v. Parker, 1 Ala. 421.

So, where the garnishee disclosed that he was indebted to the defendant in the sum of $800, from $100 to $200 of which was dischargeable in saddlery if the garnishee thought proper, a judgment against him for that sum was set aside; and the court was apparently uncertain whether it would have been proper to delay the proceedings to afford the garnishee an opportunity to pay merchandise to the extent that his contract authorized, or whether the entire debt should have been condemned, with the reservation that the garnishee might deliver the saddlery to the sheriff, and that his indebtedness should *pro tanto* be discharged. Blair v. Rhodes, 5 Ala. 648.

And a covenant under seal to pay the defendant for land in Iron at 5 cents a pound did not give rise to a claim which was subject to the process, since the defendant could not recover in debt upon an obligation which was not payable in money, nor in *indebitatus assumpsit*, because the contract was under seal. Nesbitt v. Ware, 30 Ala. 69.

A simple obligation to pay the defendant a certain amount of cotton was not garnishable. Jones v. Crews, 64 Ala. 368.

And a promissory note for a certain sum payable in specific articles in trade was also not subject to garnishment; it was not negotiable, and not assignable, and the claim, if sued upon, would be one for unliquidated damages. Deaver v. Keith, 27 N. C. (5 Ired. L. 374).

So, before demand and refusal to pay, a due bill from the garnishee to the defendant for "$1,000 in brandy at $5 per gallon" did not give rise to a garnishable claim, for until default it was not a money demand; the debt must be absolutely due as a money demand, unaffected by liens or prior encumbrances or conditions of contract. Well v. Tyler, 38 Mo. 545, 90 Am. Dec. 441, 43 Mo. 581.

And the same was true of a note for $50, with no time fixed for payment, payable to the defendant in board for his wife and child; it was not a cash note until default. Aldrich v. Brooks, 25 N. H. 241.

In Peebles v. Meeds (1880) 96 Pa. 150, the garnishees had given the defendant a due bill for "$2,000 payable in boarding at the St. Charles hotel at regular rates." This was "not a debt due at the present, or which will become due in the future, so that no judgment can be had against the garnishees in this form; neither is it of such a character that it can be taken in execution. . . . Were there a breach of this contract, the case would be different, for in that case judgment could be had for an amount which could be readily liquidated:" and Girard F. & M. Ins. Co. v. Field, 45 Pa. 129, is cited as authority on this last point.

The same rule was apparently applied where the garnishee undertook to pay the defendant $150 for a piece of work, $30 to be paid in provisions as the work progressed, and the remainder in a carriage when the work was completed; and when the work was about one fourth done and the sum of $24 had been paid in provisions, the garnishee was served with process. It was held that nothing was payable, except the $30, until the completion of the work; since the amount from time to time becoming payable out of the $30 should be in proportion to the amount of work done, the garnishee was not indebted to the defendant, but the defendant had been overpaid. It was also held that nothing was due the defendant at any time in money, and that a contract for the delivery of specific articles could not be converted into a contract for the payment of money, without default on the part of the contractor or promisor: but the court does not decide that the debt, or rather obligation, could not, because it was not primarily payable in money, be garnished before demand and refusal. Smith v. Davis (1853) 1 Wis. 417, 60 Am. Dec. 390.

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But where the trustee was indebted for certain property, purchased with the option to restore it within a time not yet expired, this option was held not to create a "contingency," under the Maine statute. Smith v. Cahoon, 37 Me. 281. It was uncertain only as to the manner of payment; it was not uncertain whether he had received absolutely the consideration of his contract, or whether he was absolutely bound to fulfil that contract by a return of the property or to pay its agreed equivalent; but the manner in which he should discharge it was dependent upon his choice. He was accordingly chargeable.

But where a trustee answered that he owed the sum of $90.96, which was to be paid in mason's work and materials, it was held that a "promise to perform labor for another to a certain amount is not a chose in action attachable until the promise be broken, after which the promisee is entitled to receive the agreed value of the labor in money." Wrigley v. Geyer, 4 Mass. 102. This case, however, decided without any citation of authorities, cannot be reconciled with two earlier cases,—Comstock v. Farnum, 2 Mass. 96, and Clark v. King, 2 Mass. 524. In the former the trustee had given the defendant two notes, amounting to $300, which were payable in horses at a day certain after the service of the summons, and he was held to be chargeable, the court saying: "The horses . . . come within the description of specific articles considered in the statute as credits liable to attachment;" and Clark v. King is practically the same; the maker of a note for $250 payable to bearer in West India and English goods at a day certain after the service of the summons, was held to be the trustee of the holder.

So, where the garnishee owed the defendant a certain sum which, by express agreement, was to be paid in work and labor, this was held to be a credit under the Maryland acts of 1715 and 1795. Louderman v. Wilson, 2 Harr. & J. 379.

There are two Pennsylvania cases, earlier than Peebles v. Meeds, 96 Pa. 150, *supra*, which were cited in argument in the latter case, and may have been overruled. Collum v. Mason (1874) 1 W. N. C. 298, was an application for a rule for judgment against a garnishee, who had answered that he had been indebted to the defendant in a certain sum payable in "wagon or smith work," and that there remained unpaid a certain part of that sum, and the rule was made absolute for judgment against the garnishee, without opinion. And in the other (Gill v. Snyder [1875] 2 W. N. C. 155) the garnishee admitted in his answer that he owed a certain sum "payable in trade, to wit, painting work." The court said that the point was a novel one, but that the plaintiff might have the judgment for which he asked and "that the garnishee's counsel fee must, however, be paid in cash," and apparently the judgment was to be paid in work.

And in Iowa, where a garnishee bought wheat of the defendant for $500, which he was to pay for in merchandise at his store, it was held that the judgment against the garnishee could not be unconditional for $500, but should have been for that amount dischargeable in goods or merchandise at a fair value, to be placed at the disposal of the sheriff, or, on failure to discharge the debt in this way, the judgment was to become absolute, on motion for which a general execution should issue for the same amount. Stadler v. Parmlee, 14 Iowa, 175.

But where farm land is rented on shares the interest of the landlord cannot be attached by levy upon the crops, the title to which is in the tenant alone; it can be reached only by garnishment of the tenant, and the rent reserved, being a share of the crop, is the same as when the rent is reserved in money so far as the rights of the landlord or his creditors to take possession are involved. Howard County v. Kyte, 69 Iowa, 307, 28 N. W. 609; Tuohy v. Wingfield, 52 Cal. 319.

c. Claims on unsettled accounts.

Where the uncertainty as to the amount of a claim is due merely to the fact that the accounts between the garnishee and the principal debtor have not been settled and adjusted, the prevailing rule is that the claim is not so "contingent" or uncertain as to escape liability to garnishment process.

Accordingly, where the trustee and the defendant had entered into an agreement, not amounting to a partnership, to share the profit and loss in cutting by the trustee of timber on the defendant's land, the amount due the defendant from the trustee could be attached. "The contingency referred to in the statute . . . [of Maine, requiring that the claim to be attached must be 'due absolutely and without depending on any contingency'] is not a contingency which may often exist before a settlement of an account or other business transaction, whether anything may be found due from the trustee to the principal, who has an absolute right to call upon the trustee to render the account and make the settlement; but it is a contingency which may prevent the principal from having any claim whatever or right to call the trustee to account, or settle with him." Dwinel v. Stone, 30 Me. 384.

And in J. A. Fahy & E. Co. v. Ouachita Excelsior Saw & P. Mills, 50 La. Ann. 205, 23 So. 312, 51 La. Ann. 1708, 26 So. 386, it was held that, upon similar facts, the final disposition of the matter should be postponed until the contract had ended, and that the attachment would be effective until the ultimate indebtedness should be ascertained by adjustment of the accounts between the parties and the settlement of their rights under the contract.

Similarly, where the debt of the garnishees to the principal defendants on several contracts of sale, on some of which default had been made, was subject to an elaborate account, the amount due was ascertained and adjusted in the trial court, and the garnishee were charged. Gomila v. Milliken, 41 La. Ann. 116, 5 So. 548.

And where a judgment creditor garnished the defendant in a pending suit brought by the judgment debtor, and left his judgment in the sheriff's hands for collection, and later the claim was liquidated by the judgment being entered against the garnishees in the judgment debtor's suit, it was decided upon an intervention by the assignee of the judgment in favor of the principal defendant against the garnishees that the judgment debt was transferred, by the seizure, from the judgment debtor to the judgment creditor, as to the garnishees, and no one could acquire rights upon it to the prejudice of the garnishing creditor, and the later assignment of the judgment produced no effect. Walker v. Creevy (1851) 6 La. Ann. 535.

Yet in Rhode Island, where the amount due the defendant from the garnishee could not be ascertained owing to certain involved accounts, before certain prior suits had been settled, it was held that when the question as to whether a garnishee should be charged is involved in litigation in this manner, with the result necessarily problematical and in doubt, the court will not enter a charging order; and, moreover, that the judiciary act, chap. 34, § 18, provides

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that the court, in charging the garnishee, must determine the extent to which he is chargeable. Cross v. Brown, 10 R. I. 220, 33 Atl. 147.

And in a case where railroad contractors, garnished as the debtors of their subcontractors, had reserved the right to pay them by payment directly to the workmen employed, and were also bound by their contract with the railroad to discharge all claims of men employed in the construction of the road, they were not chargeable as debtors of the defendants when the amount due them was unadjusted. Drake v. Harrison, 69 Wis. 99, 33 N. W. 81.

And where the defendants contracted to build a house for the trustees, and were to be paid certain sums at certain stages of the work, and the trustees answered that they had generally paid the instalments before they became due and so could not say whether, at the time of the service, they were indebted or not,—it was held that they were not chargeable, although they would be trustees for any sum which might be due at their final settlement, if summoned at that time. Harris v. Aiken, 3 Pick. 1.

In the same way, where the defendant was a member of a mutual insurance association in which his deposits and credits were uncertain and contingent owing to outstanding premium notes and assessments, the agent or broker of the association was not liable as his debtor, there not being any absolute debt due the defendant from the association. Haven v. Wentworth, 2 N. H. 93.

But where a creditor of a mutual insurance company garnished a member of the association, but the amount due the company from the garnishee on his premium notes had not been ascertained by the officers of the company, upon its dissolution during the pendency of the attachment action, and the appointment of the receiver, who fixed the amount of the assessment due from the garnishee, he became liable for the amount so ascertained. Hays v. Lycoming F. Ins. Co. 99 Pa. 621.

So, although in West Virginia a contingent debt cannot be garnished, where the agent of the defendant insurance company was garnished as to its funds in his hands, and contended that the amount so claimed to be due was uncertain, since the uncertainty was only apparent and was due merely to the garnishee's confused and unintelligible manner of keeping his books, he was liable as such; if there were any uncertainty as to whether the sum judicially reached were correct, the garnishee could not complain. Webster Wagon Co. v. Home Ins. Co. 27 W. Va. 314.

And where a contractor made to a bank an equitable assignment of his current claims upon a building contract, the bank crediting the amounts received from time to time to his account, on which he drew, the bank was held subject to garnishment in favor of creditors of the contractor of so much of the fund so in its custody as was not required to cover its advances, although the amounts finally to become due on the contract had not been received or adjusted; the garnishment created a lien on the fund superior to that of checks later drawn on the fund by the equitable owner, the contractor. Des Moines County v. Hinckley, 62 Iowa, 637, 17 N. W. 915.

Similarly, where the garnishee and the defendant were two connecting railroad companies having a mutual traffic arrangement by which each was to receive the charges, etc., for the benefit of the other, the balance between them to be settled monthly, it was held that the garnishee could not be charged simply for all credits in its hands belonging to the defendant, but the liability must depend upon the mutual accounts. Baltimore & O. R. Co. v. Wheeler, 18 Md. 372.

d. Partnership claims.

Claims between partners for an uncertain balance due from one to the other are not the subject of garnishment at law, the reason being in most cases that to ascertain the amount of any balance due would necessitate an accounting in equity.

So, even in a case where the defendant and the trustee were members of a dissolved firm, and the defendant had absconded, no settlement having been made, and the plaintiff alleged that there was a balance in the trustee's hands due to the defendant after a settlement, which was denied, it was held that to ascertain the balance due would involve an investigation of the whole of the firm's accounts and transactions, which is never submitted to a jury, and that the remedy to obtain an adjustment of partnership accounts is in equity, and not in an action at law. Burnham v. Hopkinson, 17 N. H. 259. Treadwell v. Brown, 41 N. H. 12; Farwell v. Chambers, 62 Mich. 316, 28 N. W. 859; Ives v. Vanscoyoc, 81 Ill. 121, are in accord.

In Birtwhistle v. Woodward, 95 Mo. 113, 7 S. W. 465, an action for divorce with alimony, in which it was alleged that the defendant was about to sell his interest for the purpose of defrauding the plaintiff of her alimony, and the defendant's partner, who was garnished, with knowledge of the divorce proceedings, bought his interest upon dissolution and settlement, it was held that such a claim, not being settled, was not subject to garnishment.

But where one who had been a member of the defendant's firm held certain unpaid accounts due the firm, and was garnished as the defendant's debtor, the decision was that judgment ought not to be rendered against him absolutely for the amount of the defendant's interest, but that he should be directed to pay over to the clerk of the court, for the use of the plaintiff, the proportionate interest of the defendant as fast as the account should be collected. Cox v. Russell, 44 Iowa, 556.

And where there was evidence from which a jury might infer that a balance had been struck between the two partners, the garnishee and the defendant, this was an attachable claim. Knerr v. Hoffman (1870) 65 Pa. 126. The court said, however, that although the word "debt" in the Pennsylvania attachment execution statute of 1836 has received a very wide interpretation so as to include unliquidated damages in actions in form *ex contractu*, as in Girard F. & M. Ins. Co. v. Field, 45 Pa. 129 (*supra*, IV. b, 5), yet it has never been held to extend to a claim for a balance arising upon an unsettled partnership account.

In the same way, in an attachment execution where the plaintiff alleged that one of the garnishees had admitted to him that there was due from the partnership to the defendant a balance of $1,200, and the jury found such an admission, it was held that, although partnership transactions cannot be settled upon an attachment execution, the garnishment was proper where a balance was found as a fact. Ryon v. Wynkoop, 148 Pa. 188, 23 Atl. 1002.

And in cases where a creditor of an individual member of a partnership has attempted to impound by garnishment the claim or interest of his debtor in debts or credits due to the debtor's firm, the same difficulties exist and there are still other reasons why such a claim should not be subject to garnishment process. For instance, it is generally held that a claim of this character is one in equity, since it can-

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not be ascertained without an accounting, and this cannot be had in an action at law, a court of law having no power to compel a settlement of the firm accounts. Besides this, the debtor could not himself alone enforce such a claim; the debt itself is primarily liable to the partnership debts; it cannot be known whether the debtor himself may be not merely entitled to nothing from the firm, but actually indebted to it; and, since the debtor's partner is not a party to the garnishment proceedings, to subject a firm debt to the payment of one partner's obligation would adjudicate the other's rights without notice. It is noticeable, however, that the interest of an individual member of a firm in the tangible property of the partnership was at one time generally attachable, although the same reasoning would seem to apply as in the case of claims or demands, which can only be reached by garnishment. Both kinds of property are equally assets of the firm, and so subject to the claims of partnership creditors, and, in addition, a fund or credit due the firm has the advantage of being divisible; so that if either kind of property should be garnishable the latter would seem, contrary to the decisions, to be more reasonably so.

Church v. Knox (1818) 2 Conn. 514, is a leading case. There it was held that the interest of one partner in a debt due the firm could not be garnished without showing from the final settlement of the partnership accounts that the firm was solvent, and what the amount of the interest of the defendant partner was; and that there was no possible legal mode of compelling a settlement of the accounts. To the same effect are: Atkins v. Prescott, 10 N. H. 120; Stillings v. Young, 161 Mass. 287, 37 N. E. 175; White Mountain Bank v. West (1858) 46 Me. 15; Stoutenburgh v. Vandenburgh, 7 How. Pr. 229; Sears v. Gearn, 7 How. Pr. 383; Barry v. Fisher, 39 How. Pr. 521; Laughlin v. Maybin, 39 Phila. Leg. Int. 4; Trickett v. Moore, 34 Kan. 755, 10 Pac. 147; Ripley v. People's Sav. Bank, 18 Ill. App. 430; Singer v. Townsend, 53 Wis. 126, 226, 10 N. W. 365; Brande v. Bond, 63 Wis. 140, 23 N. W. 101; Markham v. Gehan, 42 Mich. 74, 3 N. W. 262; Mobley v. Lonbat, 7 How. (Miss.) 318; Williams v. Gage, 49 Miss. 777; Sheedy v. Second Nat. Bank, 62 Mo. 17, 21 Am. Rep. 417; Pullis v. Fox, 37 Mo. App. 592; Ursuline Nuns v. Connelly (1870) 22 La. Ann. 51; Seaton v. Brooking, 1 Tex. App. Civ. Cas. (White & W.) § 1041, p. 585.

In Lyndon v. Gorham, 1 Gall. 367, Fed. Cas. No. 8,640, Story, J., said that the general rule upon such facts undoubtedly was that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken, and, since the creditor of a partner cannot have greater rights (in the absence of fraud) than the partner himself, the partner's interest cannot be attached.

The same rule was laid down in Myers v. Smith, 29 Ohio St. 120, Reversing 7 Ohio Dec. Reprint, 46: Since the defendant partner himself could not enforce such a claim, the statute could not have been intended to authorize his separate creditors to accomplish against the partnership assets what the partner himself is prohibited from doing; although, if the firm is indebted to the defendant partner, on settlement or otherwise, and the other partners are within the jurisdiction, such indebtedness may be garnished; but the general rule has no reference to the tangible assets of the firm, the interest of one partner in which may be levied upon and sold.

And in Winston v. Ewing (1840) 1 Ala. 129, 34 Am. Dec. 768, it was held that the undivided interest of the defendant in his firm's debts was not garnishable, although it was well settled that while the creditor of one partner may have execution upon and sell that partner's interest in all the tangible property of the partnership, yet in the case of tangible property the law cautiously protects the interest of the copartners and the creditors of the firm by restraining the vendee under execution from appropriating the property to his own use until the partnership accounts are adjusted and the demands of the joint creditors either paid or provided for; but the right to attach a debt due the partnership to pay the separate debt of a partner rests only upon proof, from the state of the partnership accounts as between the partners and with reference to the indebtedness of the partnership, of what the right or interest of the defendant partner amounts to.

So, it was said in Johnson v. King, 6 Humph. 233: "Such debt belongs to and is assets of the partnership primarily liable to the satisfaction of partnership debts. If a judgment were given at law upon the garnishment proceeding against the debtor to the partnership to satisfy the separate liability of one of the partners, it would unjustly abstract a portion of the fund primarily belonging to the objects and purposes and creditors of the concern. . . . The court has no power to impound the debt until, by the adjustment of all the partnership affairs, it shall appear whether the separate debtor of the execution creditor has any and what interest in the general surplus, or in the particular debt so impounded."

In several states, however, there have been decisions to the contrary effect.

In McCoombe v. Dunch (1790) 2 Dall. (Pa.) 73, the creditor of a deceased member of a firm had garnished in foreign attachment several persons, who answered, denying that they were indebted to the executors of the deceased debtor, but admitting that they were indebted to the surviving partner of the debtor; and the motion was made to dissolve the attachment on the grounds (1) that a foreign attachment would not lie against executors, and (2) that the partnership credit could not be attached to answer the separate debt of a partner; and the president delivered the opinion of the court in favor of the surviving partner on both points. But this case was apparently overruled by another case in the same volume,—M'Carty v. Emlen (1797) 2 Dall. (Pa.) 277, 2 Yeates, 190, decided by a higher court; a similar debt was held garnishable in foreign attachment for the individual debt of a partner, and it was declared that any difficulty in ascertaining whether there were sufficient funds to pay the partnership debts beyond what was necessary for the attachment might be avoided by a reference, and judgment was accordingly entered for payment to the plaintiff of one half the debt attached.

The last case, however, was overruled by Lucas v. Laws (1856) 27 Pa. 211, where the defense to an action brought by a partnership on a debt was that the debt had been garnished by an attachment laid in the hands of the defendant in an action against another partnership of which one of the plaintiffs in the first-mentioned action was a member; but this was held to be no bar, for if the garnishing creditors had any remedy against the defendant it could only be made effectual by an accounting between the partnership and the partner whose interest they had attached, and this interest was not tangible and could only be made available on condition that on such an accounting enough should be left on settlement to pay the partnership debts.

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So, in Lewis v. Paine (1869) Legal Gaz. Rep. 508, the court said that, although it was held in M'Carty v. Emlen that such a debt could be garnished in foreign attachment, and in Morgan v. Watmough, 5 Whart. 125, that under the same process partnership effects could be attached, these cases may have been overruled by Lucas v. Laws, 27 Pa. 211; and that to permit a creditor of a partner to attach and receive the whole or a part of the firm debt is repugnant to well-settled principles; and, although there might be some good reason for such a proceeding in cases of foreign attachment where the foreigner is beyond the jurisdiction of the court, there was none in the case of attachment execution.

And so, where the plaintiff had a claim against each partner in a firm, and attached the several interests of each in a partnership debt due from the garnishees, and stopped there; and then brought a bill in equity to settle the firm accounts,—it was held that he could not do this, since the resulting interest of a partner in the partnership property is not a debt within the meaning of the attachment execution law, and until judgment in attachment the creditor's right to stand in his debtor's shoes is not established so that the debt vests in him; and it was added that the reason why this resulting interest of a partner is not attachable is not that it is unliquidated, but that the true reason lies in the nature of the interest, which is not a specific thing having a distinct and independent existence, but is a mere result flowing from a comparison of accounts, and may fall on either side, as the balance happens to be. Alter v. Brooke (1872) 9 Phila. 258.

But it has been held in New Jersey that the individual creditor of one partner may attach in equity in the hands of the sheriff, before it is paid into court, the surplus arising from the sale of mortgaged land belonging to the firm, as to the interest of the debtor partner in it, even if a reference to a master is necessary to settle the partnership affairs and ascertain the defendant's claim. Hill v. Beach (1858) 12 N. J. Eq. 31. And, as to the ordinary tangible property of the firm, Columbia Bank v. Spring (1893) 55 N. J. L. 545, 26 Atl. 711, is to the same effect.

And in Georgia, where one member of a firm brought a bill for an injunction to enjoin a garnishing creditor of another member of the firm from receiving, and the firm's debtors from paying to such creditor, a sum of money alleged to be due the firm; and the defendants' answer showed that in the settlement between the firm and the garnished debtors as to the amount due the firm there was a division or severance of the amount due to the two partners; and that the garnished debtors paid the plaintiff in the injunction action his share, and of the other share retained enough to satisfy the garnishment, and paid the remainder to the other partner, but it did not appear that there was any settlement of the partnership accounts generally,—the court held that if there were a settlement of the partnership matters, and the portion of the debt appropriated by the garnishment became the property of the defendant in the garnishment action, it was subject to his individual debts, and the injunction was properly dissolved. Marlin v. Kirksey, 23 Ga. 164.

Wallace v. Hull (1859) 28 Ga. 68, however, goes further than this last case. The garnishees answered that they were not indebted to the two principal defendants, but were indebted to the firm consisting of the defendants and another, and a verdict against the garnishees for two thirds of the amount admitted due by them was upheld on the ground that a partnership was presumed to be solvent until the contrary appeared, and that the rights of the partners could be ascertained and settled at law as well as in equity, in Georgia, as in England.

But the rule laid down in this case was changed by the Georgia Code, § 1919; and even under this statute it was held, in Branch v. Adam, 51 Ga. 113, that, although under the Code a creditor of one of the firm could not now garnish a debtor of the firm, yet where the other members of the firm come into court and say that the effects in the hands of the garnishee are not the property of the debtor member, but are the property of the firm, they thereby become parties to the proceeding, and bring the whole matter before the court in such a condition that the true rights of the parties can be ascertained; and the court has jurisdiction to proceed to do justice, when all the parties in interest are before it, and to ascertain the true interest of the debtor as if the creditor had filed a bill and had brought the parties before a court of equity.

In Maryland, also, a debt due the firm of a nonresident debtor could at one time be garnished. Wallace v. Patterson (1790) 2 Harr. & M'H. 463. It was proved that the defendant was "interested in one third-part of the partnership transactions" of his firm, that the defendant and his firm were both bankrupt, and that some of the partnership debts due by the firm were still unpaid, and it was uncertain whether the property of, and the debts due to, the firm would be enough to pay its debts; yet the court, without opinion, gave judgment for the plaintiff for one third of the debt due from the garnishees, apparently because otherwise the Maryland creditor would be without remedy, and the foreign creditors would take the fund to the exclusion of the plaintiff.

But in People's Bank v. Shryock (1877) 48 Md. 427, 30 Am. Rep. 476, it was held that if the attachment had been laid on tangible effects there would have been no question, for all the authorities concur that the property of a firm may be sold for the debt of one of the partners. But the rule is the opposite as to a partnership credit; upon the ground of reason and expediency, as well as upon the weight of authority, where the partnership is a continuing one, and there has been no adjustment of the partnership affairs, it is primarily liable to the satisfaction of the partnership debts.

The same general rule applies in Massachusetts. In the leading case in that state (Fisk v. Herrick [1810] 6 Mass. 271) the trustees admitted that they owed the defendant's firm a certain sum, but they were discharged, the court saying that before either partner could rightfully claim to his own use, or for the payment of his own debts, any of the partnership effects, the partnership must be solvent, and he must not be a debtor to it; and to ascertain these facts a creditor who wishes, by this mode of attachment, to apply to the payment of his debt a debt due to the partnership, ought also to summon as trustee one of the partners, as well knowing the state of the affairs of the partnership; and that if on his examination it should appear that the principal had an interest in the partners' effects after their debts were all paid, that interest might be considered as effects or credits of the principal, and might be secured by the attachment. But in this case no process against the other partner was issued. This case was followed by Upham v. Naylor, 9 Mass. 490; Hawes v. Waltham, 18 Pick. 454; and Stillings v. Young, 161 Mass. 287, 37 N. E. 175.

Where the defendant and another had contracted to prosecute a voyage, each to contribute his services and share in the profits and losses, the owners of the cargo were served

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with trustee process for the amount of freight due, and the other joint contractor was admitted to appear as claimant, the arrangement was held to be a partnership, and the debtor to the firm could not be charged as trustee in an action against the defendant alone. Bulfinch v. Winchenbach, 3 Allen, 161.

So, where the owner of land made a contract with the defendant, by which the latter was to cut and market the lumber on the land, and the proceeds after collection and after certain deductions were to be shared, and the defendant sold some of the lumber to the trustees in his own name, a creditor of the defendant could not attach the money due, in the hands of the trustees, since title to the wood remained in the owner of the land, and he could have brought an action in his own name for the price, and the defendant could not have maintained such an action, the share of the defendant being due only after collection, not before, and after the deductions, and any collection by the defendant would be as agent for the owner; but the court adds that if the owner and the defendant were strictly partners the same result would follow, since the interest of one partner in a debt due his firm cannot be attached in an action against him. Foot v. Hunkins, 14 Allen, 15.

And where a creditor of one partner brought a bill in equity against all the members of the firm under a statute (Mass. Gen. Stat. chap. 113, § 2, cl. 11), intended to enable a creditor to reach and apply to the payment of his debt any property of his debtor which could not be attached or taken upon execution in an action at law, in order to subject to the payment of his debt the amount that would become due his debtor upon a settlement of the partnership accounts, and alleged that the interest of the debtor in the property of the firm could not be attached or taken in execution in a suit at law against him alone, and afterwards sought to make certain debtors of the firm defendants, it was held that the statute did not enable a creditor of one partner to reach and apply the property of the firm or the debts due to the firm, which are first to be applied to the payment of the firm's debts, and that consequently the plaintiff would be entitled to no relief against the debtors sought to be made defendants. Tobey v. McFarlin, 115 Mass. 98.

So, in Maine, where property of an insolvent firm, attached in actions brought by creditors of individual members of the firm, was by an agreement between the parties sold by the persons summoned as trustees, the attaching officer taking from them a receipt; and, after payment of the debts, a surplus resulted which was attached in an action by a firm creditor on a writ issued after the sale of the property and payment,—it was held that the officer attaching under the original writ could not maintain an action founded on his receipt against the trustees for the surplus, since the later attachment in favor of the creditors of the firm took precedence over the claim of the individual creditors. Smith v. Barker (1833) 10 Me. 458.

In Parker v. Wright (1877) 66 Me. 392, where upon attachment of a debt to the defendant's firm the other partner appeared voluntarily, claiming the proceeds of the debt disclosed as necessary to pay the partnership debts, but was not permitted to file allegations to that effect, it was held upon appeal that he should have been permitted to become a party and to show what the interest of the principal defendant was, and that the trustees could not be charged for the debt until it was so shown to how much the principal defendant would be entitled after a settlement of the partnership affairs; since there was no good reason why the rule by which the priority of the joint creditors and the rights of the other partners as to the tangible effects of the partnership on execution and sale are fully recognized and respected, should not be applied to that kind of property which can only be reached by trustee process.

And in an action by partners when it appeared that the defendant had been summoned as a trustee of one of the plaintiffs, and had consented to be charged for one half of the amount then due to both, and that this was done without notice to the other, the judgment was held clearly not binding upon him, since it was settled in Maine that when a debtor of a firm is trusteed in an action for an individual debt of one of the firm notice must be given to the other members; and it is only the individual share of the defendant after all the affairs of the firm have been fully settled that can be taken on trustee process and applied to the payment of his individual debt. Henderson v. Cashman (1893) 85 Me. 437, 27 Atl. 344.

And in a precisely similar case such a plea was no defense, for the defendant had confessed a debt due to one partner alone, which was different from that sued upon. Cook v. Arthur (1850) 33 N. C. (11 Ired. L.) 407.

Where the debt sued upon was due to a firm, and the plaintiff sued only one partner and served the garnishee as debtor of the defendant only and individually as to a debt actually due to the firm, and later obtained a judgment against the defendant individually, it was held that the partner who was the judgment debtor could not sue the garnishee for its debt, the other partner being still alive; and the fact that the other partner had assigned to the judgment debtor all his interest in the amount due them as partners had no weight, since accounts are not assignable so as to authorize a suit in the assignee's name. Kingsley v. Missouri Fire Co. 14 Mo. 465.

But where a partnership of which the defendant was a member assigned to the garnishee its claim against the government, and the garnishee collected it, and since each partner claimed the whole, divided the amount into two packages and paid one half to the partner who was not the defendant, being later garnished as to the other half as a debt to or property of the defendant individually,—it was held that in the case of garnishment or attachment in the hands of a third person of money, which is susceptible of perfect division, belonging to the partnership, the reason and necessity of the rule that the interest of one partner in the property, and not the specific article, can alone be seized and attached cease; and, although another person may own a portion of the money, there is no reason why the money itself belonging to the debtor is not as much the subject of garnishment as the interest which the debtor may have in it when the interest is clearly defined in dollars and cents. Harlan v. Moriarity, 2 G. Greene, 486.

And in Robinson v. Moriarty, 2 G. Greene, 497, upon the same facts, it was said that the fact of the partnership and the fact that the money in the garnishee's hands was a partnership fund would not protect the amount belonging to the defendant from garnishment, although the partnership creditors would in equity be first entitled to the payment of their claims out of the partnership assets in preference to individual creditors; but in this case there was no evidence that there were any such creditors, and none had interfered by injunction in a court of equity to appropriate the funds for the benefit of the creditors, so that the garnishee ought not to be discharged.

Sweet v. Read (1878) 12 R. I. 121, was an

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action on the case against garnishees for failure in making affidavit, and the plaintiff alleged that, although the garnishees finally made affidavit that they were indebted to the defendant in the attachment action and another as a partnership, in fact the debt admitted was due to the defendant alone, who was then doing business under the name of the firm to whom the debt was admitted to be due; but the action could not be sustained on these allegations, since the creditor could recover of the garnishees only such personal estate as their affidavit disclosed, and the creditor could not supplement the affidavit by extrinsic testimony and recover partly on the affidavit and partly on the extrinsic testimony; and, since the affidavit showed that the garnishees were indebted to a partnership of which the original defendant was only one of two members, the plaintiff could not recover, because a mere partnership credit is not attachable for the individual debt of one of the partners.

Where an attachment for contempt was asked against a sheriff who had refused to answer as garnishee in regard to a certain sum of money in his hands resulting from several conflicting executions on both individual and partnership claims by certain judgment creditors, the application was denied, since it was not clear what amount of funds in his hands, if any, was due to the judgment debtor or debtors. *Re* Truxton, 2 Marv. (Del.) 373, 43 Atl. 257.

And where the garnishee, an insurance company, answered that it was not indebted to the defendant except in so far as he might be interested in an indebtedness of the garnishee then due to the firm composed of the defendant and another, and the plaintiff replied that the debt admitted was still due to the defendant and the other on account of a loss by fire of property used by the defendant and the other for the sole purpose of conducting a gambling business, and that except for such gambling business the defendant and the other were not partners, contending in effect that since the partnership was solely for an illegal purpose the partnership rights and status of the defendant and the other as partners were to be considered to have no existence, and consequently that they should be considered as tenants in common of the insurance money,—it was held that the garnishment laws afforded no means of ascertaining the partner's interest, and until an account of the partnership affairs were taken it could not be known that the particular effects garnished might not be wanted to pay the firm debts, and that the particular partner to whose debt it was sought to apply the effects was not a debtor of the partnership; and as to the illegal contract of partnership it was held that the rule that a court of equity will not enforce an illegal contract did not necessarily involve the proposition that where the illegal venture has been consummated, resulting in profit, a court of chancery would not call for an account and compel justice to be done to the excluded partner; that although a contract were illegal it did not follow that it was illegal or immoral for the parties to it, after its completion, fairly to settle and adjust the profits and losses which had resulted from it; and that to sustain this garnishment would be to condemn the other partner as to his rights in the partnership without an opportunity to be heard, and, it may be, to take his property without due process of law. Crescent Ins. Co. v. Bear, 23 Fla. 50, 1 So. 318.

In a case where the defendant, in his own name merely, entered into a building contract with the trustee and concealed from the trustee the fact that he and another had formed a partnership expressly for the contract, it was held that the trustee was not chargeable for any part of the contract price in an action against the defendant alone, although, if the indebtedness had been created by the defendant alone, or had at one time belonged to him alone, and his fellow contractor had purchased one half of it, or a joint interest in it, he would have been obliged to notify the trustee of the purchase to protect it from attachment as a debt due the defendant; and although the contract was one which could be enforced against the trustee only in the name of the defendant alone, or in the name of the two as partners contracting under the name of the defendant, in whichever way the suit might be brought the trustee would be entitled to all the set-offs and equities which it could have if the suit were brought in the name of the defendant alone. Bartlett v. Woodward (1873) 46 Vt. 100. This was followed by McNeal Pipe & Foundry Co. v. Inman Bros. (1896) 69 Vt. 181, 37 Atl. 284.

Switzer v. Smith (1872) 35 Iowa, 269, was a very similar case. In that there were two garnishment actions. In the first the defendant had similarly, in his own name, entered into a contract with the garnishees to do certain work, and then formed a partnership with two others, and the firm did the work; but the garnishees answered that they were indebted to the defendant in a certain amount, and were later garnished as debtors of the firm. It was held that the legal effect of the defendant's forming a partnership, and of the firm doing the work, was to work a parol assignment of the contract to the firm so that the money due from the garnishees was due to the firm, which earned it, and hence that the creditor of the individual partner could not garnish it.

But a debt due a firm may generally be attached by a creditor of the surviving partner. Knox v. Schepler (1835) 2 Hill L. 595. In this case it is said that the interest of the surviving partner is attachable upon the giving of security by the plaintiff to cover the claims of creditors of the firm; that although the court cannot go into an investigation of the equities which may exist against the fund in the hands of the garnishees, or as to whether any creditors have a better claim, or whether on a final accounting with the representatives of the deceased partners the defendant might not be found to be a debtor of the firm, the plaintiff's have a right to have the fund paid over to them, but they can take it only as the defendant had it, that is, subject to the equities of the other partners and of the creditors of the firm; and they must therefore enter into a bond to answer any claim which might be made on the fund.

And in Berry v. Harris, 22 Md. 30, 85 Am. Dec. 630, such a debt was attached without proof of the exact state of the accounts between a judgment debtor and his partners, and without the requirement of a bond; since the surviving partner had the legal estate, the creditor could not be deprived of this advantage upon presumption of equitable liens in behalf of other partnership creditors who might or might not exist.

And where the trustee disclosed that the defendant and another were partners, and that after the death of the other partner the trustee bought of the defendant partnership property, giving therefor his note to the defendant as surviving partner, it was held that the trustee could be charged: there was no legal evidence that any debts existed, or that the firm would be insolvent without the payment to it of this debt; if the plaintiff might have summoned the administrator of the deceased partner to ascer-

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tain from him the condition of the partnership, such an omission did not impair his remedy, and the administrator might have interposed to protect the estate. Thompson v. Lewis (1852) 34 Me. 167.

Somewhat similar is a case where, in an action on an individual debt of a surviving partner who continued business in the firm name, his debtors were garnished on account of a transaction occurring since the death of the other partner, and it was held that, although the surviving partner was liable to account to the representatives of the deceased partner for continuing the business in the firm name and with firm assets, if such were the case, the business done by the survivor after the other's death was his individual business, and debts accrued to him in such business, though nominally due to the firm, were legally due to the survivor and appropriable to his debts; a partner could not make use of the firm name and take notes payable to that name, and when such assets are sought to be reached by his creditors elude their pursuit by setting up the real or imaginary claim of a partner, who was not such, to defeat creditors. Brenner v. Hirst, 69 Miss. 309, 13 So. 730.

But where the plaintiff sued on a note made by the defendants as a firm, of whom only one was served with process, and judgment was taken against him alone and not as surviving partner, and an attachment to reach the funds of the firm was served on a bank, which moved to be discharged on the ground that a debt due a firm cannot be attached for the debt of a single member of it; whereupon the plaintiff suggested that the other member of the firm was dead, leaving the judgment debtor as the surviving partner,—it was held that, the judgment being against one only of the partners, the execution could not be broader than the judgment, and could only be levied on the property of the judgment debtor and hence could not be levied on the partnership property. The judgment debtor's interest was what might remain to him after the settlement of the partnership business and the payment of the partnership debts, and this could only be ascertained judicially by the aid of a court of equity. Rich v. Solari, 6 Mackey, 371.

Debts due to individuals jointly, and not as a partnership, where the interest of each is not distinct, have generally been treated in the same way as debts to a partnership.

So, where the defendant and another entered into an agreement by which the territorial rights to sell the defendant's patented machine were to be sold by the other, the expenses and profits were to be shared equally, and divisions of the profits were to be made from time to time as soon as possible, and the expenses were such as not to apply to the individual sales but to the whole business generally; the plaintiff served as trustee of the defendant one with whom the other party to the contract had placed for sale on commission certain goods received by him as consideration for the sale of certain territorial rights in the patent in pursuance of the contract, and it was held that the trustee was not liable to the creditors of the defendant alone; the defendant had no separate interest in the funds in the hands of the trustee, but his interest, if any, was joint, and since, whether he had any interest at all could only be determined by an accounting and settlement with the other party to the contract of all their transactions growing out of it, it was unnecessary to inquire whether they were strictly partners or not or if their contract gave them a joint interest in the proceeds of the sale and subjected the proceeds to the payment of all debts and expenses before they could be severed as between the parties. The result as to the liability of the trustee must be the same as if they were partners in the strictest sense, the ruling consideration being that there was a want of legal privity between the parties. Towne v. Leach (1860) 32 Vt. 747.

And a trustee who was indebted on a note to the defendant and another jointly, each owning an undivided half, was held not chargeable, since he had no credits belonging to the defendant, but only a fund belonging to the defendant and the other jointly; the statute did not provide for any remedy for this situation. Fairchild v. Lampson, 37 Vt. 407.

To the same effect are Hanson v. Davis, 19 N. H. 133; Markham v. Gehan, 42 Mich. 74, 3 N. W. 262; and Kennedy v. McLellan, 76 Mich. 598, 43 N. W. 641.

But trustees who had received a quantity of cheese from the defendant and another to dispose of for them and to pay the avails to the owners, one half to each, were chargeable for the share of one in an action against him when they had recognized the several rights of the owners by crediting the several shares of each to each. Piper v. Hanley, 48 Vt. 479.

Where, however, the defendant and another, who appeared as claimant, had an agreement by which the defendant was to manage the claimant's farm, the defendant was to pay her one half the profits, and each party was to have a lien on his undivided share, one who bought milk from the defendant was not liable as his trustee for the amount of the price, for the funds in his hands belonged to the defendant and the claimant jointly as tenants in common, and were not subject to trustee process for the sole debt of the defendant. This case seems somewhat doubtful, since the defendant could apparently have enforced a claim against the trustee in his own name alone. Willard v. Wing, 70 Vt. 123, 39 Atl. 632.

On the other hand, where the defendant and another had an informal understanding by which the defendant managed the other's farm, and in accordance with this arrangement made an agreement with a third party by which the latter was to pay a certain sum for the use of some of the land and also for the services of the defendant in caring for his cattle, upon the defendant being sued and the debt to her garnished, the owner intervened, and it was held that the fund owing from the garnishee was not one in which the defendant and the owner of the land were interested as partners, in which case it would not be attachable at the suit of the creditor of one of the partners; but, although there was a joint ownership of the money, each owner had an interest which was easily determinable and capable of being definitely fixed, and therefore was in law an interest which was certain, and garnishable. Perry v. Blatch, 2 Kan. App. 522, 43 Pac. 989.

In Thorndike v. De Wolf (1828) 6 Pick. 120, the principal question was whether property was owned by partners or tenants in common, since a partner's share could not be taken by trustee process until it appeared that it was free from the lien of the other partners; and it was decided that the relation between the parties was not a partnership; they were tenants in common until the property was divided, and when it was sold they had the same interest in the proceeds, and neither could claim more than his share, having no lien; so that a creditor of either might attach a moiety of the proceeds of the sale of the property.

And in the case of a note made by the trustee to the order of the defendant and another jointly, it was held that he could not be charged, al-

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though he disclosed that both payees were equally interested in the note, since the interest of the defendant was merely a contingent one; for if he died the note would survive to the other payee, and he alone could enforce payment of it. Hanson v. Davis, 19 N. H. 133.

On the other hand, where it appeared from the disclosure that the trustees owed a debt to the defendant and another as joint contractors, the trustees insisting that the arrangement was a partnership, which the plaintiff denied, the court held that the debt was divisible, although neither of the joint creditors could alone enforce the debt and charge the trustees for the moiety apparently due the defendant; as to whether the arrangement between the joint contractors constituted a partnership the court said it was unnecessary to decide, and the objection that the fund was primarily due to the creditors of the joint contractors as a partnership did not apply, since it did not appear that they had any joint interest, and, if they had, that they would have any right to interfere with the attachment. Whitney v. Munroe (1841) 19 Me. 42. (Compare Thompson v. Lewis, 34 Me. 167, *supra*.)

So, a joint debt to the defendant and another was garnishable to the extent of the interest of the defendant or the amount of plaintiff's claim, where the claim was separable, and the other claimant had been made a party. Moore v. Gilmore (1896) 16 Wash. 123, 47 Pac. 239.

Where, however, a foreign corporation and a domestic corporation undertook to enter into a partnership, each contributing one half of the expenses and each to be entitled to one half of the profits, and one holding the profits of the concern was garnished in an action against the foreign corporation, it was held that even if these corporations were not legally capable of becoming partners, or were to be treated as a partnership only for certain purposes, yet, since the indebtedness of the garnishee was the indebtedness to these two parties jointly, the money could not be taken in attachment to satisfy a claim against one of the joint creditors; the court could not determine what proportion of the money due from the garnishee was due to the defendant until there was a determination of the rights of the two companies between themselves, and the debt could not be severed by this proceeding. Olcott v. Guerinck (1899) 19 Ohio C. C. 32.

And where a garnishee answered that it was not indebted to the defendant Drew, but acknowledged that it owed $150 to "Mr. and Mrs. Drew, who are under joint contract, as copartners, with the garnishee to play at its theatre for two weeks," it was held that the garnishee could not be charged for the amount in an action for the individual debt of the husband; apparently, not because the arrangement was a partnership, but because the wife, under the marriage laws, was jointly entitled to the amount, so that the whole could not be garnished. Macks v. Columbia Theatre Co. (1900) 86 Mo. App. 224.

Where claims are due to individuals jointly as partners who are partners in more than one firm the same rules apply. And a garnishee which was summoned as to its indebtedness to a partnership and denied indebtedness, but was actually indebted to a distinct firm having a similar name, two of whose members were also members of the defendant firm, was not charged; and it was held that a debt due the second firm was a particular asset of that firm, and could not be attached or seized in execution for the debt of individual members of the firm. Carvin v. Bates (1855) 10 La. Ann. 756. To the same effect in Lucas v. Laws, 27 Pa. 211, *supra*.

And in an action brought by members of a dissolved firm against the members of another dissolved firm for the balance due on an account, money in the hands of a third firm due to a fourth firm was garnished on the ground that one of the defendants was a nonresident, and that he was a member of the firm to which the garnishees were indebted; but it was held that the garnishees did not owe either of the defendants a separate debt, due to either separately or to both jointly, and that therefore the debt was not garnishable. Buchanan v. Mitchell, 8 Ohio Dec. Reprint, 437.

And in an action against Naylor, Sumners, and Milton, a partnership, upon a disclosure of the trustee that he held in his hands the proceeds of certain merchandise consigned to him by Sumners, Milton, and one Birthwait, partners and successors of the former firm, the court discharged the trustee, on the ground that the case was within the reason of Fisk v. Herrick, 6 Mass. 271, *supra*. Upham v. Naylor (1813) 9 Mass. 490.

But on a disclosure by attorneys that at the time of the service of the writ they were indebted to Bulkley, Weld, & Andrews, lately a copartnership, for a sum of money collected for them, but that they were not indebted to the defendants Weld, Kneeland, and Andrews, and that two members of each firm were the same persons, they were charged. Burnell v. Weld, 59 Me. 423.

Similarly, where a Kentucky partnership had two members who also composed a firm in New York, and while the Kentucky house was in liquidation, having been dissolved, in an action between the partners brought for the purpose of settling its affairs, by the order of the Federal court in Kentucky, and its affairs placed in the hands of one of the partners as receiver, the creditors of the New York members who constituted the other firm attached funds of the Kentucky firm in South Carolina as a credit or debt in part due to the New York firm,—it was decided that the appointment of a receiver in Kentucky did not amount to an assignment of the partnership funds, and merely substituted one of the partners in the place of all in order to settle with greater facility complicated transactions, and that the credit was attachable, as the tangible property of a firm is seizable in execution upon a judgment in favor of one of the partners; the objection that partnership creditors have a preference over individual creditors in the disposition of partnership funds did not apply where there was no contest between these two classes of creditors expressly laid before the court. No difference was recognized between this case and that of several distributees of an interstate's estate; the estate might be variously encumbered, but the apprehension of encumbrances could not destroy the right to attach, although, should any such appear, the attachment would not have destroyed their prior liens; and wherever there is an interest in a debtor his creditor may lay his attachment on it though finally it may be exhausted by prior claims. Schatzill v. Bolton (1823) 2 McCord L. 478, 13 Am. Dec. 748.

And debts due to the defendant from a firm of which the garnishee is a member are not garnishable, as a debt from the garnishee to the firm of which the defendant is a member is generally not garnishable. A garnishee answered that the defendants alleged that his firm was indebted to them; but he could not be charged because not individually and solely indebted to the defendants; if they had brought suit against him he might have pleaded in abatement that

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there were other partners not named in the writ. Ellicott v. Smith, 2 Cranch C. C. 543, Fed. Cas. No. 4,387; Wellover v. Soule, 30 Mich. 481; Knapp v. Levanway, 27 Vt. 298. The last case was decided upon the ground that in both classes of cases the ruling principle was that there was a want of legal privity between the parties.

V. *Unliquidated claims in equity.*

a. *Equitable claims generally.*

In many jurisdictions there are cases to the effect that no equitable claims are subject to garnishment, without regard to the question whether or not such claims are liquidated. Of this class are the following: Loftin v. Shackelford, 17 Ala. 455; Harrell v. Whitman, 19 Ala. 135; Godden v. Pierson, 42 Ala. 370; Henry v. Murphy, 54 Ala. 246; Hassle v. God Is With Us Congregation, 35 Cal. 378; Holcomb v. Winchester, 52 Conn. 447, 52 Am. Rep. 609 (*contra*, as to an equitable demand on a note, Enos v. Tuttle, 3 Conn. 27); Gamble v. Central R. & Bkg. Co. 80 Ga. 595, 7 S. E. 315; May v. Baker, 15 Ill. 90; Carr v. Waugh, 28 Ill. 418; Glass v. Doane, 15 Ill. App. 60; Massachusetts Nat. Bank v. Bullock, 120 Mass. 86; Sheedy v. Second Nat. Bank, 62 Mo. 17; 21 Am. Rep. 407; Beckham v. Carter, 19 Mo. App. 604; Edney v. Willis, 23 Neb. 56, 36 N. W. 300; Burnham v. Hopkinson, 17 N. H. 259; *Re* True, 4 Abb. N. C. 90; Bills v. National Park Bank, 15 Jones & S. 302; Conner v. Weber, 12 Hun, 580; Anthony v. Wood, 96 N. Y. 180 (compare, however, Ten Broeck v. Sloo, 13 How. Pr. 28); Elliott v. Newby, 9 N. C. (2 Hawks) 21; Smith v. Millet, 12 R. I. 59; Galveston, H. & S. A. R. Co. v. McDonald, 53 Tex. 510; Galveston, H. & S. A. R. Co. v. Butler, 56 Tex. 506; Galveston, H. & S. A. R. Co. v. Hume, 59 Tex. 47; Swann v. Summers, 19 W. Va. 115; and in England equitable debts are not attachable: opinion of Turner, L. J., in *Ex parte* Turner, 6 Jur. N. S. 1173.

So, under the Illinois statute the interest of a member in a voluntary unincorporated association, such as a board of trade or stock exchange, does not confer a right to make any claim at law which is garnishable against the association, and any equitable claim or interest is not subject to the process. Netter v. Chicago Bd. of Trade, 12 Ill. App. 607.

And a second mortgagee cannot garnish the first mortgagee, who, after default, is a trustee for the mortgagor of the rents, etc., for the amount due the mortgagor as the surplus of the rents and profits of the land over the amount of the mortgage debt, this being a sum only ascertained by an accounting in equity. Toomer v. Randolph, 60 Ala. 356.

In the same way, a mortgagor whose land had been sold and bought in by the mortgagee, and who was garnished as the debtor of the mortgagee as to the amount still owing him, was not subject to garnishment, since garnishment, is a legal proceeding, and the rights of the parties could not be adjusted with justice to both without resorting to a court of equity. Harris v. Miller, 71 Ala. 26.

So, where a defendant had conveyed land to the trustee on certain trusts, and later, seeking to have the deed set aside, brought a bill in equity for an accounting; and the trustee, after serving his answer as defendant, was served with process, while the bill was still pending, as trustee of the defendant, the plaintiff in that action,—it was held that he was not chargeable, although not upon the ground that the claim was unliquidated. The Massachusetts rule was adopted as to the attachment of a claim in suit,

by which the process is not available against such a claim unless served in time for the trustee to plead it in bar of the action. Wadsworth v. Clark, 14 Vt. 139.

But where there is a plain matter of account between the defendant and the garnishee, depending on the single fact as to whether the garnishee subscribed a certain sum to the capital stock of the defendant company, although the garnishee maintains that the case involves an adjustment of a matter of account between the defendant and the garnishee, which could not be adjudicated in an action at law and so is of equitable jurisdiction,—since the defendant could have a trial by jury no equitable accounting is necessary, and the garnishee is chargeable for the amount. Des Moines Sav. Bank v. Colfax Hotel Co. 88 Iowa, 4, 55 N. W. 67.

And where an unliquidated demand in suit in chancery was attached, pending a reference to determine the amount, and before any judgment, and the garnishee did not answer till after the judgment had fixed the amount, it was held that this demand, pending the suit, was fixed with the garnishment lien by notice in favor of the judgment creditors of the defendant, and was garnishable. Penniman v. Smith, 5 Lea, 130.

But where the purchaser of shares of the defendant corporation paid for them in property at a fictitious valuation, he could not be garnished as debtor of the corporation for the difference between the real and fictitious valuations of the property, since the right of the creditors in such case would be purely equitable, and the corporation could not enforce any claim by an action either of debt or of *indebitatus assumpsit*. Nicrosi v. Irvine, 102 Ala. 648, 15 So. 429. And Sangamon Coal Min. Co. v. Richardson, 33 Ill. App. 277, to the same effect, the court saying that there was no garnishable claim until the contract was set aside in equity, was followed by Pullman v. Railway Equipment Co. 73 Ill. App. 313.

So, where the defendant sold the garnishee shoes for an amount greater than his debt to the garnishee, and the latter paid the difference in cash, he was not chargeable as garnishee of the defendant at the suit of a creditor who alleged that the sale was fraudulent, since the defendant had no remedy against him. Chatroop v. Borgard, 40 Ill. App. 279.

Similarly, where one contracted to buy land, paying a certain sum down, and then sold his equity to another who defaulted on later payments, the claim of the latter against the first vendor was not garnishable, being a mere equitable claim for the amount paid, subject to the vendor's right to recoup damages for breach of contract; it was at best a mere equity, and not a cause of action upon which he could have maintained a common-law action of debt or *indebitatus assumpsit*. Redondo Beach Co. v. Brewer, 101 Cal. 322, 35 Pac. 896.

And where A obtains a judgment against B, and later a judgment is obtained in a garnishment suit in the name of B, "for the use of A," against C, who is indebted to B, and later D, a creditor of A, in a similar suit brought in the name of A "for the use of D" against C, seeks to charge C as debtor to A, the proceeding cannot be maintained since C is not legally indebted to A, in whose name the suit is being prosecuted. In such a case the court held that, although A might have an equitable interest in the whole or a part of the indebtedness for which B "for the use of A" recovered a judgment against the original garnishee C, the extent of that interest could not be ascertained in this proceeding; and if it could, it could not be subjected to

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the payment of A's creditor D, since the statute did not authorize it. Webster v. Steele, 75 Ill. 544.

b. *Claims under trusts.*

The claims of a *cestui que trust* against his trustee are garnishable or not, dependent upon whether the beneficiary has a claim at law against the trustee, and this question is itself generally dependent upon whether the trustee has discretionary powers in the exercise of the trust.

So, where money was bequeathed in trust to pay over the interest and proceeds annually to the beneficiary, it was held that the interest was attachable in the hands of the trustees, as the property of the beneficiary "because it was his in law and equity. If the trustees had withheld it from him he could have sued for and recovered it," and wherever a party has a right of action his creditors may attach the debt, unless it be for wages. Park v. Matthews (1853) 36 Pa. 28. And to the same effect is Gruver v. Edinger, 13 Pa. Co. Ct. 307.

But under a testamentary devise in trust for the support and maintenance of the beneficiary for his life, to pay him the net income of the lands, etc., for so much as the trustee should think proper, in which complete discretion was expressly given to the trustee as to the amounts, disbursements, etc., it was held that until the discretion of the trustee was exercised the beneficiary had nothing, and there was nothing that could be subject to attachment execution in the hands of the trustee as garnishee, and that to subject the income to execution at the suit of the creditor in effect would utterly defeat the intent of the testator in creating it. Where the amount to be paid results only from the discretion of the trustee, and that discretion is personal, no sum exists to be attached; it only belongs to the *cestui que trust* when it is paid or in some other way made over or set apart to him. And although it was argued that under Girard Life Ins. & T. Co. v. Chambers, 46 Pa. 485, 86 Am. Dec. 513, the income was attachable, that case was distinguished by the court upon the ground that in that case there was an express direction to the trustees to pay over absolutely to the *cestui que trust* or to his order the income of the trust estate quarterly, without the exercise of any discretion by them; the income was therefore his own absolutely, and he could invoke the aid of a chancellor to compel payment by the trustees to him of the amount quarterly as provided for. Keyser v. Nicholas, 7 Phila. 150, Affirmed in Keyser v. Mitchell (1871) 67 Pa. 473.

So, in the case of a testamentary trust to pay over to the defendant certain income half yearly, to be applied to the personal support and maintenance of the defendant so that it should not be in any manner assignable or anticipated or liable to his debts, contracts, or liabilities, or, in the discretion of the trustee, to the support and education of any children which the defendant might have, it was held without discussion that the fund in the hands of the garnishee was not subject to the plaintiff's attachment. Prentice v. Pleasonton (1887) (Pa.) 7 Cent. Rep. 484, 8 Atl. 842.

The effect was the same under a trust by which the defendant was entitled, under certain terms and conditions, to receive the net income arising from the rents and profits of land after payment of all expenses, such as taxes, insurance, repairs, etc.: the court could not, as a court of law, call such a trustee to account and proceed to examine his accounts, even so far as to ascertain that he was accountable at least for a sum larger than the plaintiff's demand, and then order the amount of such demand to be paid to the plaintiff; the remedy by attachment is strictly legal, and only such rights, credits, and effects of the defendant are subject to the process as are not encumbered with trusts, although, if there has been a settlement between such trustee of an express trust and his beneficiary, and a balance has been found to be due upon such settlement, it becomes a debt at law, and may be garnished. Lackland v. Garesche (1874) 56 Mo. 267.

Yet, where a judgment debtor was entitled for life, under the will of his father, to the net proceeds of certain real estate devised in trust for that purpose, but the devise did not expressly exempt the property devised from the claims of the son's creditors, the trustees were held to be liable in a proceeding in the nature of an equitable garnishment. Pickens v. Dorris, 20 Mo. App. 1.

And the rents and profits of land devised in trust for the defendant exclusive of all other persons, and not in any manner for the use and benefit of any creditors of the defendant, to be paid to him annually, but without discretionary power on the part of the trustee, could be reached by foreign attachment in the hands of the trustee; but the court knew of no way to reach the future rents and profits. Easterly v. Keney, 36 Conn. 18.

The same test is applied in White v. Jenkins, 16 Mass. 62, in which the trust was to pay for the maintenance and support of the son of the donor at the trustees' discretion; there was no attachable debt; the defendant could maintain no action for any amount; and, further, it would be impossible to ascertain for how great a sum the trustees should be charged. And Banfield v. Wiggin, 58 N. H. 155, is to the same effect.

So, in Hinckley v. Williams, 1 Cush. 490, 48 Am. Dec. 642, where property was devised in trust to pay the income and principal, in the discretion of the trustee, for the comfortable support and maintenance of the testator's daughter, and no money had been so used, it was held that since there had been no demand by the beneficiary, and the matter was in the discretion of the trustee, there was no attachable claim. But the court adds that when nothing remains for the trustee to do but to pay over the money on demand, it may be regarded as a debt, and assumpsit will lie for it. Estabrook v. Earle, 97 Mass. 302, is to the same effect on this point.

And a guardian of infants the rents and profits of whose real estate are charged with an annuity is not chargeable as trustee of the annuitant before the time when the annuity is due, although he has funds in his hands applicable thereto: this equity could not be enforced by her against him at law, and consequently could not be enforced against him by her creditor through process of foreign attachment. Perry v. Thornton, 7 R. I. 15.

The effect is the same under a different rule where the defendant is entitled, under a will, to a life estate in certain personal property, and the testamentary trustee is served with process as trustee as to an amount of income derived from the trust fund sufficient to pay the plaintiff's judgment against the defendant, but the trustee has made no accounting in the probate court, and no order of distribution has been made. Husted v. Stone, 69 Vt. 149, 37 Atl. 253. In this case it was held that the trustee was not chargeable, since the trust had not terminated, the trustee had not promised to pay the beneficiary the amount of income in his hands, or accounted to her for it so that a prom-

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lse could be implied, and no order or decree had been made, so that the defendant could sue for it; and the share of the defendant had not been fully determined.

So, in the case of a guardian of an insane person (Davis v. Drew, 6 N. H. 399, 25 Am. Dec 467), although a creditor of the ward might in equity compel a guardian to adjust his accounts, the rule is the same.

Similarly, where a trustee received money to pay the income to one person for life, and then the principal to the defendant, he could not be charged as the debtor of the defendant, since the claim was contingent until the death of the life beneficiary, and might be lost before that time. Clement v. Clement, 19 N. H. 460.

So, where the executor of, and trustee under, a will, summoned as garnishee, answered and admitted that the defendant was entitled under the will to an estate in remainder which the trustee was directed to sell upon the death or marriage of the testator's widow, neither of which events had occurred, and to distribute the proceeds among the children, of whom the defendant was one, it was held that there was nothing in the garnishee's hands belonging to the defendant but a naked and contingent power to sell at the death of the widow and distribute the proceeds among the children, and that, if judgment were rendered against him, his estate could not be discharged of the debt if he died before the widow, and judgment against him was reversed. Hess v. Shorb (1847) 7 Pa. 231. To the same effect is Carson v. Carson, 6 Allen, 397.

And in the case of a bequest to the testator's wife of the use of certain stock with remainder to his heirs, of whom the principal defendant was one, it was held that during the life of the widow the executor of the estate could not be charged as trustee of the defendant as to his remainder expectant upon the death of the widow, since there was no vested interest then in the defendant, and it was wholly uncertain whether the defendant would survive to take any of the estate. Rich v. Waters, 22 Pick. 563. Here the court assumed that the word "heirs" meant those who would be such at the time when the remainder became due and payable, thus holding that the remainder was contingent; but (as is pointed out in Abbott v. Bradstreet, 3 Allen, 590) the question whether the devisee of the remainder may not live to the time of distribution or possession is not the test as to whether the remainder is vested or contingent.

In an action against a nonresident, who appeared merely for the purpose of filing a plea to the jurisdiction, service upon him being obtained only by the attachment in the hands of the executor of his father's estate, which was still unsettled, of his interest in remainder subject to the life estate of the widow, which interest, if the son should die leaving issue before the widow, was to go to his issue, it was held that this contingent and uncertain interest was not such as to be attachable; the process of foreign attachment is unadapted to secure an interest in a remainder so remote and so uncertain; and the executor has no power to hold enough personal property and money of the estate to pay this possible legacy until the happening of the events upon which the legacy depends. Smith v. Gilbert (1898) 71 Conn. 149, 41 Atl. 284.

But where the defendant was entitled to one eighth of the estate of his father held in trust, subject to certain bequests and to the life estate of the widow, and during the widow's life his share was attached in the hands of the testamentary trustees, a judgment subjecting his claim to the attachment and providing that this should in no way interfere with the administration of the trust as the will provided, but that, when the amount of it should be ascertained and subject to be distributed to the defendant, it should be subjected to the judgment lien, was affirmed. Ernst v. Northern Bank (1899) 20 Ky. L. R. 1334, 49 S. W. 333. To the same effect are Simonds v. Harris, 92 Ind. 505, and Fenton v. Fisher, 106 Pa. 418, a case of attachment execution.

Where heirs at law of an estate executed a deed of the lands of the estate to a trustee for sale and distribution of the proceeds, which were to be made under the direction of a court of competent jurisdiction, and all disputes as to advances, etc., to the individual heirs were to be adjusted by the same court, and a certain sum was awarded by an auditor of the court to one of the heirs, the defendant in the action; but the award had not been finally confirmed at the time of the service of garnishment process on the trustee,—it was held that the amount in the hands of the garnishee was not liable to attachment, since the proceedings for ascertaining and adjusting the amount due the defendant were still open. Cockey v. Leister, 12 Md. 124, 71 Am. Dec. 588. McPherson v. Snowden, 19 Md. 197, was to the same effect.

But in a case of attachment in the hands of a trustee of a distributive share of the proceeds of certain real estate, the service being made before a final accounting ascertaining the share, it was held that the attachment would be good if at any time before trial or judgment upon it the share of the fund in hand belonging to the debtor were ascertained by the final account. Groome v. Lewis (1865) 23 Md. 137, 87 Am. Dec. 563. And hence where, as in this case, an attachment is laid in the hands of a trustee, and judgment is entered before the account is stated, owing to the failure of the garnishee to make a defense, the later adjustment of the specific fund cures the irregularity of entering judgment before the final account, no proceedings being taken in the meantime to correct the irregularity in the entry of judgment. In this case it was also said that Cockey v. Leister only decided that an attachment laid in the hands of a trustee before his final accounting would not be effective in the sense of subjecting the fund to condemnation before that time.

So, where certain land was sold on partition among the heirs, and the trustee was garnished as the debtor of one of them, but the accounts of the auditor ascertaining the distributive share of the defendant had not been ratified, it was held, in equity, that the court below should have suspended the distribution of the share of the defendant to allow the attaching creditor to obtain a judgment in condemnation. Early v. Dorsett, 45 Md. 462.

In Coffield v. Collins, 26 N. C. (4 Ired. L.) 486, the garnishee answered that a debtor of the principal defendants had assigned to him in trust all his property to pay the debt to the defendants, with others; that the moneys received by him on the sale of the property up to the time of the answer had not been enough to pay all the debts, but that he held obligations not yet due, and uncollected, from which further amounts applicable to the payment of the defendants' debt might be expected, but that it could not be ascertained what the amounts would be until the complete settlement of the estate of his assignor; and he maintained that as he held, merely as trustee, only whatever amounts, now unascertained, might come to his hands, he was not to be garnished therefor. It was held that since the principal defendants could not maintain an action at law against

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the garnishee to recover the amount, their creditors could not be in any better position. The only redress of the principal defendants would be in a court of equity where all the persons interested would be before the court and their interests properly protected. (Compare the cases of surplus on assignments for creditors, *supra*, IV. b, 9.)

VI. *Distributive shares and residuary legacies, before settlement.*

The question of garnishment of executors and administrators, generally, has been treated in a *note* to Hudson v. Wilber (Mich.) 47 L. R. A. 345.

It is to be noted that specific legacies are not within the scope of the present note, since they are not unliquidated claims, although the amount finally to be realized from them may be uncertain owing to the fact of there not being enough assets of the estate to satisfy them after payment of the debts and prior legacies.

In the absence of statutes, which are now general, including within the reach of the process of garnishment claims against executors and administrators, whether debts, legacies, or distributive shares, such persons have always been exempt from liability as garnishees before settlement of the estate or order of distribution. Elliott v. Newby, 9 N. C. (2 Hawks) 21, is an example of the rule. There a distributive share could not be condemned in garnishment before the settlement of the estate, since a court of law was incompetent to take an account of the assets of the estate, to order payment upon terms, etc., as if the distributee himself had brought the action, and it was not possible for the court to order condemnation although both distributive shares and legacies are claims or rights at law.

So, in the case of an attachment in equity (under N. C. Rev. Code, chap. 7, § 20) intended to reach and subject to the payment of a nonresident defendant's debt the distributive share of his wife which was still in the hands of the administrator and apparently unascertained, a court of equity would not interfere actively to the prejudice of the wife, and subject her interest to the attachment. McLean v. McPhaul (1860) 59 N. C. (6 Jones Eq.) 15. To the same effect is Young v. Young, 2 Hill L. 425, where it was held that there was no jurisdiction in the court by which the creditors of the testator could be made parties, and it might so work a wrong to creditors who were third persons and could have no day in court to interplead in such a suit.

Roth, D. & Co. v. Hotard, 31 La. Ann. 194, is in accord. There the executor answered that the estate of which an undivided portion was due to the defendant was still in course of administration, the debts and expenses being unascertained. It was held that the executor of the deceased and the creditors of one heir have no authority to ascertain the amount to be turned over to that heir in a proceeding in which the other heirs are not parties, and that the executor could not be charged until the debts and legacies were paid and the estate was settled; and even upon a later answer of the same executor (32 La. Ann. 280) that he held property of the succession sufficient to pay the debts, legacies, and charges, and that the defendant would be entitled to one tenth of the residue, it was held that a judgment for a specific sum could not be rendered.

So, where a garnishee was made a party defendant to the plaintiff's petition, which alleged that he had in his hands a large amount of money owing to the principal debtor and other heirs, and that the debtor's share of that fund was more than sufficient to satisfy the plaintiff's debt, and the garnishee later qualified as administrator of the decedent, it was held that the order of the court, that the plaintiff's debts should be paid out of the assets in the administrator's hands, was error, since the plaintiff could subject only the debtor's interest after the payment of debts, and whether there were any debts did not appear. Beaven v. Beaven (1885) 7 Ky. L. Rep. 365.

But although an executor or administrator is not liable as garnishee before a decree of distribution in the probate court for the sum due a distributee (*Re* Sime, Myrick Prob. [Cal.] 100; Crownover v. Bamburg, 2 Ill. App. 162), after such an order of distribution the administrator may be garnished. *Re* Nerac, 35 Cal. 392, 95 Am. Dec. 111; Fitchett v. Dolbee, 3 Harr. (Del.) 267; Bartell v. Bauman, 12 Ill. App. 450; Harrington v. La Rocque, 13 Or. 344, 10 Pac. 498.

The same rule applies in Kansas. In Nelson v. Stull (1902; Kan.) 68 Pac. 617, it was held that the Kansas statute (Gen. Stat. 1901, § 4634, providing that any creditor shall be entitled to garnishment "against any person," etc.) was taken verbatim from the Wisconsin statute; and the supreme court in that state in J. I. Case Threshing Mach. Co. v. Miracle, 54 Wis. 295, 11 N. W. 580, decided that the executor or administrator was not so liable; and that this construction, made before the adoption of the statute in Kansas, controlled it in Kansas after the adoption.

So, even under a statute permitting the attachment of such legacies and distributive shares, where the plaintiff sought to hold by trustee process the interest of the defendant's wife in her ancestor's estate before distribution and ascertainment of the interest, a decree of distribution was indispensable to any right of action whatever against the administrator, and until such a decree the extent of the wife's interest was not ascertained, since there might have been advances to the heir or she might have been otherwise indebted to the estate. Short v. Moore (1838) 10 Vt. 446.

Sorzano v. Coudert (1899) 28 Misc. 677, 59 N. Y. Supp. 1064, was an action brought by a sheriff with the plaintiff in an attachment suit, in aid of the attachment, which was served upon the ancillary administrator and the attorneys of the father of the defendant, to reach "the undivided interest in all the personal property within the state" formerly of the defendant's father, a citizen of France; but it was not alleged that the administration of the estate had been finished, or that the undivided interest had been liquidated, or that any decree of distribution had been made; it was held that the action was not maintainable: there was no evidence of proceedings to fix the share, if any, of the defendant in the estate of his father, and the extent of his ultimate interest could only be determined by the courts of France; and, although the ancillary administrator in New York had property of decedent apparently free from debts, in amount more than sufficient to cover the claim of the plaintiffs against the defendant, if the latter should establish his right to the share which he claimed it was not possible to determine reliably in advance how far that share might be diminished upon the accounting required by the French law, by the provisions of which the amount of advances must be deducted from the distributive share, and for all that appeared the share of the defendant might be entirely consumed.

Substantially the same questions were decided in a special proceeding (*Re* Dunn, 39 App. Div. 510, 57 N. Y. Supp. 444) where the same cred-

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itor of the distributee unsuccessfully sought to compel the ancillary administrator to account, the claim of the distributee being disputed by the other next of kin.

And where an ascertained debt, a legacy, was owed by an executor and trustee, by his accounts, which were in evidence, to the estates of the children of the defendant, who was their administrator and sole distributee and heir, and the defendant had no accounting or settlement of the estates,—upon a judgment against the defendant individually an attachment execution was issued against the legacy debt to the children, and it was asked that judgment be rendered against the garnishee executor for the amount of the unknown surplus which would be due the defendant individually from the defendant as administrator, after the payment of the debts of his children and the settlement of their estates; but it was held that the debt was not attachable; judgment on an attachment execution is that the debt attached shall be sold, or so much thereof as will satisfy the debt sued upon, and the interest of the distributee is only in the surplus which remains after satisfying the debts of the deceased; but that balance could not be ascertained until the administrator had settled the account, and no purchaser could be found for an interest so uncertain, so that a sale would be unjust to the distributees. Bank of Chester v. Ralston (1848) 7 Pa. 482. McCreary v. Topper (1849) 10 Pa. 419, was a similar case, also of attachment execution, decided upon the authority of Bank of Chester v. Ralston.

But by the Pennsylvania statute (act of July 27, 1842) legacies and distributive shares are subject to foreign attachment; and Sinnickson v. Painter, 32 Pa. 384, decides that the statute applies even before any settlement of the estate, and that it is in the power of the court to mold the judgment against the executor or administrator into such form that no injustice shall be done to anyone.

So, Lorenz v. King, 38 Pa. 93, decides that a legacy or distributive share is subject to attachment execution before any settlement of the estate of decedent, where assets are admitted by the representative; and that, where there are ample funds in the hands of the executor to pay a legacy after the discharge of all debts due by the estate, there is no practical difficulty in satisfying an attaching creditor so far as the amount of the bequest extends; the only difficulty occurs where either the funds are not in the hands of the executor, or it is uncertain whether they will not be required to pay debts of the testator.

In Alabama, also, the rule has been changed by statute. So, Moore v. Stainton, 22 Ala. 831, holds (under § 2519 of the Code, providing that executors and administrators could be garnished for debts due legatees and distributees, but prohibiting judgment against them until eighteen months from qualification) that they might be garnished in the first six months. This changes the old rule laid down in Presnall v. Mabry, 3 Port. (Ala.) 105, and Mock v. King, 15 Ala. 66. In the last case, against garnishment of such officers the practical reasons are given that the debts are still to be paid; a will might be established in the case of garnishment of an administrator, or in the case of an executor the will might be set aside; and posthumous children might be born.

A similar change has been made in Georgia. A defendant was insolvent, and was administrator of an estate in which he owned a distributive share, and a judgment creditor sued out a writ of garnishment and served it upon the defendant as administrator, and, under the provision of the Civil Code, §§ 4734, 4735, for the garnishment of an executor or administrator, by which, when the defendant is insolvent or a nonresident, and the estate in which the defendant is entitled to a distributive share is sufficiently administered so that the executor or administrator may safely answer upon the garnishment, as to whether the defendant is entitled to anything therefrom, it was held that the fact that the defendant was also the garnishee did not interfere with the garnishment, and that he was liable as garnishee to the plaintiff. Brown v. Wiley (1899) 107 Ga. 85, 32 S. E. 905. This changes the rule laid down in Bridges v. North, 22 Ga. 52, in cases where the defendant is insolvent or a nonresident. There the garnishees, executors, answered that the debtor was a legatee of the estate, but that they did not know whether they were indebted to him, and were discharged.

And the interest of a wife in the estate of her father in the hands of the administrator, though unascertained at the time of the commencement of the attachment proceedings, was held subject to foreign attachment as the debt of her nonresident husband, in Vance v. McLaughlin, 8 Gratt. 289; but, the husband dying, the interest of the creditor died with him.

And under the Indiana statute (Rev. Stat. 1843, p. 772), subjecting to attachment the "goods, chattels, rights, credits, moneys, and effects" of nonresidents, the unascertained distributive shares in the hands of an executor are "effects," liable to garnishment. But "here the order of the court is not to have effect until the estate is fully and finally settled; and it cannot in any respect interfere with the duties of the executor in paying debts and equalizing distributive shares." Stratton v. Ham, 8 Ind. 84, 65 Am. Dec. 754, Followed in Simonds v. Harris (1884) 92 Ind. 505.

So, under the Iowa Code, § 2976, providing that an executor may be garnished "for money due from the decedent to the defendant," it is held that the statute was intended to give the right to garnish an executor before an order had been made for payment or distribution, since at the common law an executor or administrator could not be garnished before such an order, and therefore that the executor could be garnished as for "money due from the decedent to the defendant" for a legacy or distributive share, before settlement of the estate. Boyer v. Hawkins (1892) 86 Iowa, 40, 52 N. W. 659.

So, Sampsell v. Sampsell (1899) 17 Ohio C. C. 455, under Ohio Rev. Stat. §§ 5530, 5531, decided that an executor or administrator with the will annexed may be garnished as to such a residuary legacy before any settlement of the estate, and the garnishment will bind the legacy for the payment of the plaintiff's claim until on final settlement there shall be funds in the hands of the executor or administrator to pay it; and so expressly overruled Bently v. Strathers (1880) 8 Ohio Dec. Reprint, 44, to the effect that before an order of distribution there is no garnishable indebtedness from the administrator to the defendant.

And where, in New Hampshire, the residue of an estate was to be paid to the defendant in ten equal parts annually by the executors as trustees, and the disclosure admitted that their account had at the time been duly settled with the judge of probate, but the ten years had not expired, it was decided that only so much could be held upon the trustee process as was due and payable at the time when the plaintiff took his judgment against the trustees, and the plaintiff might, at his option, take his judgment or execution against the trustees either at once or wait until the entire sum grew due.

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Palmer v. Noyes (1864) 45 N. H. 174. In this case the court said that it was the practice to summon individuals as trustees when it is uncertain whether they will be chargeable or not, and when, as the facts exist at the time of the service, they could not be charged, to have the action continued until such time as the liability of the trustee to the principal defendant is determined, and then to take his disclosure, and, if chargeable, to hold the amount thus due.

Similarly, in Maine, an executor of an estate is chargeable as trustee of a residuary legatee, although it is uncertain whether there will be any residue, and the case will be continued until the estate is so far settled as to ascertain the amount of the residue, and the executor will be required to make further disclosure showing the facts when ascertained. Cutter v. Perkins, 47 Me. 557.

The practice is similar in Massachusetts. A trustee, the administrator of an intestate estate, answered that after discharging all the liabilities of the estate there would be a surplus for distribution, but the estate had not been settled; he was chargeable (under Rev. Stat. chap. 109, § 62) as to a distributive share, although the amount of it was uncertain, and the case would be continued until sufficient opportunity had been given to settle the account of the administrator and obtain a decree of distribution. The court said, however, that, even if the administrator had not admitted that there would be a surplus, he would be chargeable in the same way. In accord are Holbrook v. Waters, 19 Pick. 354, and Strong v. Smith, 1 Met. 476.

So, Mechanics' Sav. Bank v. Waite, 150 Mass. 234, 22 N. E. 915, decides that the distributive share of an intestate minor's estate is attachable by trustee process as soon as the administrator has qualified as such and while the property of the estate is still in the hands of the infant's guardian; the proceeding being continued as in the preceding cases.

But where it was sought to charge an administrator as trustee on account of a distributive share of an heir at law of the intestate in a sum of money to be received from a sale of real estate to pay debts, but the license obtained by the administrator from the probate court granted permission to the administrator to sell the whole or any part of the real estate, in his discretion, and at the time of the service of the trustee process the sale had not been made, it was held that the administrator was not chargeable as trustee, since it was contingent whether there would ever be any sale, and if there were, it was contingent whether the amount of real estate sold would be more than enough to pay the debts. Beverstock v. Brown, 157 Mass. 565, 32 N. E. 901.

And in a Tennessee case where a bill in equity was brought to attach and hold subject to the complainant's debt the interest of the defendant in the estate of his father, who before his death had made advancements to the defendant, and paid certain of his debts, the amount of which, however, was uncertain and disputed, it was held that the amounts paid to or for the defendant by the intestate must be accounted for before the complainant could reach any part of the estate. Johnson v. Hoyle (1859) 3 Head, 56.

On somewhat similar principles, where the plaintiff brought an action against his debtor, who was the executor of certain estates, to have applied to the payment of his debt, on the ground of the debtor's insolvency, his fees and commissions, which had not been allowed by the probate court, and judgment was rendered for the plaintiff and a receiver was appointed, it was held that the fees were not subject to attachment or any similar process, for the case did not come within the rule that the money, in order to be attachable, must be due or about to become due subject to no other condition than the lapse of time; the executor might not be entitled to the commissions provided by law at his final settlement, since from his maladministration he might be deprived of compensation; and to permit such an attachment would embarrass the settlement of estates, interfere with the jurisdiction of the probate court, and incur conflict with the jurisdiction of the court granting the attachment. Overturf v. Gerlach (1900) 62 Ohio St. 127, 56 N. E. 653.

And where judgment creditors of an heir garnished persons holding as agents a certain sum of money, being the proceeds of the sale of property of the judgment debtor's father, and produced evidence in the garnishment action tending to show that the father owed no debts at the time of his death, but not showing positively that there was no administration of his estate, or that he died intestate, or that the defendant was the only heir, this was not sufficient to sustain the garnishment, under the settled rule that the heir cannot sue and recover property of the estate without alleging and proving that there is no administration of the estate, and that there is no necessity for such administration; since the garnishing creditor has no right, superior to that of his debtor, to entitle him to recover in garnishment. Trueheart v. Savings & Loan Co. (1901; Tex. Civ. App.) 64 S. W. 1003.

VII. *Set-off or recoupment of unliquidated claims.*

In cases where a debtor summoned as garnishee would, as against his creditor simply, have a right to make some counterclaim, undetermined in amount by way of set-off or recoupment, it would seem that the reasonable rule would be, either to prohibit the garnishment when the uncertain claim cannot be adjudicated in a garnishment proceeding, or to give the garnishee as to such counterclaims precisely the same rights against the plaintiff that he would have against the defendant; for it is a general rule that the garnishing creditor should have no greater rights than his debtor would have against the garnishee. But the decisions vary in this regard.

So, where a defendant leased a house to the trustee with covenant to perform certain things, which he failed to do, whereby the trustee sustained damage the amount of which was not yet determined, it was held that for this reason the defendant's claim against the trustee must be regarded as one for unliquidated damages, and hence that it could not be reached by the trustee process. Eastman v. Thayer, 60 N. H. 575.

And where the garnishee answered that the defendant held his note for $1,200, and that he had a set-off to this, the amount of which could not be determined without a settlement, he could not on this answer be subjected to judgment for the $1,200, less the amount of the set-off. Allen v. Morgan, 1 Stew. (Ala.) 9.

But where a trustee had become bail in a civil action for the defendant, and by the arrangement between them the defendant was to work for the trustee, and his wages were to remain in the trustee's hands to indemnify him for his liability, it was held that the trustee must be allowed to set off the amount for which he might be charged on his contingent liability as bail. White v. Richardson, 12 N. H. 93.

Similarly, a trustee who was surety for the defendant for his accounting for and paying to

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his employer all moneys which he should receive for it, and with whom the defendant left a sum of money, and then absconded, when it was found that he had become in arrears to his employer in a sum greater than the amount deposited with the trustee, was discharged, since he was entitled to a set-off against the defendant of his larger claim for reimbursement upon his contingent liability as surety for the defendant. Boston & M. R. Co. v. Oliver, 32 N. H. 173.

The same principle governs the case of Doyle v. Gray, 110 Mass. 206, where a contractor abandoned his contract before completion of the work, and so occasioned damages to his employer greater in amount than the sum due him on the contract; the employer was not chargeable as his trustee, since in an action by the contractor the employer would have the right to recoup his damages, and the contractor's creditor had no greater right than the contractor.

And where a trustee, before the service of process upon it, had assigned to another a claim against the principal defendant in a much larger sum than the defendant's claim, by which assignment the assignee agreed to hold the claim for the joint benefit of both parties so that all benefits at any time directly or indirectly derived from the claim should inure to them jointly, it was held that the trustee could set off this claim against the debt due the principal defendant, since the only party who could object to the setting off of the claim to the benefit of which the trustee and his assignee were equitably entitled would be the assignee, which was prevented from doing so by its agreement; although it was conceded that at common law the ownership of a chose in action cannot be so divided that each owner may file his undivided share in set-off. Nutter v. Framingham & L. R. Co. 132 Mass. 427.

So, even under the statute of Maine (Rev. Stat. chap. 86, § 64), providing that trustees may not set off unliquidated damages for wrongs and injuries, where the trustees disclosed that the defendant undertook to work one year for them and abandoned his contract without their consent and to their great injury, and that there was due him at the time of his breach a certain sum; and claimed that the amount due him would not compensate them for their damages from the breach,—it was held that, since in an action against the trustees by the principal defendant they would unquestionably be entitled to have their claim for damages allowed, they could not legally be placed in a worse position as trustees; and that if there were liability on the part of the trustees it was for the amount of money earned by the principal defendant less the damages caused by his breach deducted, not by way of set-off, but as recoupment; and the statute was declared to refer only to independent claims, and not to such as arise under the contract itself on which the debt is founded. Cota v. Mishow, 62 Me. 124.

But where the plaintiff sued the cashier of a bank in equity for the rescission of a contract of sale of its stock and to recover back the purchase money paid, and garnished the bank on account of a deposit in it belonging to the defendant, it was held that the bank could not set off against the deposit a claim against the defendant for unliquidated damages resulting from his gross mismanagement of the affairs of the bank as its cashier, since such a claim is unascertained and unliquidated, and the subject matter of future litigation between the bank and its cashier. Irvine v. Dean (1894) 93 Tenn. 346, 27 S. W. 666.

Yet, in Smith v. Boston, C. & M. R. Co. 33 N. H. 337, where a railroad company, the trustee, was indebted to the defendant, a connecting railroad, but the defendant had given the trustee several notes not yet due, which the trustee had indorsed and transferred to a bank which discounted them, so that the trustee thereby became liable as indorser, and sought to set up this contingent liability as a defense to the trustee process, it was held to be no defense, since demands, in order to be the subject of set-off, must be both mutual, and due and payable; the trustee was under only a contingent liability upon its indorsement, which might never be a claim which could be enforced at law. In this case, as reported, however, there is no mention or citation, in either the opinion or argument, of White v. Richardson, 12 N. H. 93, or Boston & M. R. Co. v. Oliver, 32 N. H. 173, *supra*.

But in an action against a garnishee, the purchaser of goods to an uncertain amount, to be manufactured by the principal defendant before a certain date, upon the abandonment of the contract by the principal defendant before that date, the garnishee was allowed as damages, the amount of which was fixed by arrangement between him and the garnishing creditors, all the expenses incurred by him in completing the contract; but further damages claimed by him upon the trial of the action, alleged to have resulted from delay in obtaining material, which was caused by the abandonment of the contract by the principal defendant, were not allowed, since they were not claimed in the garnishee's answer, and also because the evidence tending to show the damage was too indefinite and uncertain. Globe Milling Co. v. Boynton, 87 Wis. 619, 59 N. W. 132.

Similarly, where the defendant indorsed a note for collection to the garnishee, who was his attorney, and the attorney having collected the amount due claimed upon garnishment a lien on the proceeds for his services, this lien, although unliquidated in amount, could not defeat the garnishment. Trunkey v. Crosby, 33 Minn. 464, 23 N. W. 846.

And the equitable rule allowing, under special circumstances, an equitable set-off to a debt, although unliquidated in amount, has been applied in the case of garnishees. Where a garnishee was indebted to the principal defendant in a definite and ascertained amount, but also had a valid claim against the defendant for damages in an unascertained amount arising out of the breach of a contract existing at the time of the service of the garnishment, it was held that the garnishee, after an order at law subjecting the definite debt to the claim of the garnishing creditor, might in equity, upon the ground that the principal defendant was insolvent and a nonresident, restrain the garnishing creditor from enforcing the payment of the amount due until the amount of the unliquidated damages could be ascertained. And in such case a court of equity could itself ascertain the amount of the damages resulting from a breach of the contract, and allow it as an equitable set-off. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 Sup. Ct. Rep. 710.

Similarly, in the case of a bill for an equitable garnishment, where the plaintiff sought to attach a debt owed for various properties conveyed, the garnishee was held to be entitled to set off *pro tanto* such a claim for failure of parts of the consideration as would be available to him as against the defendant, and which he might have established by proof. Mowry v. Davenport, 6 Lea, 81.

So, in scire facias against a garnishee, she was permitted to show mistakes made in her settlement with her son, the defendant, amounting to an equitable set-off, equal at least to the

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whole amount of her debt to him, the court saying that actions of this nature have been considered much in the same manner as suits in chancery. Fowler v. Spelman, 1 Root, 353.

But, in Alabama, garnishment was merely a legal remedy, so that the garnishee could not set off an equitable demand against the defendant, arising from his possession by transfer, without indorsement from the payee, of a note made by the defendant. Loftin v. Shackelford, 17 Ala. 455; Self v. Kirkland, 24 Ala. 275. In the later case the garnishee answered that he would have been indebted to the defendant, but that, before the garnishment was served upon him, a third person had agreed to sell him the defendant's note, the consideration for which was to be the amount, then unascertained, of the garnishee's debt to the defendant; but the note was not transferred to him until after the service. It was held that there was no set-off existing at the time of the service, since the legal title to the note was not in the garnishee, and judgment should have been rendered against him.

VIII. *Summary.*

Although it is difficult to generalize as to the law upon a matter of practice governed by some fifty differing statutes, when cases apparently to the same effect are really not necessarily in accord on account of varying phraseology in the written law of the different jurisdictions, it is possible to discover in the cases some general tendencies as to the rules determining what kinds of claims are subject to garnishment. The broadly exclusive statements of law, such as that only such claims as can be enforced in the actions of debt or *indebitatus assumpsit* (in decisions in Alabama, California, Colorado, Illinois, Mississippi, Missouri, New Hampshire, North Carolina, and Wisconsin, *supra*, II.), and only legal claims (as in cases in Alabama, California, Connecticut, Colorado, England, Georgia, Illinois, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Rhode Island, Texas, West Virginia, Wisconsin, *supra*, V, a), are the subject of garnishment; that executors or administrators, generally (see the *note* on this point in Hudson v. Wilber [Mich.] 47 L. R. A. 345), and officers of the court, or of the law, or municipal officers or corporations, on grounds of public policy, are not subject to garnishment process,—while never general in the sense of being universally accepted, have in many instances been varied, or wholly reversed, by statute.

But claims in tort, unless in a few instances where there is a concurrent remedy for the same wrong, as for a breach of contract (as *supra*, IV. a), are never the subject of garnishment until reduced to debts by the entry of judgment: and the mere rendering of a verdict upon such a claim in suit does not change its character as to liability to garnishment process. This general rule is ordinarily put upon the ground that a claim in tort is unliquidated; but it has been held that a verdict will liquidate such an uncertain claim and yet not make it a debt, so as to be subject to garnishment, until the entering of judgment upon it. (*Supra*, III.)

As to claims in damages for the breach of a definite contract, they are ordinarily no more garnishable than claims in tort, being for amounts which can be determined only by the aid of a jury; but in the few cases where such claims do not depend upon any uncertain amount, but the recovery upon them, if anything, is upon a certain measure of damages not resting upon opinion, they may generally be garnished. (*Supra*, IV. a.)

In cases of contract to pay an amount of money unknown at the time of contract but to be determined by future events, the rule is, roughly, that such a claim is garnishable if the contract itself contains a statement of a standard by which the amount to become due may be easily determined. (*Supra*, IV. b.) In some states, as in New Hampshire, when it is certain that some amount will be due under such a contract, and the only contingency in regard to the claim is as to its amount, it is subject to the process; but when this contingency is combined with uncertainty as to whether anything will ever be due, the contrary rule generally prevails. Similarly, when a certain sum is absolutely due, but something additional may grow due later, this uncertainty does not prevent garnishment of the certain amount. (*Supra*, IV. b. 1.)

Where claims upon contracts, such as construction contracts, are subject to a lien, they are not garnishable (*supra*, IX. b, 2); and the same is true of claims which are uncertain in amount, owing to a provision for a forfeiture of uncertain extent in case of default in complying with all the terms of the contract (*supra*, IX. b, 3); but where the only uncertainty in regard to such a claim results from the fact that the amount to be due is subject to the estimate of an engineer or architect, it is subject to the process; but not until the amount has been fully earned, and all conditions precedent have been performed, by the owner of the claim, and there is nothing left for him to do to entitle him to the fund. (*Supra*, IV. b, 4.)

Claims for losses upon fire insurance policies, before any adjustment of the amount to be due, are the subject of conflicting decisions, the authorities being rather evenly divided; but there is little question that claims before proper proofs of loss have been made in accordance with the terms of the policy, as well as before adjustment of the amount, are not liable to garnishment, unless the garnished insurer has waived this requirement of the policy; and if the insurer still has an option, not exercised at the time of garnishment, to repair or replace the property injured or destroyed, this imports such uncertainty as ordinarily to relieve the claim from liability to the process. (*Supra*, IV. b, 5.)

The surplus eventually to arise upon a contract of pledge (*supra*, IV. b, 6), of deposit to cover current advances or a contingent liability (*supra*, IV. b, 7), of chattel mortgage (*supra*, IV. b, 8), or of an assignment for the benefit of creditors (*supra*, IV. b, 9), may be said to be usually subject to this process. In the case of pledge this statement is, of course, limited to cases where the pledgee has a power of sale; in the case of deposit, it would seem that the surplus should be garnishable when the operation of the process will not interfere with the special purpose for which the deposit is made; in all these four cases the tendency is to allow garnishment where it is clear that a surplus will actually arise; and in some jurisdictions it is the practice to continue the garnishment proceedings until the embarrassing contingency has been removed by sale, or otherwise; but the authorities are respectable in number which deny the applicability of the process to any such uncertain claim.

And claims upon *quantum meruit* are, except in a few instances, not subject to garnishment (*supra*, IV. b, 10); and, even more invariably, claims to support, until breach of the contract to support, are excluded from the operation of the process. (*Supra*, IV. b, 11.) Obligations payable absolutely, or at the option of the payor, in property other than money, or even

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in labor, although not debts, have yet been sometimes held to be the subject of garnishment, even before breach of the contract; but generally not. (*Supra*, IV. b, 12.)

Demands uncertain merely from the fact that the accounts between the parties, which are not subject to any matter of opinion, are unsettled and unadjusted, are not ordinarily for that reason exempt from the process. (*Supra*, IV. c.)

Similarly, unsettled claims between partners upon the firm accounts are not garnishable, the reason being primarily that to settle the accounts would involve an accounting in equity; unless there is evidence from which it can be inferred that a balance has been struck between the defendant and the firm, or the defendant and his partner. But in the case of garnishment of the claim or interest of an individual partner in a debt owed to his firm, although the difficulties seem to be greater in number than in the simpler case of demands between partners, there are some decisions subjecting such an interest to the process; and where the fund in question is within the control of the court it would seem that there is no difficulty. The converse case of a debt owed to the defendant by the firm of which the garnishee is a member is also subject to the rule excluding partnership claims from garnishment. A debt owed to a firm may be garnished by a creditor of a surviving partner; but debts due to individuals jointly whose relation is not one of partnership are ordinarily subject to the same rules as debts to a partnership; where it appears, however, that there are no debts owed by the individuals jointly, debts to them are sometimes subject to garnishment to satisfy the debt of one. (*Supra*, IV. d.)

In the case of equitable claims generally, there is general unanimity in excluding them from garnishment, in the absence of statutes providing for "equitable garnishment," which is in effect a different remedy. (*Supra*, V. a.) In the case of express trusts, however, there is more divergence in the cases; there the decision depends primarily upon the question whether the trustee has discretionary powers in the exercise of his trust, in which case the courts are unanimous in excluding the equitable claim of the beneficiary from process of garnishment to subject it to payment of his debts. If the trustee has no such discretion, then the question ordinarily is whether the beneficiary has a right of action at law against the trustee for his claim, and if he has, whether for a certain amount: if he has a legal cause of action for a certain amount, it is garnishable; if for an uncertain amount only, generally not. (*Supra*, V. b.)

Although in the absence of statute any claim against an executor or administrator was once not garnishable, whether liquidated or not, when a representative, upon garnishment, admits the possession of assets sufficient to pay the debts of the estate, he is generally garnishable as to a distributive share or residuary legacy; but even when he does not admit the existence of such funds he is often subject to garnishment, and to avoid interference with the administration of the estate it is provided that the order subjecting such a demand to garnishment shall not take effect until the estate is fully administered, and the case will be continued until that time. (*Supra*, VI.)

In cases where a garnishee sets up in his answer a counterclaim unliquidated in amount, by way of set-off or recoupment, there are three classes of decisions. In the first it is decided that the unliquidated set-off has the effect of rendering the claim of the principal defendant itself uncertain in amount so as not to be garnishable; in the second class, garnishment is not allowed because the unliquidated counterclaim is greater in amount than the principal defendant's claim; and in the third, garnishment of the principal claim is allowed, but the unliquidated set-off is not allowed against it, as upon the ground that the set-off is the subject of future litigation between the parties. And it would seem that an equitable set-off is allowable in an action in equity against liability in the garnishment proceedings, upon the usual grounds for the granting of such relief; and in the garnishment proceeding itself, an equitable set-off is sometimes allowed, and sometimes not, upon the ground that garnishment is purely a legal remedy. (*Supra*, VII.) L. B. B.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, *Plff. in Err.*,

v.

Steve PHILLIO.

(.....Tex.....)

A railroad company is under no obligation to protect persons who resort to its stations to aid the departure of friends who are to become passengers on its cars, from assaults by persons lounging about the stations, although such duty may exist as to the intending passengers.

(October 23, 1902.)

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of the District Court for Falls County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been inflicted on plaintiff while in defendant's passenger station. *Reversed.*

The facts are stated in the opinion.

Messrs. **A. P. McCormick** and **Frank Andrews** for plaintiff in error.

Messrs. **E. T. Johnson, T. N. Graham,** and **N. J. Lewellyn** for defendant in error.

Gaines, Ch. J., delivered the opinion of the court:

The following is the statement of this case, together with their conclusions upon the evidence, filed by the court of civil appeals: "This is an action by the appellee, Steve Phillio, against the railroad company to recover damages for injuries sustained, arising from the following state of facts, which are as substantially alleged in his petition: Plaintiff and his wife went to the depot of the appellant's road in the town of Calvert for the purpose of procuring a ticket for his wife to the town of Marlin. She at the time was sick and in feeble condition. While waiting in the waiting room of the depot for the train, and after the ticket had been purchased and the baggage checked, the defendant permitted one Allen, who was alleged to be a strong, active, and robust white man, and being in a drunken and rowdy condition, to sing vulgar and indecent songs and use vulgar and indecent

NOTE.—For another case in this series as to liability of railroad company for assault on person in station house, though not a passenger, by employees and strangers, see Krantz v. Rio Grande Western R. Co. (Utah) 30 L. R. A. 297.

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language in the presence of plaintiff and his wife, and, being armed with a pocketknife open in his hand, make an unjustifiable assault upon the plaintiff and his wife, by which the plaintiff and his wife were greatly intimidated, causing them to become frightened, and causing plaintiff's wife to become very nervous and sick. There are further allegations to the effect that the agent of the appellant at the depot at that time was present, and witnessed the assault and wrongful conduct as alleged, inflicted upon the plaintiff and his wife by Allen, or was in a position to see the same, and that no steps were taken by the agent to prevent the assault or the wrongful conduct complained of. Upon trial of the case below, verdict and judgment were in favor of the plaintiff for the sum of $400. We find that the evidence in the record substantially sustains these averments, and the judgment and verdict below are supported by the evidence found in the record." The court of civil appeals found no error in the proceedings, and affirmed the judgment of the trial court.

We are of the opinion that the conclusions of that court, in so far as they pertain to the right of recovery by reason of the assault upon, and insulting conduct towards, the wife of the plaintiff, are correct, but do not concur in the proposition that the evidence showed any right of action in the plaintiff on account of the outrage of Allen upon himself personally. The wife, having entered the depot, and a ticket having been procured for her, became a passenger of the defendant company, and the duty devolved upon the company's agent to protect her against assault and insulting conduct on the part of third persons, provided he knew of such misconduct or had reasonable grounds to anticipate it. As to the plaintiff the case is different. He went to the depot merely to assist his wife in taking the train, and with no intention of becoming a passenger himself. He was there by the implied invitation of the company, and was not a trespasser. The railway company owed him the duty which is owed by the owners of property to persons who enter upon it by their invitation, and no more. That duty is to use ordinary care to see that the premises are kept in a reasonably safe condition, so that persons entering thereupon by invitation are not injured thereby. *Hamilton* v. *Texas & P. R. Co.* 64 Tex. 251, 53 Am. Rep. 756; *Texas & P. R. Co.* v. *Best*, 66 Tex. 116, 18 S. W. 224. In the case of *Louisville & N. R. Co.* v. *Crunk*, 119 Ind. 542, 21 N. E. 31, the court says: "The defendant, in contracting to carry the passenger Naas in his sick and enfeebled condition, contracted an obligation which could only be carried out by Naas being carried upon the train and seated in the car. By thus contracting to carry Naas as a passenger, it took upon itself the obligation of allowing him assistants to place him upon the train and seat him in the car, and the compensation received by the defendant for conveying Naas from Mt. Vernon to his destination included as well the right to have assistants place him in the car as the carrying him after being so placed in the car, and the defendant owed the same obligation to his assistants while necessarily entering and leaving the car with Naas as it owed to Naas himself." So far as we have been able to discover, this case, in so far as it holds that the railway company owed the same duty to the assistants which it owed to the passenger, stands by itself, and unless there be a distinguishing feature in the fact that owing to the enfeebled condition of the passenger, which made it necessary for his friends to assist in boarding the train and securing a seat (which we doubt), it is in opposition to all the authorities upon the question.

Our conclusion is that, since the plaintiff was not a passenger, the defendant company did not owe him the duty of protection against the injurious actions of third persons, and that, therefore, he was not entitled to recover for the misconduct of Allen towards himself.

Therefore *the judgment of the District Court and that of the Court of Civil Appeals is reversed*, and the cause remanded.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

S. M. BURT *et al., Plffs. in Err.*,
v.
UNION CENTRAL LIFE INSURANCE COMPANY of Cincinnati, Ohio.

(44 C. C. A. 548, 105 Fed. 419.)

1. **The innocence of an insured who was executed after conviction of a capital crime** does not change the rule that insurance cannot be recovered upon the life of a person who is executed for crime, even if the policy makes no provision for forfeiture on that account.

2. **A contract written to insure against a capital conviction** in the established courts of competent jurisdiction, in the event that such conviction is unjust and un-

NOTE.—The above case is one of first impression on the important question decided, to the effect that a life insurance policy does not cover a case of death by legal execution, though the insured was innocent of the crime for which he was convicted. The decision is affirmed by the Supreme Court of the United States in 187 U. S. 362, 47 L. ed. —, 23 Sup. Ct. Rep. 139.

For express exceptions, in insurance policies, of death caused by criminal act or violation of law, see, in this series, Duran v. Standard Life & Acci. Ins. Co. (Vt.) 13 L. R. A. 637; Gresham v. Equitable Life & Accl. Ins. Co. (Ga.) 13 L. R. A. 838, and *note;* Cornwell v. Fraternal Accl. Asso. (N. D.) 40 L. R. A. 437; and Wells v New England Mut. L. Ins. Co. (Pa.) 53 L. R. A. 327.

For a decision as to the hanging of a person by a mob as an accident, see Fidelity & C. Co. v. Johnson (Miss.) 30 L. R. A. 206.

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warranted by the evidence, is void as being against public policy.

(McCormick, Circuit Judge, dissents.)

(December 4, 1900.)

ERROR to the Circuit Court of the United States for the Western District of Texas to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a policy of life insurance. *Affirmed.*

The facts are stated in the opinions.

Argued before *Pardee*, *McCormick*, and *Shelby*, Circuit Judges.

Mr. **Gardner Ruggles,** for plaintiffs in error:

The only implied understanding or agreement between assured and the company (the policy being silent as to death of assured at the hands of the law) was that the assured should not intentionally or voluntarily, while of sound mind, vary the risk insured against by commission of crime which effected such death.

Amicable Society for a Perpetual Life Assur. Office v. *Bolland*, 4 Bligh N. R. 194; *Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *Terry* v. *Life Ins. Co.* 1 Dill. 403, Fed. Cas. No. 13,839; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236; *New York Mut. L. Ins. Co.* v. *Armstrong*, 117 U. S. 600, 29 L. ed. 1000, 6 Sup. Ct. Rep. 877; *Dean* v. *American Mut. L. Ins. Co.* 4 Allen, 96; *Breasted* v. *Farmers' Loan & T. Co.* 4 Hill, 73, 8 N. Y. 299, 59 Am. Dec. 482; *Supreme Commandery, K. of G. R.* v. *Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Clift* v. *Schwabe*, 3 C. B. 437; *Hatch* v. *Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541; 1 May, Ins. §§ 308 *et seq.*

Although assured died at the hands of the law, nevertheless, if he was innocent, in fact, of the act for which he suffered, there was no such voluntary or intentional variation of the risk on his part, or violation of any covenant or agreement.

Breasted v. *Farmers' Loan & T. Co.* 8 N. Y. 299, 59 Am. Dec. 482; Bliss, Life Ins. § 223; 2 Biddle, Ins. § 837; 2 Black, Ins. § 910; 1 May, Ins. § 326; *Phillips* v. *Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549; *Connecticut Mut. L. Ins. Co.* v. *Groom*, 86 Pa. 92, 27 Am. Rep. 689; *Schultz* v. *Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676; *Connecticut Mut. L. Ins. Co.* v. *Akens*, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. Rep. 155; *Robertson* v. *French*, 4 East, 130, 14 English Ruling Cases, 13; Joyce, Ins. § 2606.

Although he died at the hands of the law, and actually killed his wife (the act for which he suffered), yet, if he was, in fact, insane and wholly irresponsible for his acts at the time he killed her, there was still no such voluntary or intentional variation of the risk, or violation of the contract on his part, as avoided or forfeited the policy, and his situation was the same as if he had been wholly innocent of the act.

Manhattan L. Ins. Co. v. *Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 531–534, 30 L. ed. 740, 742, 743, 7 Sup. Ct. Rep. 685; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 586, 21 L. ed. 240; *Horn* v. *Anglo-Australian & U. F. L. Ins. Co.* 7 Jur. N. S. 673; *Hartman* v. *Keystone Ins. Co.* 21 Pa. 466; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623; *De Gogorza* v. *Knickerbocker L. Ins. Co.* 65 N. Y. 232; 1 May, Ins. § 320; Bliss, Life Ins. §§ 225–238; *Van Zandt* v. *Mutual Ben. L. Ins. Co.* 4 Bigelow, Life & Acci. Ins. Rep. 318; *Coverston* v. *Connecticut Mut. L. Ins. Co.* 3 Ins. L. J. 113, Fed. Cas. No. 3,290; *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755; *Dormay* v. *Borrodaile*, 10 Beav. 335; *Stormont* v. *Waterloo Life & Casualty Assur. Co.* 1 Fost. & F. 22; *Fowler* v. *Mutual L. Ins. Co.* 4 Lans. 202; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *Eastabrook* v. *Union Mut. L. Ins. Co.* 54 Me. 224, 89 Am. Dec. 743; *St. Louis Mut. L. Ins. Co.* v. *Graves*, 6 Bush, 268.

Messrs. **George F. Pendexter** and **George E. Shelley,** for defendant in error:

It is against public policy to permit a recovery upon an insurance policy issued on the life of a person who has died at the hands of the law, under judgment and sentence of a court of competent jurisdiction.

Amicable Society for a Perpetual Life Assur. Office v. *Bolland*, 4 Bligh N. R. 194; *Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; *Clift* v. *Schwabe*, 3 C. B. 437; Bliss, Life Ins. p. 367.

Contracts of insurance originating in fraud on the part of the assured cannot be enforced, notwithstanding the terms of the policy are silent on the subject.

Phœnix Ins. Co. v. *Slaughter*, 12 Wall. 404–406, 20 L. ed. 444, 445; *Ex parte Daintree*, 18 Week. Rep. 396; *Wheelton* v. *Hardisty*, 8 El. & Bl. 232; Bacon, Ben. Soc. § 340*a*; Bunyan, Life Assurance, p. 88; *Holman* v. *Johnson*, 1 Cowp. 341; *Scott* v. *Brown* [1892] 2 Q. B. 724; *Moore* v. *Woolsey*, 4 El. & Bl. 243; *New York Mut. L. Ins. Co.* v. *Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Schreiner* v. *High Court, C. O. of F.* 35 Ill. App. 576; *Manufacturers' L. Ins. Co.* v. *Anctil*, 28 Can. S. C. 103.

Shelby, Circuit Judge, delivered the opinion of the court:

This suit is on a life insurance policy, and is brought by S. M. Burt and H. R. Burt, citizens of Texas, against the Union Central Life Insurance Company, a corporation chartered under the laws of Ohio. The policy was issued by the defendant on August 1, 1894, for $5,000, on the life of William E. Burt, and was payable at his death to his wife, Anna M. Burt, if living, otherwise to the executors, administrators, or assigns of the insured, within sixty days after proof of death. The annual premiums for

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the policy were duly paid. The policy contained no provision for forfeiture in the event that the insured should be executed under sentence of the law. On September 10, 1895, Anna M. Burt and William E. Burt assigned in writing to the plaintiffs, to whom they were indebted, a one-half interest in the policy. Anna M. Burt died intestate on July 24, 1896. She left surviving her no descendants, and her husband, William E. Burt, became entitled to any interest she had in the policy. By assignment from William E. Burt, and as his heirs and next of kin, the plaintiffs are the sole owners of the policy. William E. Burt was indicted for the murder of Anna M. Burt, in the district court of Travis county, Texas, and was tried on November 27, 1896. In addition to the plea of not guilty, he pleaded insanity. He was found guilty by the jury of murder in the first degree, and was by the court sentenced to be hanged; and on May 27, 1898, pursuant to the sentence, he was executed by the sheriff of Travis county, Texas. These facts are all alleged in the plaintiffs' petition. The petition then avers that the insured, William E. Burt, was in fact innocent of the crime of which he was convicted. To quote the petition as abridged by the plaintiffs' counsel, "Notwithstanding said conviction and sentence, said William E. Burt did not in fact commit said murder, nor participate therein, but that, if he did, his policy was not avoided thereby, because he was insane." The defendant demurred to the petition because it appeared therefrom that the insured died at the hands of the law, under judgment of a court of competent jurisdiction. The circuit court, Judge Maxey presiding, sustained the demurrer. The plaintiffs declining to amend the petition, the case was dismissed. In this court it is assigned that the circuit court erred in sustaining the demurrer.

The industry of counsel has been able to find but one case in which a suit was brought on a life insurance policy when the insured had been tried and executed for the commission of crime. That case is *Amicable Society for a Perpetual Life Assur. Office* v. *Bolland*, 4 Bligh N. R. 194, 211, and it is better known and oftener cited as the *Fauntleroy Case*. It was an action by assignees in bankruptcy to collect a policy of insurance on the life of one Fauntleroy. The policy was made payable to his administrators or assigns. Fauntleroy was convicted of forgery, then a capital offense, and was executed. The lord chancellor (Lyndhurst) delivered the opinion. After stating the case, he said: "The question, under these circumstances, is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed,—whether, under such circumstances, the parties representing him and claiming under him can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the noble lord . . . now present, and we have both come to the conclusion that the assignees cannot maintain this suit. It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money; is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely; the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that, in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering this policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went, at least, altogether void?"

This case has been cited approvingly in many text-books on insurance, and by the Supreme Court of the United States. *Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300. That it correctly states the law has never been questioned so far as we know. It is quoted and relied on by the learned counsel for both parties to this suit. It is conceded, however, that there is a material difference between the facts of that case and this. Here the petitioners aver that the insured was guiltless, although convicted and executed. They aver in another count that, if he actually killed his wife, he was insane when he committed the act, and that the defense of insanity was presented unsuccessfully at the trial. If the insured did commit the homicide while insane, he was not guilty of murder. The meaning of the petition, therefore, is that at the trial of Burt, the insured, there was a miscarriage of justice, —that he was unjustly convicted. It must be and is conceded as settled law that, if he had been rightfully convicted, his assignees could not recover on the policy, because, as was held in the *Fauntleroy Case* (stating the point most favorably for the plaintiffs in error), the policy would have been void if it had expressly provided for payment of the amount thereof on the just conviction and execution of the insured. Does a contract of insurance having no special provision on the subject cover the loss when the insured is tried and condemned in, and executed by an order of, a court of competent jurisdiction, when he is in fact

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innocent of the crime with which he is charged? This precise question, we are advised by counsel, has never been decided. We will apply to the question the illustration used by the court in the *Fauntleroy Case*. Would the policy sued on have been valid if it had provided, in the event of the insured's being indicted, tried, convicted, and executed for murder, when in fact he was innocent, that the amount of the policy should be paid to his administrators or assigns? This condition would not be as encouraging to the insured, determined on crime, as that supposed by Lord Lyndhurst, but it would at least let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution; that the beneficiaries would have a right of action on the policy, with chances of success, even if he was apprehended, convicted, and executed. It is well settled that no one can lawfully contract to do that which has a tendency to be injurious to the public or against the public good. Can there be a legal life insurance against the miscarriage of justice? Can contracts be based on the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied in a kind of accident insuranee, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another jury and court, not infallible. That juries and courts do make mistakes is unquestionable. It may be admitted that the history of criminal jurisprudence shows that innocent defendants have, in rare instances, by a departure from proper rules of evidence, been convicted of murder and executed. Cases in which the juries, the courts, and the pardoning power are so at fault are so rare that they are not likely to be in the contemplation of parties making contracts of life insurance. The terms of the contract of life insurance, it seems, would exclude the idea, as in the case of suicide by the insured while sane, that death at the hands of the law was within the contemplation of the contracting parties. *Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300. But, if parties made express contracts on the subject, could the courts lawfully enforce them? It is the policy of every state or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation,—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kind were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon of the executive. Such contracts would encourage litigation and bring reproach upon the state, its judiciary and executive, and would, we think, be against public policy and void. The policy of the law often permits, and even requires, for error, a new trial of a convicted defendant, but never after his execution. The principle that makes void a wagering contract as to a rise or fall in the price of goods in the markets (*Irwin* v. *Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160) would make void, for stronger reasons, a contract based on the failure of courts and juries to perform their respective duties. Now, to apply the reasoning of Lord Lyndhurst in the *Fauntleroy Case*, if a policy with such a form of condition inserted in it in express terms cannot, on grounds of public policy, be sustained, a policy without such a condition cannot be enforced on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void. In some cases it has been held that a trial and conviction or acquittal in a criminal case are conclusive as to the facts decided, when brought in question by the parties in a subsequent civil suit. *Coffey* v. *United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; *Roberts* v. *State*, 160 N. Y. 217, 224, 54 N. E. 678; *People* v. *Petrea*, 30 Hun, 106. But the authorities on this subject are conflicting. 1 Freeman, Judgm. 4th ed. § 319, and cases there cited. The assignee takes the policy subject to all defenses and equities which attached to it in the hands of the assignor. Bliss, Life Ins. § 331. If the judgment of conviction against Burt is conclusive as to his guilt in this suit by the assignees of the policy, this case would be brought precisely within the principle decided in the *Fauntleroy Case*, for the averment in the petition of the conviction of Burt would avoid the effect of the allegation of his innocence. But we prefer to base our conclusion on the ground that a contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction in the event that such conviction is unjust and unwarranted by the evidence, is void, as being against public policy.

The judgment of the Circuit Court is affirmed.

McCormick, Circuit Judge, dissenting:

I cannot concur in the judgment of the court in this case. It seems to me that the case does not call in question in any manner, or come under the authority of or the reasoning in, the case of *Amicable Society for a Perpetual Life Assur. Office* v. *Bolland*, 4 Bligh N. R. 194, 211. The action might very well have been brought in the common form on the policy of insurance, and left it to the defendant to raise by its answer the questions that are herein raised. The plaintiffs, being so advised, chose to raise the question as they have done in their petition. The petition implies, if it does not expressly announce, that if the insured

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was in fact guilty of murder, and his death occurred by the execution of the sentence against him for that crime, the proof of such facts would avoid the civil contract on which this action is brought. The holders of the policy, however, expressly allege that the assured did not commit the homicide charged against him, and that, if he did commit the homicide, he was in such a condition of mental disorder as rendered him incapable at that time of committing murder. They allege that these pleas were presented on the trial of the indictment against the assured, and that on that trial, in a court of competent jurisdiction, the verdict and judgment were rendered against him, and sentence of death pronounced upon him and executed. The demurrer which was sustained in the circuit court must assume, either that the death of the assured by a judicial sentence for crime, though in fact he was wholly innocent, and merely the victim of mistake or miscarriage of justice, avoids the policy, or that the judgment of conviction in the criminal case is not only admissible to prove both the sanity and the guilt of the accused, but that it is conclusive evidence of both. I fully concur with counsel for the plaintiffs in error that the first question has never been directly heretofore decided. It is certainly not decided in either the *Fauntleroy Case* or the *Ritter Case*. The first of those cases proceeds upon the admission or assumption that the assured was guilty of forgery, as charged, and for which he was executed; no question being made as to his mental condition. In the latter case the question of the assured's sanity was submitted to the jury in the civil suit, and on the evidence and under the charge of the court the jury found against the policy holder. While the elaborate argument in the opinion of the Supreme Court announcing the decision in the case does not show that, if the insanity of the assured had been shown, his suicide while in that condition would not have avoided the policy, it seems to me to strongly imply that it would not. It seems to me that the ruling of the circuit court cannot be sustained, except upon the second ground indicated above, and that the practical effect of the judgment of this court is to set aside a general rule, which has received immemorial recognition, to the effect that "a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which it was rendered."

This is elementary. The reason of the rule, as expressed by Mr. Greenleaf, is: "If the defendant was convicted, it may have been upon the evidence of the very plaintiff [or party claiming the benefit] in the civil action; and, if he was acquitted, it may have been by collusion with the prosecutor. But, beside this, and upon more general grounds, there is no mutuality. The parties are not the same. Neither are the rules of decision and the course of proceeding the same. . . . The judgment [of a court of competent jurisdiction], being a public transaction, rendered by public authority, . . . [is] presumed to be faithfully recorded. It is, therefore, the only proper legal evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, whoever may be the parties to the suit in which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted, and sues . . . for malicious prosecution, the record of acquittal is evidence for the plaintiff to establish that fact, notwithstanding the parties are not the same. But if he were convicted of the offense, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault, for, as to matters involved in the issue, it is *res inter alios acta*." 1 Greenl. Ev. §§ 527, 538.

I am unable to see why public policy, which not only does not forbid, but seems to require, the courts of public justice, at the suit of proper parties, to make new inquiry as to the guilt of one who had been criminally charged and convicted of making an assault, should forbid the making of the inquiry sought to be made in this case, as to the real guilt of the assured in the matter for which he was charged, tried, and executed. It seems to me that the public interest and a sound public policy give stronger support to the general rule in a case like the present than in a suit for damages by one claiming to have been assaulted by a defendant who had been convicted therefor in a criminal prosecution. In the case of *Coffey* v. *United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437, the parties to the civil suit were the same as the parties in the criminal action; the subject-matter was the same; the civil suit, if we may call it so, being for the recovery of a part of the punishment denounced by the penal statute against a crime charged in the criminal action. In that case the court says: "In both proceedings, criminal and civil, the United States are the party on one side, and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In the case of *Roberts* v. *State*, 160 N. Y. 217, 54 N. E. 678, the parties in the civil action were the state of New York and the claimant; being the same as the parties in the criminal action. And it is not held, as I read the decision, that the judgment of conviction in the criminal action was conclusive as to the fact of the guilt of the ac-

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cused. On the contrary, the opinion asserts: "It was, therefore, incumbent upon him [the plaintiff] to establish that he was improperly convicted and imprisoned, and the amount of damages he had sustained by reason thereof. While a great volume of evidence was given upon the second question [the amount of damages], we find nothing in the record which justified the board in finding that his conviction and imprisonment were improper; but, instead, the evidence upon which he was convicted and the judgment of conviction were introduced, both of which show that his conviction was proper,—the former presumptively, and the latter conclusively."

By this last word, "conclusively," the court could not have meant that no other evidence on that subject should have been received, because, if that had been their meaning, they would at once have held that the act of the legislature which authorized the proceeding was a void act; for this act recited upon its face that the claimant had been convicted and imprisoned for the alleged crime of burglary, and no question appears to have been made, either in the act or before the board of claims, that the conviction was not had in a court of competent jurisdiction.

Petition for rehearing denied January 15, 1901.

Affirmed by Supreme Court of United States December 22, 1902.

ALABAMA SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, *Appt.*,
v.
W. S. CROCKER.

(.....Ala.....)

1. **Questions arising on motion to strike** averments from the complaint can be considered on appeal, only when properly presented by bill of exceptions.
2. **A grandmother may recover damages** for mental anguish for failure promptly to deliver to her a telegram announcing the serious illness of her grandchild.
3. **Evidence as to the number of plaintiff's grandchildren** and their location is irrelevant in an action by a grandmother for damages for neglect to deliver to her a telegram announcing the serious illness of one of them.

(November 27, 1902.)

APPEAL by defendant from a judgment of the Birmingham City Court in plaintiff's favor in an action brought to recover damages for failure to deliver a telegram promptly. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Walker, Tillman, Campbell, & Porter** for appellant.

Messrs. **Ward & Houghton,** for appellee:

Damages can be awarded for mental pain or suffering by reason of the failure to deliver a telegram.

Western U. Teleg. Co. v. *Henderson,* 89 Ala. 510, 7 So. 419; *Western U. Teleg. Co.* v. *Wilson,* 93 Ala. 32, 9 So. 414; *Western U. Teleg. Co.* v. *McNair,* 120 Ala. 99, 23 So. 801; *Western U. Teleg. Co.* v. *Adair,* 115 Ala. 441, 22 So. 73.

The grandmother was entitled to recover in this case.

Western U. Teleg. Co. v. *Henderson,* 89 Ala. 510, 7 So. 419; *Western U. Teleg. Co.* v. *Luck* (Tex. Civ. App.) 40 S. W. 753, Reversed in 91 Tex. 178, 41 S. W. 469; *Western U. Teleg. Co.* v. *Robinson,* 97 Tenn. 638, 34 L. R. A. 431, 37 S. W. 545; *Cashion* v. *Western U. Teleg. Co.* 124 N. C. 459, 45 L. R. A. 160, 32 S. E. 746.

Dowdell, J., delivered the opinion of the court:

This is an action by the appellee against the appellant to recover damages for the negligent failure to deliver a telegraphic message. Damages are claimed for mental suffering and anguish. This is the main, and practically the only, question in the case. And it is sought in various ways to be raised,—by motions to strike out of the complaint certain averments, by demurrer, by objections to the introduction of evidence, and by written charges requested to be given to the jury. Questions on motions to strike will be considered on appeal only

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NOTE.—For conflicting authorities as to right to damages for mental anguish on account of default of telegraph company, see also *note* to Western U. Teleg. Co. v. Rogers (Miss.) 13 L. R. A. 859.

For subsequent cases in this series denying the right, see Wilcox v. Richmond & D. R. Co. (C. C. App. 4th C.) 17 L. R. A. 804; Connell v. Western U. Teleg. Co. (Mo.) 20 L. R. A. 182; Western U. Teleg. Co. v. Wood (C. C. App. 5th C.) 21 L. R. A. 706; International Ocean Teleg. Co. v. Saunders (Fla.) 21 L. R. A. 810; Francis v Western U. Teleg. Co. (Minn.) 25 L. R. A. 406; Morton v. Western U. Teleg. Co. (Ohio) 32 L. R. A. 735; Peay v. Western U. Teleg. Co. (Ark.) 39 L. R. A. 463; Western U. Teleg. Co. v. Robinson (Tenn.) 34 L. R. A. 431; Western U. Teleg. Co. v. Ferguson (Ind.) 54 L. R. A. 846; Connelly v. Western U. Teleg. Co. (Va.) 56 L. R. A. 663; and Robinson v. Western U. Teleg. Co. (Ky.) 57 L. R. A. 611.

For cases sustaining the right, see Mentzer v. Western U. Teleg. Co. (Iowa) 28 L. R. A. 72; Cashion v. Western U. Teleg. Co. (N. C.) 45 L. R. A. 160; and Gray v. Western U. Teleg. Co. (Tenn.) 56 L. R. A. 301.

As to validity of statute making telegraph company liable for mental anguish caused by failure promptly to deliver message, see Simmons v. Western U. Teleg. Co. (S. C.) 57 L. R. A. 607.

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when properly presented by bill of exceptions. That was not done here. The bill of exceptions fails to show any ruling on the motion, and exception thereto. The question, however, as to whether damages for mental suffering can be recovered under the facts of this case, has been otherwise fairly presented on exceptions reserved to the introduction of evidence, and by charges requested and refused.

The telegram which it is alleged that the defendant negligently failed to deliver was as follows:

To L. C. Mullin,
Gate City, Ala.:—
Walter is worse. Come on midnight train. W. S. Crocker.

Walter was the four-year-old son of the sender, W. S. Crocker, and the grandson of the sendee, L. C. Mullin, who was the mother-in-law of Crocker. The message was written and delivered to the defendant at 1 P. M., and paid for in ample time for its transmission and delivery to the sendee, in order for her to take the train designated. The nondelivery of the telegram is not denied. In its transmission from the receiving office to the delivery office of the defendant, the name of the sendee was changed. This was the negligence or fault of defendant's agents or employees. The agent who received the message for transmission knew the sender and the sendee, and knew the relationship that existed between them, and knew that Walter, the person mentioned in the message, was the son of the plaintiff, and grandson of L. C. Mullin. In consequence of the failure to deliver the telegram, Mrs. Mullin did not reach the home of the plaintiff until after the death of his son; and then, after having been sent for by the plaintiff. In *Western U. Teleg. Co.* v. *Ayers*, 131 Ala. 391, 31 So. 78, where the relationship between the sender and sendee was that of brother-in-law, and the relationship of the sendee to the infant child mentioned in the message was that of uncle, we expressed an unwillingness to extend the doctrine of recoverable damages for mental pain and suffering for the negligent failure to deliver a telegraphic message to that relationship. Here the relationship between the sender and sendee is nearer and stronger. It is the closest of all relationship by affinity, and from which, if love and affection do not naturally spring, it is on account of some exceptional reason or cause, —a love, too, that is strengthened in the birth of the grandchild. The tender and doting love of the grandmother for her grandchild, and the reciprocal, confiding love of the little child, is a matter of common knowledge. The father, in sending the message, knew of the affection existing between his child and the grandmother, and would have been an unnatural father not to have been sustained and comforted by her presence, or pained and grieved by her absence, in the trying hour of the death of his son. We are of the opinion that the relationship between sender and sendee, and person named in the message, is such as to warrant the recovery of damages for mental suffering and anguish. The rulings of the trial court on the admission of evidence and in the giving and refusal of written charges, being in harmony with this view, were free from error.

The defendant, on the cross-examination of Mrs. L. C. Mullin, sought to show by her how many children and grandchildren she had, and how widely scattered they were, which the court, on plaintiff's objection, refused to permit. This evidence was wholly immaterial and irrelevant, and the court committed no error in sustaining plaintiff's objection to its introduction.

There was a motion for a new trial, which was denied. The grounds of the motion, with the exception of the one as to the verdict being excessive, raised the same questions raised on the trial, and which we have already considered. As to the verdict being excessive, we see no reason for differing with the finding of the jury and the trial court in sustaining the verdict.

We find no reversible error, and the judgment will be affirmed.

FIRST NATIONAL BANK OF MONTGOMERY, *Appt.*,
v.
A. P. TYSON.

(133 Ala. 459.)

1. **Pillars erected in front of a building** so as to extend 22 inches onto the sidewalk are a public nuisance.
2. **The owner of a building abutting on a highway is specially injured by the erection of pillars** in the street in front of an adjoining lot, so as to be entitled to an injunction, where they obstruct the light and air coming from the street to his property, and the view to and from his property along the street, so as to depreciate the rental value of the property.
3. **An owner of land abutting on a public street has an easement of view** from every part of the street, of

NOTE.—As to right of abutting owner to light and air from highway, see cases in *notes* to Selden v. Jacksonville (Fla.) 14 L. R. A. 370; Egerer v. New York C. & H. R. R. Co. (N. Y.) 14 L. R. A. 383; and Case v. Minot (Mass.) 22 L. R. A. 543; also Block v. Salt Lake Rapid Transit Co. (Utah) 24 L. R. A. 610; Willamette Iron Works v. Oregon R. & Nav. Co. (Or.) 29 L. R. A. 88; and Townsend v. Epstein (Md.) 52 L. R. A. 409.

For encroachments on streets by awnings, awning posts, bay windows, things overhanging streets, etc., see Augusta v. Burum (Ga.) 26 L. R. A. 340, and *note;* State v. Clarke (Conn.) 39 L. R. A. 670, and annotation beginning on page 667; Hibbard v. Chicago (Ill.) 40 L. R. A. 621; and State v. Kean (N. H.) 48 L. R. A. 102.

As to right to private remedy for public nuisance, or injury, see, in this series, Griffith v. Holman (Wash.) 54 L. R. A. 178, and cases in *footnote* thereto.

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which he cannot be deprived by encroachments placed on it by an adjacent proprietor.

4. **One whose property is injured by the erection of pillars** in the highway need not apply to the municipal authorities for relief before applying for an injunction.

(May 20, 1902.)

APPEAL by defendant from a judgment of the City Court of Montgomery in favor of complainant in an action brought to enjoin the maintenance of pillars on a sidewalk adjacent to complainant's property. *Affirmed.*

The bill alleged that complainant owned a building used as a bank and office building extending up to the building line of the street, but not encroaching thereon. That defendant owned a building lot upon which it was constructing a building, in front of which it intended to place stone columns as ornaments, to extend upward 16 feet in height, and 2 feet, more or less, beyond the established building line into the street, of which the bases were already laid. That said encroachment would greatly damage complainant beyond what is common to the public generally by depreciating his property, and obstructing the light, air, and view incident thereto, and by depreciating the rental value thereof.

A temporary injunction having been granted, defendant filed an answer setting up three pleas, in the first of which it alleged that complainant's building also encroached on the highway. Second, that, before beginning the building defendant called upon the proper municipal authorities to establish the true building line, which they failed to do, but that the city granted permission to project the base of the pillars 26 inches beyond the property line, and to set the columns thereon; and that under this authority its action was lawful. Third, that complainant permitted defendant to proceed with the construction of a costly building, knowing its intention to place the columns on the sidewalk, having granted permission to erect the building according to the plans after having seen them, and withdrawing such permission only after it would cost defendant $10,000 to change the plans; whereby complainant was estopped from insisting that the columns were not lawful.

There was also a demurrer to the bill, because there was not sufficient averment of intention to obstruct the street or create a nuisance; complainant did not show that he would suffer irreparable damage; it does not appear that the city had not consented to the erection of the columns; no obstruction of the street is shown; and it is not shown that complainant has applied to the proper authorities of the city to abate the nuisance.

Further facts appear in the opinion.

Messrs. **Watts, Troy, & Caffey** for appellant.

Mr. **O. C. Maner,** for appellee:

The alleged encroachment will be a public nuisance when completed.

Elliott, Roads & Streets, 2d ed. § 645; *Webb* v. *Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289; *Costello* v. *State*, 108 Ala. 45, 35 L. R. A. 303, 18 So. 820; *Reed* v. *Birmingham*, 92 Ala. 339, 9 So. 161; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Flynn* v. *Taylor*, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; *Dill* v. *Camden Bd. of Edu.* 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739; *State* v. *Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *State* v. *Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Cabbell* v. *Williams*, 127 Ala. 320, 28 So. 405; *State* v. *Edens*, 85 N. C. 526; *McCloughry* v. *Finney*, 37 La. Ann. 31.

The appellee will be injured by this encroachment to an extent beyond that suffered by the general public, and may maintain a bill in equity to have the nuisance abated.

Cabbell v. *Williams*, 127 Ala. 320, 28 So. 405; *Douglass* v. *Montgomery*, 118 Ala. 599, 43 L. R. A. 376, 24 So. 745; *Nininger* v. *Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Doe ex dem. Kennedy* v. *Jones*, 11 Ala. 63; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Dill* v. *Camden Bd. of Edu.* 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739; *Flynn* v. *Taylor*, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; *Casebeer* v. *Mowry*, 55 Pa. 419, 93 Am. Dec. 766.

An abutter upon a public street has an easement for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon.

Story v. *New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Lahr* v. *Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528; *Barnett* v. *Johnson*, 15 N. J. Eq. 481; *Dill* v. *Camden Bd. of Edu.* 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; Elliott, Roads & Streets, 2d ed. 695.

An abutting proprietor has an easement of view over and along a public street.

Dill v. *Camden Bd. of Edu.* 47 N. J. Eq. 421; 10 L. R. A. 276, 20 Atl. 739; *Brummell* v. *Wharin*, 12 Grant Ch. (U. C.) 283; *Trenor* v. *Jackson*, 46 How. Pr. 389; *Townsend* v. *Epstein*, 93 Md. 537, 52 L. R. A. 409, 49 Atl. 629; *Hallock* v. *Schoyer*, 33 Hun, 111.

A municipality, except by valid legislative authority, cannot license or permit any private encroachment on a public highway; and such encroachment is a nuisance *per se*, even though permitted and sanctioned by the authorities of the city.

State v. *Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Webb* v. *Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289; *Costello* v. *State*, 108 Ala. 45, 35 L. R. A. 303, 18 So. 820; *Hoole* v. *Atty. Gen.* 22 Ala. 190; *Mobile* v. *Louisville & N. R. Co.* 124 Ala. 132, 26 So. 902; *Louisville & N. R. Co.* v. *Mobile, J. & K. C. R. Co.* 124 Ala. 162, 26 So. 895; Elliottt, Roads & Streets, 2d ed. § 653; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Flynn* v. *Taylor*, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; *Reimer's Appeal*, 100 Pa. 185, 45 Am. Rep. 373;

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Townsend v. *Epstein*, 93 Md. 537, 52 L. R. A. 409, 49 Atl. 629.

The "balance of injury" rule, *i. e.*, that the injunction ought not to have been granted because the appellant suffers much more injury on account of its issuance than the appellee would have suffered if the injunction should have been refused, ought not to obtain in this case, because any unauthorized encroachment on a public street is a nuisance *per se*, and the above rule cannot apply in such cases.

Saltmarsh v. *Tuthill*, 13 Ala. 410; *Wailes* v. *Couch*, 75 Ala. 134.

If the thing sought to be restrained is a nuisance *per se*, the courts should interfere to prevent the same before irreparable mischief is done.

Ogletree v. *McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112; Elliott, Roads & Streets, 2d ed. § 665; *Casebeer* v. *Mowry*, 55 Pa. 419, 93 Am. Dec. 766; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Newell* v. *Sass*, 142 Ill. 104, 31 N. E. 176; *Com.* v. *Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372; *Dill* v. *Camden Bd. of Edu.* 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739.

Even if appellee's building encroaches on the highway, that could be no defense to appellant if he should attempt to go 2 feet beyond appellee into the street.

Louisville & N. R. Co. v. *Mobile, J. & K. C. R. Co.* 124 Ala. 162, 26 So. 895; *McCloughry* v. *Finney*, 37 La. Ann. 31.

It was not necessary to allege in the bill that the complainant had applied to the proper authorities of the city of Montgomery to prevent the alleged nuisance.

Douglass v. *Montgomery*, 118 Ala. 611, 43 L. R. A. 376, 24 So. 745.

Any citizen of a town or city may maintain a bill in equity to enjoin the destruction of a public park or common.

Douglass v. *Montgomery*, 118 Ala. 599, 43 L. R. A. 376, 24 So. 745; *Sheffield & T. Street R. Co.* v. *Rand*, 83 Ala. 294, 3 So. 68.

Irreparable injury, as used in the law of injunctions, is not such injury as is beyond the possibility of compensation in damages; nor does it mean that it must be very great.

Elliott, Roads & Streets, 2d ed. § 665; *Com.* v. *Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Dill* v. *Camden Bd. of Edu.* 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739; *Townsend* v. *Epstein*, 93 Md. 537, 52 L. R. A. 409, 49 Atl. 629; *Cabbell* v. *Williams*, 127 Ala. 320, 28 So. 405; *Casebeer* v. *Mowry*, 55 Pa. 419, 93 Am. Dec. 766; *Flynn* v. *Taylor*, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; *Newell* v. *Sass*, 142 Ill. 104, 31 N. E. 176.

The rights of access, light, air, and view are easements in fee,—incorporeal hereditaments,—and form a part of the estate in the lots.

1 Hare, Am. Const. Law, 376; Lewis, Em. Dom. § 114; *Story* v. *New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Wyman* v. *New York*, 11 Wend. 487; *Child* v. *Chappell*, 9 N. Y. 246; *Schulte* v. *North Pacific Transp. Co.* 50 Cal. 592; *Denver* v. *Bayer*, 7 Colo. 113, 2 Pac. 6; *Dooly Block* v. *Salt Lake Rapid Transit Co.* 9 Utah, 31, 24 L. R. A. 610, 33 Pac. 229; *McDonald* v. *Stark*, 176 Ill. 456, 52 N. E. 37; *Zearing* v. *Raber*, 74 Ill. 412; *Maywood Co.* v. *Maywood*, 118 Ill. 61, 6 N. E. 866; *Newell* v. *Sass*, 142 Ill. 104, 31 N. E. 176; Dill. Mun. Corp. 4th ed. §§ 556*a*, 556*b*; *McQuaid* v. *Portland & V. R. Co.* 18 Or. 237, 22 Pac. 899; *Haynes* v. *Thomas*, 7 Ind. 38; *Garrett* v. *Lake Roland Elev. R. Co.* 79 Md. 277, 24 L. R. A. 396, 29 Atl. 830.

As long as a street is used for street purposes the appellant cannot encroach thereon with any permanent structure that will damage his neighbor.

Townsend v. *Epstein*, 93 Md. 537, 52 L. R. A. 409, 49 Atl. 629; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Flynn* v. *Taylor*, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; *Newell* v. *Sass*, 142 Ill. 104, 31 N. E. 176.

The appropriate remedy for obstructing an easement is an injunction to remove or restrain the obstruction.

Cabbell v. *Williams*, 127 Ala. 320, 28 So. 405; Elliott, Roads & Streets, 2d ed. § 665; *White* v. *Flannigain*, 1 Md. 525, 54 Am. Dec. 668; *McCloughry* v. *Finney*, 37 La. Ann. 31.

An injunction will be issued when the trespass reaches to the substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed, or where it would impair the just enjoyment of it in future.

Garrett v. *Lake Roland Elev. R. Co.* 79 Md. 277, 24 L. R. A. 396, 29 Atl. 830; *White* v. *Flannigain*, 1 Md. 525, 54 Am. Dec. 668; *Shipley* v. *Ritter*, 7 Md. 413, 61 Am. Dec. 371; Story, Eq. Jur. § 928.

An abutting proprietor has a right to have the street kept open for its entire width, free from all unlawful encroachments, as it was originally dedicated.

McDonald v. *Stark*, 176 Ill. 456, 52 N. E. 37; *Zearing* v. *Raber*, 74 Ill. 410; *Costello* v. *State*, 108 Ala. 45, 35 L. R. A. 303, 18 So. 820; *Webb* v. *Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289; *Townsend* v. *Epstein*, 93 Md. 537, 52 L. R. A. 409, 49 Atl. 629; *Field* v. *Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Pillsbury* v. *Brown*, 82 Me. 450, 9 L. R. A. 94, 19 Atl. 858; *Driggs* v. *Phillips*, 103 N. Y. 77, 8 N. E. 514; *McCloughry* v. *Finney*, 37 La. Ann. 31; Elliott, Roads & Streets, 2d ed. § 645; *State* v. *Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *Savage* v. *Salem*, 23 Or. 381, 24 L. R. A. 787, 31 Pac. 832; *Lebanon Light, Heat, & Power Co.* v. *Leap*, 139 Ind. 443, 29 L. R. A. 342, 39 N. E. 57; Angell & D., Highways, § 226; *Johnson* v. *Whitefield*, 18 Me. 286, 36 Am. Dec. 726; *Goodrich* v. *Burlington, C. R. & N. R. Co.* 103 Iowa, 412, 72 N. W. 653.

The act complained of will be an unlawful act if completed, and the law does not shield or protect a wrongdoer.

Saltmarsh v. *Tuthill*, 13 Ala. 410; *Wailes* v. *Couch*, 75 Ala. 134; *Townsend* v. *Epstein*,

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93 Md. 537, 52 L. R. A. 409, 49 Atl. 629; *Karrer* v. *Berry*, 44 Mich. 391, 6 N. W. 853.

Haralson, J., delivered the opinion of the court:

The cause was submitted for decree on the pleadings, the exceptions of complainant to the three pleas filed by the defendant, the motions to discharge and to dissolve the injunction, and on the demurrer to the bill, accompanied by the several affidavits filed by the complainant and the defendant.

It may be stated broadly, since it seems to be everywhere settled in this country, that a building or other structure of like nature, erected on a street,—which includes its sidewalks,—without the sanction of the legislature, is a nuisance; that public "highways belong from side to side and from end to end to the public," and they are entitled to a free passage along any portion of it, not in use by some other traveler, and that there can be no rightful permanent use of the way for private purposes. Elliott, Roads & Streets, § 645. This court has said: "The public have a right to passage over a street, to its utmost extent, unobstructed by any impediments; and any unauthorized obstruction which necessarily impedes the lawful use of a highway is a public nuisance at common law." *Costello* v. *State*, 108 Ala. 45, 35 L. R. A. 303, 18 So. 820. Again, it is said: "Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is, of itself, a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to anyone. It is an encroachment upon a public right, and as such, is not permitted by the law to be done with impunity." *State* v. *Edens*, 85 N. C. 526.

It is again well settled that a municipal corporation cannot license the erection or commission of a nuisance in or on a public street. "A building," says Dillon, "or other structure of a like nature, erected upon a street without the sanction of the legislature is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets, without express power to this end conferred upon them by charter or statute. The usual power to regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as porches extending into the streets, or flights of stairs leading from the ground to the upper stories of buildings, standing on the line of the streets. The person erecting or maintaining a nuisance upon a public street, alley, or place, is liable to the adjoining owner or other person who suffers special damage therefrom." 2 Dill. Mun. Corp. § 660, and authorities there cited; *State* v. *Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Demopolis* v. *Webb*, 87 Ala. 666, 6 So. 408, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289; *Hoole* v. *Atty. Gen.* 22 Ala. 194; *Costello* v. *State*, 108 Ala. 45, 35 L. R. A. 303, 18 So. 820; *Douglass* v. *Montgomery*, 118 Ala. 599, 43 L. R. A. 376, 24 So. 745.

There can be no question, but that the erection of the proposed pillars by defendant in front of its building on the street, and which are to extend, as admitted, 22 inches beyond the west line of said building onto the sidewalk, is a public nuisance, to abate which, the public might maintain a bill. *Reed* v. *Birmingham*, 92 Ala. 344, 9 So. 161; 1 Dill. Mun. Corp. § 374; Elliott, Roads & Streets, §§ 664, 665; authorities *supra*.

It is also well understood that, in addition to the right of the public to maintain a suit in equity for an injunction against the erection and maintenance of a public nuisance, a private citizen who sustains an injury therefrom, different in degree and kind from that suffered by the general public, may maintain a suit in equity to enjoin it. *Cabbell* v. *Williams*, 127 Ala. 320, 28 So. 405; *Columbus* v. *Rodgers*, 10 Ala. 37, 47; Elliott, Roads & Streets, § 665. As to the injury being irreparable, or not capable of full and complete compensation in damages, as is sometimes said to be the requirement in case a private citizen complains to abate it, Mr. Elliott observes in the section referred to, that "the phrase, 'irreparable injury,' is apt to mislead. It does not necessarily mean, as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one." *Ogletree* v. *McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112.

On the same subject Mr. Wood states that, "by irreparable injury, is not meant such injury as is beyond the possibility of repair or beyond possible compensation in damages, nor necessarily great injury or great damage; but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law." 2 Wood, Nuisances, § 778, and note; 3 Pom. Eq. Jur. § 1349; *Whaley* v. *Wilson*, 112 Ala. 630, 20 So. 922.

The bill alleges, "that said encroachment [of the erection of said pillars on the sidewalk] upon said highway is a public nuisance, not only infringing upon the rights of the commonwealth of Alabama, but if same are completed and placed in position, as now contemplated by the First National Bank, said encroachment will greatly damage your orator beyond that which is common to the public generally, by injuring and depreciating the value of your orator's property, and by destroying the symmetry of your orator's building along the highway, which is valu-

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able, and by obstructing the light, air, and view necessarily ensuing therefrom, and by depreciating the rental value of your orator's property, in that the view of persons going south along said highway north of your orator's building will be cut off from your orator's building." He also avers that the tenants in his building are valuable to him, and some of them have informed complainant, that if said columns encroach on said highway, or if any part of said building of defendant encroaches on said highway, they will no longer remain his tenants. Here is averment of special damage to complainant, apart from that which may be suffered by the public at large.

It appears that the basis of the columns proposed to be erected in front of defendant's building are outside the west wall of the main structure to which they are expected to be attached, and as is averred and not denied, "are to extend from the sidewalk, 16 feet in height, more or less, and are to extend 2 feet more or less [22 inches seems to be the real extent] beyond the established building line on said highway, into and upon the street." It is wholly immaterial, it may be added, whether these columns are designed to be for ornament or utility, or whether defendant will be prejudiced more by the temporary injunction against their erection, than complainant might be, if it had not been granted.

We try the case on this appeal, on the pleadings as they are presented, in advance of any evidence taken in the cause. Whether the evidence when taken will, on submission of the case for final disposition, sustain the averments for relief or not, we are not given to know. It is a case as presented, as the court below held, and we think properly, where, everything considered, the complainant was entitled to his injunction, and its continuance, to await the final disposition of the cause. *Harrison* v. *Yerby*, 87 Ala. 185, 6 So. 3.

The defendant, it may be conceded, owns, as it claims, to the center of the street in front of its building, and its right to the use of its property in any way it pleases, subject only to the easement of the public along the street, as a thoroughfare of travel and commerce; but it denies to complainant the right to light, air, and view, except from that part of the street immediately in front of his property. So far as light and air are concerned, the subject has been much discussed, and may be taken as well settled, but the question of view, if distinguishable from these, has not often arisen. The easement of light and air is placed, on what would seem to be good reason, and certainly on authority, along with the easement of access, the one no more important than the other, except in degree. This easement of access, says Mr. Elliott, "is so far regarded as private property that not even the legislature can take it away and deprive the owner of it without compensation. In New York and in most of the states in which the question has arisen, the abutter has an easement in the light and air over the street, and 'above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner.'" [Elliott, Roads & Streets, § 695.] In support of the text, note 1, many authorities from different courts are cited, including the case of *New York Elev. R. Co.* v. *Fifth Nat. Bank*, 135 U. S. 432, 34 L. ed. 231, 10 Sup. Ct. Rep. 743. In the case last cited, the court says: "The owners of lands abutting on a street in the city of New York have an easement of way and of light and air over it, and, through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for the permanent injury to this easement; but, in an action at law, cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing the action."

From the well-considered case of *Barnett* v. *Johnson*, 15 N. J. Eq. 481, we quote approvingly what we consider to be especially applicable to the case in hand, that there are "two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage, the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air. . . . When people build upon the public highway, do they inquire or care who owns the fee of the roadbed [or street]? Do they act or rely on any other consideration except that it is a public highway, and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. . . . It is a right founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactment and all judicial decision." *Dill* v. *Camden Bd. of Edu.* 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739; *Field* v. *Earling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850.

In the case of *Dill* v. *Camden Bd. of Edu.* 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739, touching the rights of parties to streets dedicated to public use, the court said: "If we inquire what those rights are, we find that they are twofold: First, a right of access from the abutting property, and a passage to and fro over it in all its extent; and, second, a right of light, air, prospect, and ventilation. These rights are quite distinct from each other, and capable of being

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separately exercised and enjoyed. The right of light and air and ventilation may be enjoyed fully without the least exercise of the right of access and passage. That this right of light, air, prospect, and ventilation exists is clearly established by the authorities of this and other states." *Hallock* v. *Scheyer*, 33 Hun, 111.

It is difficult to understand why an easement of view from every part of a public street is not, like light and air, a valuable right, of which the owner of a building on the street ought not to be deprived by an encroachment on the highway by a coterminous or adjacent proprietor. The right of view or prospect is one implied, like other rights, from the dedication of the street to public uses. As was well said by the learned judge below in respect to this right: "It seems to be a valuable right appurtenant to the ownership of land abutting on the highway, and to stand upon the same footing, as to reason, with the easement of motion, light, and air, and to be inferior to them only in point of convenience or necessity, and that an interference with it is inconsistent with the public right acquired by dedication. The opportunity of attracting customers by a display of goods and signs is valuable, as I have no doubt the streets of any city in the world will demonstrate." As to these and all other matters brought forward, the injunction should await the decision of the cause when tried for final decree, on pleadings and proofs taken.

The demurrer on the ground that it is not alleged in the bill that complainant had applied without success to the authorities of the city of Montgomery for relief is wanting in merit. He had a right to file the bill without reference to any action taken by the city. *Douglass* v. *Montgomery*, 118 Ala. 611, 43 L. R. A. 376, 24 So. 745. The demurrer as to any of its grounds was properly overruled.

From what has been said it will appear that the first and second pleas were properly held to be without merit. See *Louisville & N. R. Co.* v. *Mobile, J. & K. C. R. Co.* 124 Ala. 162, 26 So. 895; *Webb* v. *Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289, respectively, as to each of these pleas. The court held that the third plea, as originally filed, was good, but, as amended, was bad for duplicity,—citing Story, Eq. Pl. 653. Without considering the third plea as originally filed, we concur with the court below that, as amended, it was bad for duplicity. There was no error in overruling the motion to discharge and dissolve the injunction, and, finding no reversible error in any of rulings of the court below, let its decree be affirmed.

Affirmed.

Tyson, J., not sitting.

CALIFORNIA SUPREME COURT.

Ignatz STEINHART
v.
SUPERIOR COURT OF MENDOCINO COUNTY.

(137 Cal. 575.)

1. **Possession of land sought to be condemned** pending the proceedings cannot be given by the legislature to the applicant upon payment into court of sufficient money to compensate the landowner in case the land is finally taken, or for damages in case, for any reason, it is not taken, under a Constitution providing that private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.

2. **A constitutional provision prohibiting the appropriation of private property for a right of way by private corporations** until compensation has been made or ascertained and paid into court will, if necessary to avoid conflict with the 14th Amendment to the Federal Constitution, be held to be equally applicable to all other persons.

(November 8, 1902.)

NOTE.—As to constitutional right to have payment made or secured before taking of property by eminent domain, see also, in this series, Consumers' Gas Trust Co. v. Harless (Ind.) 15 L. R. A. 505; Martin v. Tyler (N. D.) 25 L. R. A. 838; and Harrisburg, C. & C. Turnp. Road Co. v. Harrisburg & M. Electric R. Co. (Pa.) 34 L. R. A. 439.

59 L. R. A.

PETITION for a writ of prohibition to prevent the making of an order in condemnation proceedings. *Granted.*

The facts are stated in the opinion.

Messrs. **Sullivan & Sullivan, E. A. Bridgford,** and **Theodore J. Roche,** for plaintiff:

Section 1254, Code Civ. Proc., in so far as it undertakes to authorize the court, in advance of a trial and before the damages are assessed by a jury, to take possession of defendant's lands in an action to condemn a right of way, is unconstitutional and void.

San Francisco v. *Scott*, 4 Cal. 114; *Gillan* v. *Hutchinson*, 16 Cal. 156; *Davis* v. *San Lorenzo R. Co.* 47 Cal. 517; *San Mateo Waterworks* v. *Sharpstein*, 50 Cal. 284; *Sanborn* v. *Belden*, 51 Cal. 266; *Coburn* v. *Townsend*, 103 Cal. 233, 37 Pac. 202; *Lamb* v. *Schottler*, 54 Cal. 327; *Wagner* v. *Railway Co.* 38 Ohio St. 32.

The payment of compensation must precede or accompany the taking and damaging of the land.

San Francisco v. *Scott*, 4 Cal. 114; *Gillan* v. *Hutchinson*, 16 Cal. 155; *Lamb* v. *Schottler*, 54 Cal. 327; *Weyl* v. *Sonoma Valley R. Co.* 69 Cal. 206, 10 Pac. 510; *Porter* v. *Pacific Coast R. Co.* (Cal.) 18 Pac. 428; *Tripp* v. *Overocker*, 7 Colo. 72, 1 Pac. 697; *Curran* v. *Shattuck*, 24 Cal. 434; *State ex rel. Smith* v. *King County Super. Ct.* 26 Wash. 278, 66 Pac. 385; *Oliver* v. *Union Post & W. P. R. Co.* 83 Ga. 258, 9 S. E. 1086.

The money deposited in court is not de-

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posited for defendant, nor can it be withdrawn by it.

Reynolds v. *Louisiana, A. & M. R. Co.* 59 Ark. 171, 26 S. W. 1039.

Defendant is entitled to have the jury fix compensation in the first instance.

Wagner v. *Railway Co.* 38 Ohio St. 32; *Redman* v. *Philadelphia, M. & M. R. Co.* 33 N. J. Eq. 165; *Northern P. R. Co.* v. *St. Paul, M. & M. R. Co.* 1 McCrary, 302, 3 Fed. 702; *Birmingham Traction Co.* v. *Birmingham R. & Electric Co.* 119 Ala. 129, 24 So. 368; *People ex rel. Decatur & S. L. R. Co.* v. *McRoberts*, 62 Ill. 38; Cooley, Const. Law, p. 29; 1 Story, Const. § 451; *French* v. *Teschemaker*, 24 Cal. 539.

The "taking" of land occurs when the plaintiff is put into the occupation of defendant's land.

Callahan v. *Dunn*, 78 Cal. 370, 20 Pac. 737.

Mr. **W. B. Cope,** for defendant:

Section 1254 of the Code of Civil Procedure of California is constitutional.

Spring Valley Waterworks v. *Drinkhouse*, 95 Cal. 220, 30 Pac. 218; *St. Louis & S. F. R. Co.* v. *Evans & H. Fire Brick Co.* 85 Mo. 326; *Rothan* v. *St. Louis, O. & H. C. R. Co.* 113 Mo. 132, 20 S. W. 892; *State ex rel. Moody* v. *Baker*, 20 Fla. 616; *Central Branch Union P. R. Co.* v. *Atchison, T. & S. F. R. Co.* 28 Kan. 453; *Ex parte Reynolds*, 52 Ark. 330, 12 S. W. 570; 2 Lewis, Em. Dom. 2d ed. §§ 453*a*, 578–580, 582; *Martin* v. *Tyler*, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392; 1 Debates Constitutional Convention, 346, 352; *Beveridge* v. *Lewis* (Cal.) 67 Pac. 1040; *Fox* v. *Western P. R. Co.* 31 Cal. 538.

Messrs. **Seawell & Pemberton** also for defendant.

Temple, J., delivered the opinion of the court:

This is an application for a writ of prohibition to prevent the respondent from making an order in a condemnation suit for a right of way at the instance and for the Albion Southeastern Railway Company, a corporation, putting such corporation in possession of certain lands of petitioner during the pendency of the proceeding, and before the value of the land sought to be taken has been ascertained. The order is sought pursuant to § 1254 of the Code of Civil Procedure, and, waiving some question as to whether the land sought to be condemned is sufficiently described in the petition, it may be assumed that the Code provisions have been followed. The main question is whether the section authorizing the court to make an order that such plaintiff may "take possession of and use the land and premises sought to be condemned, during the pendency and until the final conclusion of the proceedings brought to condemn," is constitutional. To obtain such order, the plaintiff must pay into court, "or give security for the payment thereof, to be approved by the judge of such court," sufficient money to compensate the defendant in case the land is finally taken, or for damages if for any reason the land be not taken. The defendant may apply to the court for the money, but a payment is deemed an abandonment of all defenses except the claim for greater compensation. In the nature of things, this provision for payment cannot apply to the claim of a defendant for unliquidated damages for the value of the use of the land, and damages thereto, if the land be not finally taken. As to such claim, the money is not paid into court for the defendant, but as security only. It is further provided that the deposit shall be at the risk of plaintiff until the court finally awards the money to the defendant, and the clerk and his sureties shall be liable therefor. In the former Constitution the entire provision upon this subject was in these words: "Nor shall private property be taken for public use without just compensation." In 1861 an act was passed which contained provisions somewhat similar to § 1254 of the Code of Civil Procedure. In 1865 the Western Pacific Railroad Company commenced proceedings under the statute to condemn lands for a right of way through lands owned by Bernard C. Fox. At the commencement of the proceeding the railroad company filed a bond, as required by the act, and obtained an order authorizing it to take possession, and to continue in possession pending the proceeding. It took possession, and made the usual excavations and fills upon the land. The proceeding was carried to a conclusion, and final judgment of condemnation entered. But before final judgment a suit was commenced against the railroad company for damages. The defendant justified under the order permitting it to take and hold possession. On appeal an elaborate opinion was handed down by Sanderson, J., and another by Sawyer, J. Several previous cases are summarily disposed of in the opinion. For instance, in *San Francisco* v. *Scott*, 4 Cal. 114, the court held that compensation must be made before the citizen can be devested of his rights. "It is not sufficient that the law points out the mode by which damage may be ascertained, and provides the party with a remedy to enforce his rights. No such obligation can be imposed upon him. He is entitled to the damages which he has sustained, without resorting to a legal tribunal to enforce payment." This, it is said, means only that the damages must be paid before title will pass. Of course, it will be convenient for the person seeking to condemn to postpone that time indefinitely, if in the meantime he can have the use of the property. These propositions seem to be advanced and maintained in that case: (1) The Constitution does not require payment before the taking but only that it should be provided and made certain without unreasonable delay or expense to the property owner; (2) the court may, on the terms of the statute, authorize the party seeking to condemn to take immediate possession, and to use the property pending the proceeding, and such possession does not constitute a taking within the meaning of the Constitution; and, conversely, title will not pass un-

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til payment is made. As far as the present inquiry is concerned, the most important proposition is that taking possession and using the property during the pendency of the proceeding is not a taking, within the meaning of the Constitution. There was much more plausibility in the contention that, as the Constitution then was, compensation need not be actually paid in advance. The more important proposition was overruled in *Davis* v. *San Lorenzo R. Co.* 47 Cal. 517. The court uses the following language: "The occupation of land by the corporation, for its own purposes, pending the proceedings for condemnation, is a taking of the property, within the meaning of the Constitution; and that, as the bond does not cover such taking, the section of the statute under consideration is void." A lengthy opinion was rendered by Mr. Justice Crockett, and the case of *Fox* v. *Western P. R. Co.* 31 Cal. 538, is referred to, and confessedly modified. The same doctrine was declared in *San Mateo Waterworks* v. *Sharpstein*, 50 Cal. 284; *Sanborn* v. *Belden*, 51 Cal. 266; *Vilhac* v. *Stockton & I. R. Co.* 53 Cal. 208. At the time the present Constitution was adopted (in 1879), the law as declared by the supreme court was as follows: The possession and use in terms authorized by the statute, before compensation had been made and while the proceeding was pending, is a taking, within the meaning of the Constitution; but the requirement of the former Constitution, which only provided that private property should not be taken for public use without just compensation, was satisfied by a provision which insured the payment on reasonable terms as to delay and difficulty in the enforcement of the right. Viewed in the light of these facts, the change made in the language by the new Constitution becomes significant. The following italicized words were added, and no other change was made in the general provision: "Private property shall not be taken *or damaged* for public use without just compensation *having been first made to or paid into court for the owner*." The purpose of the amendment is perfectly obvious. If the preliminary possession during the pendency of the proceeding is a taking within the meaning of the Constitution, it cannot be authorized until the damage resulting therefrom has been judicially determined, and the amount has been paid or tendered to the owner. This matter was discussed in the case of *Coburn* v. *Townsend*, 103 Cal. 233, 37 Pac. 202, by Mr. Justice McFarland, who came to the conclusion here reached, but he secured only a limited concurrence. The case of *Spring Valley Waterworks* v. *Drinkhouse*, 95 Cal. 220, 30 Pac. 218, is relied upon as authority for the proposition that § 1254 of the Code of Civil Procedure is valid and in accordance with the Constitution. That case really involved the use of the discretion of the court under § 957 of the Code of Civil Procedure. The remarks made, however, may be considered as favorable to respondent here. Perhaps there it is true the money was paid into court for the owner. The amount had been determined by a valid judgment, which had been fully executed by paying the money into court for the defendant, and plaintiff had been put into possession under the judgment. Afterwards it was reversed on appeal.

I do not agree to the proposition that compensation is made to the owner by paying into court a sum of money before the damage has been judicially determined, and when the property owner cannot take the money. Surely, he is not compensated until he may take the money. It is not paid into court for him until he can take it. In the *Spring Valley Case* he might have taken. Here he could not, and therefore compensation in such a case is not first made. But this case comes within the purview of the 2d clause of § 14 of article 1 of the Constitution. It is to condemn a right of way which cannot be appropriated until full compensation therefor be made in money or ascertained and paid into court for the owner; and this compensation must be ascertained by a jury, unless a jury is waived as in other cases. These requirements have not been complied with, and could not be. To hold that possession of land may be given to a person seeking to acquire a right of way by condemnation, during the pendency of the proceeding, and before the amount of compensation has been determined and paid to the owner, or into court for him, would be to hold that this so-called temporary possession is not a taking of private property for a public use. But both on authority and reason it is so.

These provisions are not in conflict with the 14th Amendment of the Federal Constitution. All these provisions are but limitations upon the power of the legislature. They do not require the passage of any laws upon the subject, but state the conditions upon which the legislature may authorize the taking of private property for public use. If capable of two constructions, one of which would cause a conflict with the Federal Constitution, the other must be adopted. Construed with the 14th Amendment, it would seem that the condition which the Constitution expressly imposes upon the legislature, in granting the right to private corporations to acquire a right of way under the power of eminent domain, must apply to all other persons.

Wherefore, *it is considered now here that the said court and the Honorable J. M. Mannon, judge thereof, be restrained and prohibited* from making said or any order authorizing said corporation to take possession or to use said land, or any of it, during the pendency of the proceeding to condemn and acquire a right in and over the same, or any part thereof, until final judgment shall be rendered in said proceeding, and the legal title to said right and easement shall pass as provided in the statute.

We concur: **Beatty**, Ch. J.; **Harrison**, J.; **Van Dyke**, J.

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COLORADO SUPREME COURT.

Thomas S. CLAYTON, *Appt.*,
v.
Moses HALLETT, Exr., etc., of George W. Clayton, Deceased, *et al.*

(.....Colo.....)

1. **Subsequently acquired real estate passes under a will** devising "all my real estate, of whatsoever nature or kind soever, and wheresoever situated," under a statute giving power to devise the real estate which testator hath, "or at the time of his death shall have."
2. **Charitable uses will be enforced** in accordance with the principles of the common law, in the absence of statutory prohibition.
3. **A municipality may take property in trust** for the education of poor white male orphans under statutory authority to take gifts by devise, and providing for the assistance of charitable organizations, and for the good order, health, good government, and general welfare of the city.
4. **The capacity of a municipality to take property in trust** is to be determined, not at the testator's death, but when the devise is, by the terms of the will, to take effect.
5. **A devise for the establishment of a college for the education** "of as many poor white male orphans born of reputable parents as the income shall be adequate to maintain" is not void for indefiniteness, where the executors of the will are given authority to "devise and promulgate such rules and regulations as they shall deem proper for the government of the institution."
6. **The appointment of trustees for a college** for the education of orphans, with power to control and supervise the college, carries with it, by necessary implication, the authority to designate the beneficiaries.
7. **The education and preferment of orphans,** being one of the subjects mentioned by stat. 43 Eliz. chap. 4, is to be regarded as a public charity in jurisdictions where that statute is in force.

(June 30, 1902.)

APPEAL by plaintiff from a judgment of the District Court for Arapahoe County in favor of defendants in a proceeding to set aside the will of George W. Clayton, deceased. *Affirmed.*

Statement by **Steele, J.:**

George W. Clayton, late of the county of Arapahoe, departed this life on the 15th of August, 1899. Afterwards a document purporting to be his last will and testament was presented to the county court of Arapahoe county, and on the 3d of October, 1899, the said document was admitted to probate and record as the last will and testament of the said George W. Clayton, deceased. Moses Hallett was appointed sole executor, William M. Clayton not having survived his brother.

The 14th and 15th clauses of the will are as follows:

"Fourteenth. All the rest, residue, and remainder of my estate, real, personal, and mixed, and wheresoever situated, intending and meaning to include therein all reversionary devises and bequests, real and personal estate, the use of which I have hereinbefore given for life to the several persons above herein mentioned, respectively, after the same shall have been discharged of the respective trusts by the death of the persons respectively entitled to the use thereof for life, and all legacies above given which shall lapse by reason of the death of the legatee prior to my decease, or from any other cause, I do hereby give, devise, and bequeath unto the corporation of the city of Denver, in trust, nevertheless, to be devoted solely and exclusively to the founding, establishing, and forever maintaining a permanent college within the city of Denver, in the county of Arapahoe and state of Colorado, for the better education, and more comfortable maintenance, than they usually receive from the application of public funds, of poor white male orphan children, somewhat on the plan of the Girard College, in the city of Philadelphia and state of Pennsylvania, but necessarily in a very much smaller way. The college building shall be of stone, substantially built upon a plat of ground of sufficient size to admit of the construction of additional college buildings if the same shall become necessary or expedient. The institution above mentioned shall be established within ten years from and after my decease, as may be practicable in the judgment of my executors. They shall carefully devise and promulgate such rules and regulations as they shall deem proper for the government of the institution, and which shall be carried out and be obligatory with the same force and effect as if herein set forth at large. And for his services in this behalf my executor, Moses Hallett, shall receive the sum of five thousand dollars per year until the said college shall be organized. I make this provision for my said executor, Moses Hallett, for the reason that I believe the burden of this trust will fall principally upon him, and I have made provision herein for my brother William M. Clayton, the other executor, in case he shall survive me. The above provision for compensation to my said executor, Moses Hallett is personal to him, and shall not apply to any other executor or trustee who may become his successor. It is my desire that in carrying out my purpose as set forth in this section of my will, before a college site shall be selected or plan of a college building shall be adopted, a careful estimate of the

NOTE.—As to adoption of the English statute of 43 Eliz. chap. 4, see *note* to McKennon v. Winn (Okla.) 22 L. R. A. 510.

For municipality as trustee of a charity, see also, in this series, Dailey v. New Haven (Conn.) 14 L. R. A. 69, and *note;* New Haven v. New Haven & D. R. Co. (Conn.) 18 L. R. A. 256; Maysville v. Wood (Ky.) 39 L. R. A. 93; and Meunier's Succession (La.) 48 L. R. A. 77.

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total of my estate subject to this purpose shall be made, and so much thereof only shall be devoted to the purchase of a site and the building and the furnishing of the college as will leave my estate a sufficient fund to provide revenue for the proper maintenance of the same and of the orphans admitted thereto, and supplying competent instructors, teachers, and nurses therein, who shall be of tried skill and of good moral character. So much of the residuary of my estate as shall remain after the purchase of a site, the erection of the college, and the furnishing of the same with proper furniture and appliances, shall be set apart and held and kept inviolate forever, save and except as hereinafter provided; and the income, rents, and revenues thereof shall be used solely and exclusively for the maintenance of said institution and of the orphans admitted therein. The institution shall be organized as soon as practicable within ten years from and after the time of my death, and due public notice of the intended opening of the college shall be given, so that there may be an opportunity to make selections of competent instructors, teachers, and nurses, and that those who may have the charge of orphans may be aware of the provisions intended for them. It is my desire that the college shall be under the management and supervision of a board of five trustees, which shall be composed of the judge of the district court of the United States for the district of Colorado, or such person as he shall appoint; the senior judge of the district court of the state of Colorado of that judicial district which shall include the county of Arapahoe, or such person as he may appoint; and the chief justice of the supreme court of the state of Colorado, or such person as he may appoint; and my two executors hereinafter named, during life; and, after their decease, two other reputable freeholders of the county of Arapahoe, to be appointed by the mayor of the city of Denver, with the advice and consent of the city council of said city, which said trustees so appointed by the said mayor shall hold their office for one year, and until their successors shall be appointed and confirmed in like manner. None of the trustees shall receive any compensation whatever from my estate for his services as such trustee. Inasmuch as I have this matter seriously at heart, and my desire is that the greatest possible good may be derived from my bequest for said college, I do hereby enjoin and require that, if at the close of any year the income of the fund devoted to the purposes of said college be more than sufficient for the maintenance of the institution for that year, then the balance of the said income, after defraying said maintenance, shall be invested in good securities, thereafter to be and remain a part of the capital; but in no event shall any part of said capital fund be sold, disposed of, or pledged to meet the current expenses of the institution. And I do hereby expressly declare that all the bequests and devises in this section of my will, made of the said residue of my estate, to the said corporation of the city of Denver, are made upon the following express conditions; that is to say: First. That the name of said institution shall be 'The George W. Clayton College.' Second. That none of the moneys, principal, interest, dividends, income, or rents arising or accruing from the said residuary devise and bequest shall at any time be applied to any other purpose or purposes whatever than use herein mentioned and appointed. Third. That separate, true, and accurate accounts, distinct from all other accounts of the said corporation of the city of Denver, shall be kept concerning the said devise, bequest, college and funds, and of the investment and application thereof; and that separate account or accounts of the same shall be kept in bank, not blended or mingled with any other account, so that it may at all times appear, on examination by a committee to be appointed by the judge of the county court of Arapahoe county, that my instructions have been fully and strictly complied with. Fourth. That the said corporation shall render a detailed account, verified by oath, annually, to the county court of Arapahoe county, sitting in probate, at the January term thereof, concerning the said devised and bequeathed estate, and the investment and application of the same, and shall submit all their books, papers, and accounts touching the same to a committee of said county court for examination whenever the same shall be required. Fifth. The said corporation shall also cause to be published in the month of January, annually, in one or more newspapers published in the city of Denver, a true and concise statement and account of the trusts, devises, and bequests herein declared and made, showing the condition of said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January. As many poor, white male orphans,—and by the term 'orphan' is meant any child whose father is dead,—between the ages of six and ten years, born of reputable parents, as the income shall be adequate to maintain, shall be admitted into the college as soon as possible after the opening thereof; and from time to time thereafter, as there may be vacancies, or as increased ability from income may warrant, others shall be admitted; but, in giving admission, preferences shall be given (1) to orphans born in and belonging to the county of Arapahoe; and (2) to orphans born in and belonging to other counties in the state of Colorado. If it should unfortunately happen that any of the orphans admitted into the college shall, from malconduct, have become unfit companions for the rest, and mild means of reformation shall prove abortive, they shall no longer remain therein. Those orphans who shall merit it shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age, as, in the judgment of the trustees, shall be deemed best, and while there shall be fed with plain and wholesome food, and clothed

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with decent apparel, and due regard shall be paid to their health. They shall be instructed in such various branches of sound education as will tend to make them useful citizens and honorable members of society. If the income arising from that part of the said residuary devise and bequest remaining after the construction and furnishing the said college shall be adequate to justify it, or if the said institution receive donations from other generous men or women, and there shall be need of another college building or buildings, owing to the increase of the number of orphans, then and in that case the trustees of said college may devote so much of the said accumulated income as may be necessary for that purpose to the building of an additional college building or buildings, having in view at all times a sufficient reserve capital fund to provide revenue adequate for the maintenance of said college and of the orphans admitted thereto.

"Fifteenth. I give, devise, and bequeath all my real and personal estate, of whatsoever nature or kind soever, and wheresoever situated, unto my brother William M. Clayton and Moses Hallett, my trusted friend, the executors of this, my last will and testament, hereinafter appointed, in trust for the payment of my just debts, and the legacies, devises, and bequests, above herein specified; and I do hereby expressly authorize and empower them, my said executors, to sell, convey, and dispose of the same, at public or private sale, at such time or times and upon such terms and in such manner as to them shall seem meet, or to improve the same for the purpose of accumulating revenue for the fund above mentioned: Provided, they shall have ten years from my decease to dispose of, sell, or to improve to the best advantage the balance of my real estate remaining after the aforesaid bequests are paid, and for the purposes above mentioned."

On the 27th of February, 1900, Thomas S. Clayton filed his complaint in the district court of Arapahoe county against Moses Hallett, as executor and trustee under the will of George W. Clayton, the city of Denver, the heirs at law of George W. Clayton, and the legatees named in the will, for the purpose of having said will declared to be, as to the residuary estate of the said George W. Clayton, null and void. Upon the trial, proof was made showing that the estate of George W. Clayton was of the value of about $2,000,000; that it consisted of various kinds of property in the state of Colorado and other parts of the United States; and a deed was received showing that many parcels of real estate had been conveyed to the said George W. Clayton since the execution of his will. The district court on the 5th day of March, 1901, rendered judgment in favor of the defendants and against the plaintiff, from which judgment the plaintiff appealed to this court.

The plaintiff insists, as preliminary to the main question, that the estate of the testator acquired after the execution of his will did not pass by the devise. Upon the question of the validity of the devise in the fourteenth section of the will, his claims are: (1) That the will provides no method by which the beneficiaries shall be selected, and there being no prescribed means by which they can be ascertained, as a class or as individuals, the trust is void because of this indefiniteness. (2) That neither the statute nor the so-called principles or conservative provisions of the statute 43 Eliz. chap. 4, are in force in the state of Colorado. (3) That the jurisdiction of the court of chancery in England over charitable uses is derived from three sources,—from its ordinary inherent jurisdiction over trusts, from the prerogative of the Crown, from the statute 43 Eliz. chap. 4,—and that courts of equity in Colorado do not possess the jurisdiction derived from the prerogative of the Crown, or the jurisdiction derived from the statute of Elizabeth; that they possess only judicial powers, and exercise only so much of the jurisdiction of the English court of chancery as was derived from its ordinary, inherent, judicial jurisdiction over trusts. (4) That no trustee competent to take has been named in the will; that the beneficiaries are indefinite and uncertain, and have no vested interest in the property mentioned; and that therefore the supposed trust created by the will is void. (5) That the testator intended this trust to be personal to the city, and, even if the court adopts the English doctrine in all its phases, it cannot substitute another trustee, and the trust must be held void for this reason. The defendants assert that the district court had not jurisdiction to determine the matters in controversy, and that the plaintiff was estopped by the decree of the county court to assert the invalidity of the devise to the city of Denver mentioned in the 14th paragraph of the will; further, that the trust is a valid trust; that the city of Denver is competent to take under the will and to administer the trust.

Messrs. **Luther M. Goddard** and **Julius B. Bissell,** with *Messrs.* **Carlon, Skelton, & Morrow,** for appellant:

Plaintiff is not estopped, by the decree admitting the will to probate, to assert the invalidity of the devise to the city of Denver.

Black, Judgm. §§ 615, 635, pp. 741, 764; *Duchess of Kingston's Case,* 20 How. St. Tr. 538; *Hopkins* v. *Lee,* 6 Wheat. 109, 5 L. ed. 218; *Eastman* v. *Cooper,* 15 Pick. 276, 26 Am. Dec. 600; *Horton* v. *Hamilton,* 20 Tex. 606; 3 Redf. Wills, p. 62; *Woodruff* v. *Taylor,* 20 Vt. 65; *Mitchell* v. *Holder,* 8 Bush, 362; *Craine* v. *Edwards,* 92 Ky. 109, 17 S. W. 211; *Fallon* v. *Chidester,* 46 Iowa, 590, 26 Am. Rep. 164; *Carter* v. *Thomas,* 4 Me. 344; *Worrill* v. *Gill,* 46 Ga. 485; *Ware* v. *Wisner,* 4 McCrary, 66; *Greenwood* v. *Murray,* 26 Minn. 259, 2 N. W. 945; *Ex parte Fuller,* 2 Story, 332, Fed. Cas. No. 5,147; *Burns* v. *Travis,* 117 Ind. 44, 18 N. E. 45; *Lorieux* v. *Keller,* 5 Iowa, 196, 68

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Am. Dec. 696; *Re Merriam*, 136 N. Y. 58, 32 N. E. 621; *Evans* v. *Anderson*, 15 Ohio St. 324; *Whitfield* v. *Hurst*, 38 N. C. (3 Ired. Eq.) 242; *Trexler* v. *Miller*, 41 N. C. (6 Ired. Eq.) 250; *Campbell* v. *Wallace*, 10 Gray, 162; *Armstrong* v. *Lear*, 12 Wheat. 169, 6 L. ed. 589.

The city of Denver, under its charter at the date of the testator's death, had no power or capacity to acquire title to property for the purposes for which the bequest in the 14th paragraph of the will was made; nor had it the power or capacity to take and hold the property in trust for the purposes mentioned in said bequest.

Laws 1885, p. 76.

Only such powers and rights can be exercised under municipal charters as are clearly comprehended within their words, or derived therefrom by a necessary implication, regard being had to the subject of the grant.

Beach, Pub. Corp. § 538; Dill. Mun. Corp. 3d ed. § 89; *St. Louis* v. *Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278, 10 S. W. 197; *Los Angeles City Water Co.* v. *Los Angeles*, 88 Fed. 720; *Douglass* v. *Placerville*, 18 Cal. 644; *Clark* v. *Davenport*, 14 Iowa, 494; *Leavenworth* v. *Norton*, 1 Kan. 432; *Leonard* v. *Canton*, 35 Miss. 189; *Parker* v. *Baker*, Clarke Ch. 223; *New Orleans, M. & C. R. Co.* v. *Dunn*, 51 Ala. 128; *Joplin* v. *Leckie*, 78 Mo. App. 8; *Taylor* v. *Bay City Street R. Co.* 80 Mich. 77, 45 N. W. 335; *Detroit* v. *Detroit City R. Co.* 56 Fed. 867; *Leadville Illuminating Gas Co.* v. *Leadville*, 9 Colo. App. 400, 49 Pac. 268; *Durango* v. *Reinsberg*, 16 Colo. 327, 26 Pac. 820; *Carpenter* v. *People ex rel. Tilford*, 8 Colo. 116, 5 Pac. 828; *Hayward* v. *Red Cliff*, 20 Colo. 33, 36 Pac. 795; *Christensen* v. *Fremont*, 45 Neb. 160, 63 N. W. 364; *Holden* v. *Yonkers*, 25 Misc. 250, 55 N. Y. Supp. 254; *Sherlock* v. *Winnetka*, 59 Ill. 389; *Jackson ex dem. Lynch* v. *Hartwell*, 8 Johns. 422; *Livingston County* v. *Weider*, 64 Ill. 427; *Eufaula* v. *McNab*, 67 Ala. 588, 42 Am. Rep. 118; *Williams* v. *Lash*, 8 Minn. 496, Gil. 441; *Miller* v. *Gregg*, 26 Iowa, 75; *Knox* v. *Peterson*, 21 Wis. 249; *Champaign* v. *Harmon*, 98 Ill. 491; *Sprague* v. *Coenen*, 30 Wis. 209; *Logansport* v. *Humphrey*, 84 Ind. 467; *Hanna* v. *Putnam County*, 29 Ind. 170; *Fulton* v. *Northern Illinois College*, 158 Ill. 333, 42 N. E. 138; *Markley* v. *Mineral City*, 58 Ohio St. 430, 51 N. E. 28; *McGuire* v. *Atlantic City*, 63 N. J. L. 91, 42 Atl. 781; *Hunnicutt* v. *Atlanta*, 104 Ga. 1, 30 S. E. 500.

Public education is a state matter, which cannot be delegated to municipal corporations.

Const. art. 9, § 1.

The state cannot do indirectly what it is prohibited from doing directly.

Atty. Gen. ex rel. Barbour v. *Pingree*, 120 Mich. 550, 46 L. R. A. 407, 79 N. W. 814.

Corporations cannot hold property in trust for purposes in which they have no interest.

Jackson ex dem. Lynch v. *Hartwell*, 8 Johns. 422; *Re Howe*, 1 Paige, 214, 19 Am. Dec. 395; *South Newmarket Methodist Seminary* v. *Peaslee*, 15 N. H. 317; *Sutton* v. *Cole*, 3 Pick. 232; *Dailey* v. *New Haven*, 60 Conn. 314, 14 L. R. A. 69, 22 Atl. 945; *Maysville* v. *Wood*, 102 Ky. 263, 39 L. R. A. 93, 43 S. W. 403; *Augusta* v. *Walton*, 77 Ga. 520; *New Haven* v. *New Haven & D. R. Co.* 62 Conn. 252, 18 L. R. A. 256, 25 Atl. 316; *Bullard* v. *Shirley*, 153 Mass. 559, 12 L. R. A. 110, 27 N. E. 766; *Fosdick* v. *Hempstead*, 125 N. Y. 581, 11 L. R. A. 715, 26 N. E. 801; *Re Fox*, 52 N. Y. 530, 11 Am. Rep. 751; *United States* v. *Fox*, 94 U. S. 315, 24 L. ed. 192.

State courts which have held that municipal corporations might take and hold property in trust for certain charitable purposes placed their decisions upon the ground that the corporation was authorized by statute to do so.

Chambers v. *St. Louis*, 29 Mo. 543; *Webb* v. *Neal*, 5 Allen, 575; *Philadelphia* v. *Elliott*, 3 Rawle, 170; *Cresson's Appeal*, 30 Pa. 437; *Mary's Succession*, 2 Rob. (La.) 438; *Bell County* v. *Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Richmond* v. *Davis*, 103 Ind. 449, 3 N. E. 130; *Peynado* v. *Peynado*, 82 Ky. 5; *Atty. Gen. ex rel. Abbot* v. *Dublin*, 38 N. H. 459; *Oxford Union Cong. Soc.* v. *West Cong. Soc.* 55 N. H. 463; *Sargent* v. *Cornish*, 54 N. H. 18; *Hamden* v. *Rice*, 24 Conn. 350; *Dailey* v. *New Haven*, 60 Conn. 314, 14 L. R. A. 69, 22 Atl. 945; *Sutton* v. *Cole*, 3 Pick. 232; *Hatheway* v. *Sackett*, 32 Mich. 97.

The legal incapacity of the town or city to perform the duties imposed by a condition in a bequest entirely defeats the bequest.

Bullard v. *Shirley*, 153 Mass. 559, 12 L. R. A. 110, 27 N. E. 766.

The will provides no method by which the beneficiaries shall be selected; and, there being no prescribed means by which they can be ascertained as a class or as individuals, the trust is therefore void because of this indefiniteness.

If there is such uncertainty that it cannot be known who is to take as beneficiary, the trust is void; and the heirs, by operation of law, will take the estate stripped of the trust.

Moran v. *Moran*, 104 Iowa, 216, 39 L. R. A. 204, 73 N. W. 617; *LePage* v. *McNamara*, 5 Iowa, 124; 1 Beach, Tr. § 320; *Adye* v. *Smith*, 44 Conn. 60, 26 Am. Rep. 424; *Treat's Appeal*, 30 Conn. 116; *Tappan's Appeal*, 52 Conn. 412; *Beardsley* v. *Bridgeport*, 53 Conn. 489, 55 Am. Rep. 152, 3 Atl. 557; *Fairfield* v. *Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *White* v. *Fisk*, 22 Conn. 31; *Ruth* v. *Oberbrunner*, 40 Wis. 238; *Heiss* v. *Murphey*, 40 Wis. 276; *Hoffen's Estate*, 70 Wis. 522, 36 N. W. 409; *Holland* v. *Peck*, 37 N. C. (2 Ired. Eq.) 255; *White* v. *Atty. Gen.* 39 N. C. (4 Ired. Eq.) 19; *Johnson* v. *Johnson*, 92 Tenn. 559, 22 L. R. A. 179, 23 S. W. 114; *Fontain* v. *Ravenel*, 17 How. 369, 15 L. ed. 80; *Owens* v. *Missionary Soc. of M. E. Church*, 14 N. Y. 380, 67 Am. Dec. 160; *Williams* v. *Williams*, 8 N. Y. 525; *Downing* v. *Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *Beekman* v. *Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *Grimes* v. *Harmon*, 35 Ind.

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198, 9 Am. Rep. 690; *Green* v. *Allen*, 5 Humph. 170; *Holland* v. *Peck*, 37 N. C. (2 Ired. Eq.) 255; *Griffin* v. *Graham*, 8 N. C. (1 Hawks) 133, 9 Am. Dec. 619; *San Antonio* v. *Odin*, 15 Tex. 539; *Troutman* v. *De Boissicre Odd Fellows' Orphans' Home & Industrial School Asso.* (Kan.) 64 Pac. 33; *St. James Orphan Asylum* v. *Shelby*, 60 Neb. 796, 84 N. W. 274; *Hinckley's Estate*, 58 Cal. 457; *Bascom* v. *Albertson*, 34 N. Y. 603; *Kain* v. *Gibboney*, 101 U. S. 362, 25 L. ed. 813.

Neither the statute, nor the so-called principles or conservative provisions of the statute, 43 Eliz. chap. 4, are in force in the state of Colorado.

Mills's Anno. Stat. § 4184, p. 2171.

The act was local to the Kingdom of Great Britain.

Grimes v. *Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *Owens* v. *Missionary Soc. of M. E. Church*, 14 N. Y. 380, 67 Am. Dec. 160; *Hinckley's Estate*, 58 Cal. 505; *Dickson* v. *Montgomery*, 1 Swan, 364; *Perin* v. *Carey*, 24 How. 465, 16 L. ed. 701; *Dashiell* v. *Atty. Gen.* 5 Harr. & J. 392, 9 Am. Dec. 572; *Green* v. *Allen*, 5 Humph. 170; *Herr* v. *Johnson*, 11 Colo. 393, 18 Pac. 342; *Moore* v. *Moore*, 4 Dana, 354, 29 Am. Dec. 417; *Atty. Gen.* v. *Matthews*, 2 Lev. 167; *Atty. Gen.* v. *Syderfen*, 1 Vern. 224; *Moggridge* v. *Thackwell*, 7 Ves. Jr. 69; *Clifford* v. *Francis*, Freem. Ch. 330; *DaCosta* v. *DePas*, 1 Ambl. 228; *Atty. Gen. ex rel. Aspenshaw* v. *Herrick*, 1 Ambl. 712; *Atty. Gen.* v. *Clarke*, 1 Ambl. 422; *Plunkett* v. *Dublin*, 1 Bligh N. R. 312; *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 40; *Ludlow* v. *Greenhouse*, 1 Bligh N. R. 48; *Paice* v. *Canterbury*, 14 Ves. Jr. 372; Story, Eq. Jur. § 1190; *Doughten* v. *Vandever*, 5 Del. Ch. 65; *White* v. *Fisk*, 22 Conn. 31; *Philadelphia Baptist Asso.* v. *Hart*, 4 Wheat. 1, 4 L. ed. 499; *Wheeler* v. *Smith*, 9 How. 55, 13 L. ed. 44; *Fontain* v. *Ravenel*, 17 How. 385, 15 L. ed. 86.

The courts of this state possess none of the jurisdiction derived from the prerogative of the Crown as *parens patriæ*.

Green v. *Allen*, 5 Humph. 170; Colo. Const. arts. 3, 6, § 11; *LePage* v. *McNamara*, 5 Iowa, 145; *Owens* v. *Missionary Soc. of M. E. Church*, 14 N. Y. 380, 67 Am. Dec. 160; 2 Perry, Tr. 3d ed. 360, § 729; *Grimes* v. *Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *Wheeler* v. *Smith*, 9 How. 55, 13 L. ed. 44; *Fontain* v. *Ravenel*, 17 How. 388, 15 L. ed. 88; *Philadelphia Baptist Asso.* v. *Hart*, 4 Wheat. 1, 4 L. ed. 499.

The testator intended this trust to be personal to the city; and even if the court adopts the English doctrine in all its phases, it cannot substitute another trustee, and the trust must be held void for this reason.

Loring v. *Marsh*, 6 Wall. 337, 18 L. ed. 802; *Marsh* v. *Renton*, 99 Mass. 132; *Fontain* v. *Ravenel*, 17 How. 388, 15 L. ed. 88; *Green* v. *Allen*, 5 Humph. 170; *Atty. Gen.* v. *Gladstone*, 13 Sim. 7; *Down* v. *Worrall*, 1 Myl. & K. 561; 2 Perry, Tr. 3d ed. 363, § 731.

A will speaks as from the time of the testator's death, and is governed by the law in force at the time it takes effect.

Dodge v. *Williams*, 46 Wis. 70, 1 N. W. 94, 50 N. W. 1103; *Green* v. *Allen*, 5 Humph. 170; *Owens* v. *Missionary Soc. of M. E. Church*, 14 N. Y. 380, 67 Am. Dec. 160; *Reed's Appeal*, 118 Pa. 215, 11 Atl. 787; *Scofield* v. *Olcott*, 120 Ill. 362, 11 N. E. 351; *McArthur* v. *Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Sager* v. *Galloway*, 113 Pa. 500, 6 Atl. 209; *Hills* v. *Barnard*, 9 L. R. A. 211, and *note*, 152 Mass. 67, 25 N. E. 96.

Mr. **W. C. Kingsley** and *Miss* **Mary F. Lathrop**, for appellees:

The will was framed from the will of Stephen Girard, and the act of assembly relating thereto, passed by the legislature of Pennsylvania June 13, 1869, was sustained.

Vidal v. *Philadelphia*, 2 How. 127, 11 L. ed. 205; *Soohan* v. *Philadelphia*, 33 Pa. 9; *Philadelphia* v. *Girard*, 45 Pa. 9, 84 Am. Dec. 470; *Girard* v. *Philadelphia*, 7 Wall. 1, 19 L. ed. 53; *Philadelphia* v. *Fox*, 64 Pa. 169; *McDonogh* v. *Murdoch*, 15 How. 367, 14 L. ed. 732; *State* v. *McDonogh*, 8 La. Ann. 171.

The trust created by the will of George W. Clayton is a valid charity under the law of Colorado, and the city of Denver is competent to execute the trust. The law of what is now Colorado was, until April 30, 1803, as to all the state, until 1848 and 1850 as to the southern, and until 1861 as to the western, portion, the civil law as modified by France and the regulations by Spain.

Under the civil law, the bequest of Mr. Clayton is unquestionably valid.

Domat, Civil Law, bk. 4, title 2, §§ 2, 6, 7; *McDonogh* v. *Murdoch*, 15 How. 367, 14 L. ed. 732; *Burr* v. *Smith*, 7 Vt. 246, 29 Am. Dec. 154; Sandars, Justinian, Hammond's ed. lib. 2, title 23, § 1; *State* v. *McDonogh*, 8 La. Ann. 171.

The first legislature of Colorado adopted as the common law of the territory the Illinois act of 1845.

Ill. Rev. Stat. 1845, chap. 62, § 1, p. 337.

The same statute is, or has been at various periods, the law of Virginia, Kentucky, Ohio, Indiana, Illinois, Missouri, Arkansas, and Kansas. Prior to its repeal in Virginia, charities were entitled to peculiar favor, and to be liberally expounded.

Charles v. *Hunnicutt*, 5 Call (Va.) 311; *Protestant Episcopal Edu. Soc.* v. *Churchman*, 80 Va. 718; *General Assembly of Presby. Church* v. *Guthrie*, 86 Va. 125, 6 L. R. A. 321, 10 S. E. 318; *Bell County* v. *Alexander*, 22 Tex. 351, 73 Am. Dec. 268.

Kentucky adopted the statute June 1, 1792.

Ky. Rev. Stat. 1852, p. 38; *Hunt* v. *Warnicke*, Hardin (Ky.) 61; *Ray* v. *Sweeney*, 14 Bush, 1, 29 Am. Rep. 388.

The early Kentucky cases went further than those of any other state, in favoring charitable bequests and the *cy près* doctrine.

Gass v. *Wilhite*, 2 Dana, 170, 26 Am. Dec. 446; *Moore* v. *Moore*, 4 Dana, 354, 29 Am. Dec. 417; *Curling* v. *Curling*, 8 Dana, 38,

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33 Am. Dec. 475; *Atty. Gen.* v. *Wallace*, 7 B. Mon. 611.

Though the statute of 1843 constructively repealed the statute of Elizabeth under the law then enacted, the liberal construction of charitable devises has continued.

Cromie v. *Louisville Orphans' Home Soc.* 3 Bush, 373; *Peynado* v. *Peynado*, 82 Ky. 5; *Leeds* v. *Shaw*, 82 Ky. 79; *Kinney* v. *Kinney*, 86 Ky. 610, 6 S. W. 593; *Penick* v. *Thom*, 90 Ky. 665, 14 S. W. 830; *Bedford* v. *Bedford*, 99 Ky. 273, 35 S. W. 926.

The governor and judges of the territory northwest of the Ohio river adopted the Virginia statute of 1776, to take effect October 1, 1795.

Perin v. *Carey*, 24 How. 465, 469, 16 L. ed. 701; *McClaskey* v. *Barr*, 54 Fed. 781; *Stevenson* v. *Cloud*, 5 Blackf. 92.

Ohio re-enacted the statute February 14, 1805, but repealed it January 2, 1806.

McIntire Poor School v. *Zanesville Canal & Mfg. Co.* 9 Ohio, 255, 34 Am. Dec. 436; *Kerr-hacker* v. *Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Perin* v. *Carey*, 24 How. 465, 501, 16 L. ed. 701, 710.

Ohio courts did not follow Virginia in holding the favoring law of charities repealed.

McIntire Poor School v. *Zanesville Canal & Mfg. Co.* 9 Ohio, 203, 34 Am. Dec. 436; *Landis* v. *Wooden*, 1 Ohio St. 161, 59 Am. Dec. 615; *Sowers* v. *Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418; *Perin* v. *Carey*, 24 How. 465, 16 L. ed. 701.

Indiana introduced the exceptions contained in the statute upon its re-enactment by the territorial legislature September 17, 1807.

Stevenson v. *Cloud*, 5 Blackf. 92; *M'Cord* v. *Ochiltree*, 8 Blackf. 15; *Richmond* v. *State ex rel. Mendenhall*, 5 Ind. 335; and *Sweency* v. *Sampson*, 5 Ind. 465,—not only held that, under this section, the statute of 43 Elizabeth was in force in Indiana, but that said statute had increased and enlarged the power and jurisdiction of the state courts.

Erskine v. *Whitehead*, 84 Ind. 357; *Skinner* v. *Harrison Twp.* 116 Ind. 139, 2 L. R. A. 137, 18 N. E. 529; *Cruse* v. *Axtell*, 50 Ind. 59; *De Bruler* v. *Ferguson*, 54 Ind. 549; *Craig* v. *Secrist*, 54 Ind. 419; *Lagrange County* v. *Rogers*, 55 Ind. 297; *Haines* v. *Allen*, 78 Ind. 100, 41 Am. Rep. 555.

In *Rush County* v. *Dinwiddie*, 139 Ind. 128, 37 N. E. 795, a trust is sustained to establish a home for the benefit of worthy persons who have no home, and orphan boys, where they can be taught to work, and be made self-supporting.

Illinois enacted the statute in 1809. The courts have cited and followed the judicial interpretation of the courts of Kentucky.

Luther v. *Luther*, 122 Ill. 558, 13 N. E. 166; *Gilman* v. *Hamilton*, 16 Ill. 225.

It has unqualifiedly, and in the most liberal spirit, pronounced in favor of the statute of Elizabeth as part of its common law, and has applied the judicial *cy près* doctrine very broadly.

Gilman v. *Hamilton*, 16 Ill. 225; *Heuser* v. *Harris*, 42 Ill. 425; *Germain* v. *Baltes*, 113 Ill. 29; *Hunt* v. *Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; *Crerar* v. *Williams*, 145 Ill. 625, 21 L. R. A. 454, 34 N. E. 467; *Alden* v. *St. Peter's Parish*, 158 Ill. 631, 30 L. R. A. 232, 42 N. E. 392; *Ingraham* v. *Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; *Grand Prairie Seminary* v. *Morgan*, 171 Ill. 444, 49 N. E. 516; *Hoeffer* v. *Clogan*, 171 Ill. 462, 40 L. R. A. 730, 49 N. E. 527; *Hamsher* v. *Hamsher*, 132 Ill. 273, 8 L. R. A. 556, 23 N. E. 1123.

The territory of Missouri adopted the Kentucky statute January 19, 1816.

Arkansas territory retained it on its separation from Missouri, March 2, 1819, and afterwards re-enacted it as part of the laws of the state.

Horsley v. *Hilburn*, 44 Ark. 458.

Chambers v. *St. Louis*, 29 Mo. 543, seems to hold the statute of 43 Elizabeth in force.

The *cy près* doctrine was favored in *Academy of Visitation* v. *Clemens*, 50 Mo. 167, and *Howe* v. *Wilson*, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. 390.

See also *Barkley* v. *Donnelly*, 112 Mo. 561, 19 S. W. 305; *Women's Christian Asso.* v. *Kansas City*, 147 Mo. 103, 48 S. W. 960; *Sappington* v. *Sappington School Fund Trustees*, 123 Mo. 32, 27 S. W. 356; *Lackland* v. *Walker*, 151 Mo. 210, 52 S. W. 414; *Russell* v. *Allen*, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327; *Grissom* v. *Hill*, 17 Ark. 483.

The power of a municipal corporation to act as trustee for a charity was affirmed, and the *cy près* doctrine approved, in—

Delaney v. *Salina*, 34 Kan. 532, 9 Pac. 271; *Harrison* v. *Brophy*, 59 Kan. 1, 40 L. R. A. 721, 51 Pac. 883; *Troutman* v. *De Boissiere Odd Fellows' Orphans' Home & Industrial School Asso.* (Kan.) 64 Pac. 33.

In *Purvis* v. *Sherrod*, 12 Tex. 140, the supreme court of Texas favors a liberal construction of a trust for human liberty.

See also *Bell County* v. *Alexander*, 22 Tex. 351, 73 Am. Dec. 268; *Paschal* v. *Acklin*, 27 Tex. 173.

Oregon territory, in 1849, adopted from Missouri its constitutional and legislative provisions.

Hardenbergh v. *Ray*, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

It follows the liberal doctrine as to charitable trusts.

Brown v. *Brown*, 7 Or. 285; *Raley* v. *Umatilla County*, 15 Or. 173, 13 Pac. 890; *Pennoyer* v. *Wadhams*, 20 Or. 274, 11 L. R. A. 210, 25 Pac. 720; *Re John*, 30 Or. 494, 36 L. R. A. 242, 47 Pac. 341, 50 Pac. 226; *John* v. *Smith*, 42 C. C. A. 275, 102 Fed. 218.

Under the rules laid down in *Chilcott* v. *Hart*, 23 Colo. 40, 35 L. R. A. 41, 45 Pac. 391, it seems unquestionable that the devise of Mr. Clayton is a valid charity, capable of being enforced by our courts of equity.

Pell v. *Mercer*, 14 R. I. 412; *Woodruff* v. *Marsh*, 63 Conn. 125, 26 Atl. 846.

Since this court was first constituted, it has been enforcing the common law of England, so far as applicable and of a general nature, and, in ascertaining what the common law is, has repeatedly consulted, and

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referred with approval to, the decisions of the English court rendered since, as well as prior to, the year 1607. Under this rule, the will is a valid bequest to charity.

John Cook's Charity, Dwight, Charity Cases, 6; *Rose Will Case*, Dwight, Charity Cases, 187, 302; *Kirton Free School Case*, Dwight, Charity Cases, 41; *Symons' Case*, Duke, Charitable Uses, 163; *Skinner's Case*, F. Moore, 129, pl. 277; *Hugh Westwood's Charity*, Dwight, Charity Cases, 71; *Lunce's Charity*, Dwight, Charity Cases, 68; *Gibbons* v. *Maltyard*, Popham, 6; *Thetford School Case*, 8 Coke, 130*b*; *Robert Offley's Charity*, Dwight, Charity Cases, 185; *Sir Walston Dixie's Charity*, Dwight, Charity Cases, 99; *Lane's Charity*, Dwight, Charity Cases, 99; *Reading* v. *Lane*, Duke's Charitable Uses, Bridgman's ed. 361; *Coventry* v. *Atty. Gen.* 7 Bro. P. C. 236, 2 Vern. 397; *Atty. Gen.* v. *London*, 3 Bro. Ch. 171; *Moggridge* v. *Thackwell*, 7 Ves. Jr. 36; *Plunkett* v. *Dublin*, 1 Bligh N. R. 312; *Atty. Gen.* v. *Brentwood School*, 1 Myl. & K. 376; *Incorporated Soc.* v. *Richards*, 1 Dru. & War. 258; *United States* v. *Drummond*, 33 Beav. 449; *University of Aberdeen* v. *Irvine*, L. R. 1 H. L. Sc. App. Cas. 289.

This is a valid charitable trust under the decisions in—

Seda v. *Huble*, 75 Iowa, 429, 39 N. W. 685; *Phillips* v. *Harrow*, 93 Iowa, 92, 61 N. W. 434; *Miller* v. *Chittenden*, 2 Iowa, 315; *Griffin* v. *Graham*, 8 N. C. (1 Hawks) 96, 9 Am. Dec. 619; *Miller* v. *Atkinson*, 63 N. C. 537; *Keith* v. *Scales*, 124 N. C. 497, 32 S. E. 809; *Gould* v. *Taylor Orphan Asylum*, 46 Wis. 106, 50 N. W. 422; *Beurhaus* v. *Cole*, 94 Wis. 617, 69 N. W. 986; *Sawtelle* v. *Witham*, 94 Wis. 412, 69 N. W. 72; *Heiskell* v. *Chickasaw Lodge No. 8, I. O. O. F.* 87 Tenn. 668, 4 L. R. A. 699, 11 S. W. 825; *State* v. *Smith*, 16 Lea, 662; *People ex rel. Ellert* v. *Cogswell*, 113 Cal. 129, 35 L. R. A. 269, 45 Pac. 270; *Re Upham*, 127 Cal. 90, 59 Pac. 315; *Towle* v. *Nesmith*, 69 N. H. 212, 42 Atl. 900; *Dye* v. *Beaver Creek Church*, 48 S. C. 444, 26 S. E. 717; *Newson* v. *Starke*, 46 Ga. 88; *Beckwith* v. *St. Philip's Parish*, 69 Ga. 564; *Mason* v. *Methodist Episcopal Church*, 27 N. J. Eq. 47; *Saltonstall* v. *Sanders*, 11 Allen, 446; *Sears* v. *Chapman*, 158 Mass. 400, 33 N. E. 604; *Fellows* v. *Miner*, 119 Mass. 541; *Williams* v. *Pearson*, 38 Ala. 299; *Hatheway* v. *Sackett*, 32 Mich. 97; *Penny* v. *Croul*, 76 Mich. 471, 5 L. R. A. 858, 43 N. W. 649; *State* v. *Griffith*, 2 Del. Ch. 420.

The conditions of the will are, if material, only administrative detail, and, whether valid or invalid, cannot affect the devise.

Jones v. *Habersham*, 107 U. S. 174, 183, 27 L. ed. 401, 405, 2 Sup. Ct. Rep. 336; *Philadelphia* v. *Girard*, 45 Pa. 9, 84 Am. Dec. 470; *Ingraham* v. *Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; *Lackland* v. *Walker*, 151 Mo. 210, 52 S. W. 414; *Clephane* v. *Provost*, L. R. 1 H. L. Sc. App. Cas. 417; *McDonogh* v. *Murdoch*, 15 How. 367, 403, 14 L. ed. 732, 748; *Nourse* v. *Merriam*, 8 Cush. 11; *Moggridge* v. *Thackwell*, 7 Ves. Jr. 69; *Mills* v. *Farmer*, 19 Ves. Jr. 483.

The question is not whether the city can use funds raised by taxation to establish and maintain a college for orphans, but whether it may act as trustee for such an institution established and maintained by the munificence of the testator, which is no longer debatable.

Jones v. *Habersham*, 107 U. S. 174, 189, 27 L. ed. 401, 407, 2 Sup. Ct. Rep. 336; *Penny* v. *Croul*, 76 Mich. 471, 5 L. R. A. 858, 43 N. W. 649; *Nourse* v. *Merriam*, 8 Cush. 11.

That is no longer an open question.

Vidal v. *Philadelphia*, 2 How. 127, 191, 192, 11 L. ed. 205, 231; *Perin* v. *Carey*, 24 How. 465, 506, 507, 16 L. ed. 701, 711, 712; *Russell* v. *Allen*, 107 U. S. 163, 172, 27 L. ed. 397, 400, 2 Sup. Ct. Rep. 327; *Peynado* v. *Peynado*, 82 Ky. 5; *Zanesville Canal & Mfg. Co.* v. *Zanesville*, 20 Ohio, 483; *Lagrange County* v. *Rogers*, 55 Ind. 297; *Rush County* v. *Dinwiddie*, 139 Ind. 128, 37 N. E. 795; *Barkley* v. *Donnelly*, 112 Mo. 561, 19 S. W. 305; *Troutman* v. *De Boissiere Odd Fellows' Orphans' Home & Industrial School Asso.* (Kan.) 64 Pac. 33; *Paschal* v. *Acklin*, 27 Tex. 173; *Woodruff* v. *Marsh*, 63 Conn. 125, 26 Atl. 846; *Beardsley* v. *Bridgeport*, 53 Conn. 489, 55 Am. Rep. 152, 3 Atl. 557; *Griffin* v. *Graham*, 8 N. C. (1 Hawks) 96, 9 Am. Dec. 619; *Miller* v. *Atkinson*, 63 N. C. 537; *Keith* v. *Scales*, 124 N. C. 497, 32 S. E. 809; *Dye* v. *Beaver Creek Church*, 48 S. C. 444, 26 S. E. 717; *Newson* v. *Starke*, 46 Ga. 88; *Sears* v. *Chapman*, 158 Mass. 400, 33 N. E. 604; *Hadley* v. *Hopkins Academy*, 14 Pick. 240; *Clement* v. *Hyde*, 50 Vt. 716, 28 Am. Rep. 522; *Chapin* v. *School Dist. No. 2*, 35 N. H. 445; *State* v. *Smith*, 16 Lea, 662; *Gould* v. *Taylor Orphan Asylum*, 46 Wis. 106, 50 N. W. 422; *Dodge* v. *Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Re John*, 30 Or. 494, 36 L. R. A. 242, 47 Pac. 341, 50 Pac. 226; *Green* v. *Blackwell* (N. J. Eq.) 35 Atl. 376; *McIntire* v. *Zanesville*, 17 Ohio St. 352; *Birchard* v. *Scott*, 39 Conn. 63; *Jones* v. *Habersham*, 107 U. S. 174, 189, 27 L. ed. 401, 407, 2 Sup. Ct. Rep. 336.

The limitation of the class to "white" orphans is not obnoxious, and the further limitation to orphans "born of reputable parents" is sufficiently definite, and does not invalidate the public character of the charity, as contended by appellant.

Peynado v. *Peynado*, 82 Ky. 5; *Paschal* v. *Acklin*, 27 Tex. 173; *Beardsley* v. *Bridgeport*, 53 Conn. 489, 55 Am. Rep. 152, 3 Atl. 557; *Dailey* v. *New Haven*, 60 Conn. 314, 14 L. R. A. 69, 22 Atl. 945; *Rush County* v. *Dinwiddie*, 139 Ind. 128, 37 N. E. 795; *De Bruler* v. *Ferguson*, 54 Ind. 549; *Craig* v. *Secrist*, 54 Ind. 419; *Dodge* v. *Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Perin* v. *Carey*, 24 How. 465, 507, 16 L. ed. 701, 712; *State* v. *Smith*, 16 Lea, 662; *Sohier* v. *Burr*, 127 Mass. 221; *Woodruff* v. *Marsh*, 63 Conn. 125, 26 Atl. 846; *Sawtelle* v. *Witham*, 94 Wis. 412, 69 N. W. 72; *Williams* v. *Pearson*, 38 Ala. 299; *Swasey* v. *American Bible Soc.* 57 Me. 523; *Newson* v. *Starke*, 46 Ga. 88; *Mason* v. *Methodist Episcopal*

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Church, 27 N. J. Eq. 47; *Parks* v. *Soldiers' & Sailors' Home*, 22 Colo. 86, 43 Pac. 542; *Warner* v. *Gunnison*, 2 Colo. App. 430, 31 Pac. 238.

The trust is not repugnant, but germane, to the purposes for which the city of Denver was created; and the administration of the trust is not foreign to the objects of the corporation.

Philadelphia v. *Fox*, 64 Pa. 169; *Vidal* v. *Philadelphia*, 2 How. 127, 188–192, 11 L. ed. 205, 230, 231; *McDonogh* v. *Murdoch*, 15 How. 367, 406, 407, 14 L. ed. 732, 749; *Perin* v. *Carey*, 24 How. 465, 505, 506, 16 L. ed. 701, 711; *Jones* v. *Habersham*, 107 U. S. 174, 189, 27 L. ed. 401, 407, 2 Sup. Ct. Rep. 336; *Barkley* v. *Donnelly*, 112 Mo. 561, 19 S. W. 305; *Craig* v. *Secrist*, 54 Ind. 419; *Rush County* v. *Dinwiddie*, 139 Ind. 128, 37 N. E. 795; *Skinner* v. *Harrison Twp.* 116 Ind. 139, 2 L. R. A. 137, 18 N. E. 529; *Peynado* v. *Peynado*, 82 Ky. 5; *State* v. *Smith*, 16 Lea, 662; *Bell County* v. *Alexander*, 22 Tex. 351, 73 Am. Dec. 268; *Philadelphia* v. *Girard*, 45 Pa. 9, 84 Am. Dec. 470; *McIntyre* v. *El Paso County*, 15 Colo. App. 78, 61 Pac. 237; *John Cooke's Charity*, Dwight Charity Cases, 6; *Howell's Charity*, Dwight, Charity Cases, 15; *Robert Offley's Charity*, Dwight, Charity Cases, 185; *Atty. Gen.* v. *London*, 3 Bro. Ch. 171; *Robinson's Estate*, 63 Cal. 620; *Delaney* v. *Salina*, 34 Kan. 532, 9 Pac. 271; *Chambers* v. *St. Louis*, 29 Mo. 543; *Phillips* v. *Harrow*, 93 Iowa, 92, 61 N. W. 434; *Hatheway* v. *Sackett*, 32 Mich. 97; *Beurhaus* v. *Cole*, 94 Wis. 618, 69 N. W. 986; *Sargent* v. *Cornish*, 54 N. H. 18; *Chapin* v. *School Dist. No. 2*, 35 N. H. 445; *Lovell* v. *Charlestown*, 66 N. H. 584, 32 Atl. 160; *Higginson* v. *Turner*, 171 Mass. 586, 51 N. E. 172; *Webb* v. *Neal*, 5 Allen, 575; *Fellows* v. *Miner*, 119 Mass. 541; *Drury* v. *Natick*, 10 Allen, 169; *Sutton* v. *Cole*, 3 Pick. 232.

The question of the city's capacity to take can only be raised by the state in a direct proceeding.

Hayward v. *Davidson*, 41 Ind. 212; Dill. Mun. Corp. § 444; *Leazure* v. *Hillegas*, 7 Serg. & R. 313; *Chambers* v. *St. Louis*, 29 Mo. 543; Ang. & A. Corp. § 152; *Vidal* v. *Philadelphia*, 2 How. 127, 191, 11 L. ed. 205, 231; *Girard* v. *Philadelphia*, 7 Wall. 1, 14, 19 L. ed. 53, 56; *Jones* v. *Habersham*, 107 U. S. 174, 188, 27 L. ed. 401, 406, 2 Sup. Ct. Rep. 336; *Handley* v. *Palmer*, 91 Fed. 948; *Hamsher* v. *Hamsher*, 132 Ill. 273, 8 L. R. A. 550, 23 N. E. 1123; *Barnes* v. *Sudard*, 117 Ill. 237, 7 N. E. 477; *Alexander* v. *Tolleston Club*, 110 Ill. 65; *Ralcy* v. *Umatilla County*, 15 Or. 173, 13 Pac. 890; *Penny* v. *Croul*, 76 Mich. 471, 5 L. R. A. 858, 43 N. W. 649; *Farrington* v. *Putnam*, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652; *Chapin* v. *School Dist. No. 2*, 35 N. H. 445; *Hanson* v. *Little Sisters of the Poor*, 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052; *Heiskell* v. *Chickasaw Lodge No. 8, I. O. O. F.* 87 Tenn. 668, 4 L. R. A. 699, 11 S. W. 825; *Wade* v. *American Colonization Soc.* 7 Smedes & M. 663, 45 Am. Dec. 324.

There being a valid charitable trust and an existing trustee competent to take, objections can have no application in testator's lifetime. At his death the heirs cannot object.

French v. *Woodruff*, 25 Colo. 339, 54 Pac. 1015; *Wheatley* v. *Badger*, 7 Pa. 459; *Glover* v. *Condell*, 163 Ill. 566, 35 L. R. A. 360, 45 N. E. 173; *Grand Prairie Seminary* v. *Morgan*, 171 Ill. 444, 49 N. E. 516; *Campbell* v. *Campbell*, 130 Ill. 466, 6 L. R. A. 167, 22 N. E. 620; *Teel* v. *Hilton*, 21 R. I. 227, 42 Atl. 1111; *Weatherhead* v. *Stoddard*, 58 Vt. 623, 56 Am. Rep. 573, 5 Atl. 517; *Dodge* v. *Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Sawtelle* v. *Witham*, 94 Wis. 412, 69 N. W. 72.

Under our statute, the devise in trust to the executors and trustees became vested, absolute, and irrevocable when the will was probated.

Penick v. *Thom*, 90 Ky. 665, 14 S. W. 830; *Farrington* v. *Putnam*, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652; *Lackland* v. *Walker*, 151 Mo. 210, 52 S. W. 414; *Landis* v. *Wooden*, 1 Ohio St. 161, 59 Am. Dec. 615; *Ingraham* v. *Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; *Crerar* v. *Williams*, 145 Ill. 625, 21 L. R. A. 454, 34 N. E. 467.

The general trust for a valid charitable purpose having vested in a surviving trustee of the charity, the power of the city to take the special or secondary trust is a matter with which the heirs have no concern.

Miller v. *Atkinson*, 63 N. C. 537; *Miller* v. *Tcachout*, 24 Ohio St. 525; *Sowers* v. *Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418; *Penroyer* v. *Wadhams*, 20 Or. 274, 11 L. R. A. 210, 25 Pac. 720; *Augusta* v. *Walton*, 77 Ga. 517; *Bullard* v. *Chandler*, 149 Mass. 532, 5 L. R. A. 104, 21 N. E. 951; *Grand Prairie Seminary* v. *Morgan*, 171 Ill. 444, 49 N. E. 516; *Hadley* v. *Hopkins Academy*, 14 Pick. 240; *Miller* v. *Chittenden*, 2 Iowa, 315.

Steele, J., delivered the opinion of the court:

We shall not dwell upon the objection made that the county court was the proper tribunal in which to bring this action, and that the plaintiff, by not contesting in the county court, waived his right to question the validity of the will or any of its devises in any other proceeding, because we are not required to pass upon these questions in order to determine this controversy. We should, perhaps, suggest that the statute makes the probate of a will in this state a solemn proceeding, and that it appears to invest the county court with jurisdiction to determine all questions of law and fact relating to the proof of wills and matters testamentary.

We shall first dispose of the question presented by the plaintiff that the property of the testator acquired after the execution of the will did not pass upon his death to the executors and trustees under the 14th and 15th clauses of the will. Only such real estate as the testator owned at the time of the execution of his will could pass by the will under the common law. But by § 4652,

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Mills's Anno. Stat., a testator is given power to devise the real estate "which he hath, or at the time of his death shall have." This section of our statute was copied from Illinois, and the courts of that state, long prior to its adoption here, construed it as abrogating the rule of the common law; and under the familiar rule of construction, which we shall presently state, the decisions of Illinois should control. It is held in Illinois that, if no intention appears from the will to devise after-acquired property, it will not pass, but that such intention is sufficiently shown by the language, "I bequeath all my property, real and personal, wherever the same may be," and that "it will be presumed, where the contrary does not appear, that a party deliberately making a will does not intend to leave anything undisposed of." *Willis* v. *Watson*, 5 Ill. 64; *Woman's Union Missionary Soc.* v. *Mead*, 131 Ill. 338, 23 N. E. 603. In the will under consideration this language is employed: "I give, devise, and bequeath all my real and personal estate, of whatsoever nature or kind soever, and wheresoever situated," etc., and "all the rest, residue, and remainder of my estate, real, personal, and mixed, and wheresoever situated," etc. This in our judgment, shows plainly the intention of the testator to dispose of all his estate; and we must hold that the entire estate of which George W. Clayton died seised passed by his will, unless the trust created by the 14th section of the will be declared invalid.

We are of the opinion that the statute 43 Eliz. chap. 4, so far as applicable, is in force in the state of Colorado. Our statute, which provides that the common law of England, so far as the same is applicable and of a general nature, and all acts and statutes of the British Parliament made in aid of, or to supply the defects of, the common law, prior to the fourth year of James I., shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority, was enacted in 1861, and repealed and re-enacted in 1868. Prior to the re-enactment the Illinois authorities had held that the statute of Elizabeth referred to was in force in the state of Illinois. Our statute was under consideration by this court in the case of *Chilcott* v. *Hart*, 23 Colo. 40, 35 L. R. A. 41, 45 Pac. 391, and it is there said: "It must be presumed that our legislature was familiar with these decisions, and under a familiar rule of construction, unless there are peculiar reasons for a contrary holding, when a state adopts the statute of another state the construction which the courts of the latter state put upon the statute before such adoption should be followed by the courts of the adopting state." It is well settled that long prior to the enactment of the statute of Elizabeth the courts of chancery of England had exercised jurisdiction over charitable trusts, and had enforced them, under its judicial power, whenever the intention of the testator was clearly expressed. Mr. Justice Story, in the case of *Vidal* v. *Philadelphia*, 2 How. 127, 11 L. ed. 205, in reference to the case of *Philadelphia Baptist Asso.* v. *Hart*, 4 Wheat. 1, 4 L. ed. 499, says: "The court upon that occasion went into an elaborate examination of the doctrine of the common law on the subject of charities antecedent to and independent of the statute of 43 Eliz. chap. 4, for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights (certainly in no small degree shadowy, obscure, and flickering), the court came to the conclusion that at the common law no donation to charity could be enforced in chancery where both of these circumstances, or, rather, where both of these defects, occurred. [Namely, where the trustees mentioned in the trust were an unincorporated association which had no legal capacity to take or hold the donation in succession for the purposes of the trust, and the beneficiaries were also uncertain and indefinite.] . . . But very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth and in the earlier reigns. Among these are found many cases in which the court of chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities, where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon and enforced in, the court of chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. . . . If, then, this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It would be no answer to say that, if so, it was dormant, and that no court possessing equity powers now exists or has existed in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law, and remedies may from time to time be applied by the legislature to supply the defects. It is no proof of the nonexistence of equitable rights that there exists no adequate legal remedy to enforce them." And citing from *Witman* v. *Lex*, 17 Serg. & R. 88, 17 Am. Dec. 644: "'It is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects, or whether their corporate

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designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid.' In the latter case certain bequests given by the will of Mrs. Zane to the Yearly Meeting of Friends in Philadelphia, an unincorporated association, for purposes of general and indefinite charity, were, as well as other bequests of a kindred nature, held to be good and valid, and were enforced accordingly. The case, then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it." It is stated by Woerner, in his work on Administration, that "the statute of 43 Eliz. chap. 4, has been abolished, or never was in force, in Maryland, Michigan, Minnesota, New York, Virginia, West Virginia, and, it seems, Wisconsin; and charitable uses are in these states governed by the same rules as are applied to other devises and gifts, except in so far as the statute of the state may have introduced a change. The statute is held not to be in force, also, in Alabama, California, Connecticut, Delaware, District of Columbia, Indiana, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee; but in these states the distinction between charitable uses and ordinary trusts, formerly ascribed in many of the states to the operation of this statute, is held to emanate from principles of public policy, recognized at common law, and announced by the courts before the enactment of the statute, which in this respect is but declaratory of the pre-existing common law. Hence the same rules are applied in these states as if the statute were in force. The statute is held to be in force in Kentucky, Illinois, Maine, and Massachusetts, to which may be added a number of states in which, not the statute itself, but its principles, as declaratory of common law in relation to charitable uses, are held to be the law of the state. Among these may be reckoned Arkansas, California, Georgia, Iowa, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Vermont." § 431. So that, whether the statute of Elizabeth is held to be in force in this state or not, the principles of the common law, as it existed prior to the fourth year of James I., are in force in this state; and charitable uses are to be enforced here in accordance with the principles of the common law.

The decisions in the United States concerning charitable trusts cannot be reconciled. They can be classified according to states. This has been done by Mr. Woerner, and the authorities cited by him support his text. It seems that at the common law a bequest or devise to charity is peculiarly favored. It is not affected by the law applicable to perpetuities or the accumulation of income. It is to be given the most liberal construction, to the end that the wishes of the donor be enforced. A devise to charity is therefore not rendered invalid because trustees are not named, nor because a trustee incapable of taking is named. The court, in the exercise of its judicial functions, will never permit a trust to fail for the want of a trustee. Though the beneficiaries are described in an indefinite and uncertain manner, the courts will enforce the bequest and uphold the trust if by any means the beneficiaries are ascertainable. If the question of the designation of the beneficiaries is left to trustees, it is no objection to the validity of the trust, and it is only in cases where the beneficiaries named are so vague and uncertain that courts are incapable of executing the trust that the trust is declared to be invalid. In England, courts assume the authority of substituting a scheme of their own in cases where the scheme proposed by the testator is vague and uncertain, but in this country the courts possess no such power, and never substitute another charity for the charity named by the testator, and it is only in cases where the wishes of the testator cannot be carried out that the trusts fail.

The following cases and the citations therein are decisive of one or more of the various questions involved in this controversy, and in them we find the following propositions fully sustained: That the statute of 43 Eliz. chap. 4, so far as it recognizes or indicates what are charitable uses, and in so far as it gives validity to gifts for such uses, is in force in this country as a part of the common law, unless it has been expressly repealed. That the details of the statute, and the remedies provided therein, are not applicable to our conditions or institutions, and are not in force here. That, independently of the statute, the courts of this country have original, inherent jurisdiction over charitable gifts and trusts. That such jurisdiction was exercised by the courts of England prior to the enactment of the statute of Elizabeth. That in the exercise of this jurisdiction the courts will enforce such gifts in accordance with the desires of the donor. That a gift for charitable purposes will not fail for want of a trustee. That such gifts are excepted from the rule against perpetuities and accumulation. That it is not necessary that the beneficiary or the trustee should be clothed with power or capacity to accept the gift at the time of the grant, but the intention of the donor will be executed if a capacity arises within a reasonable time thereafter. That a charitable gift will not fail because it favors a class of the population. That it is immaterial how indefinite or vague the subjects are, provided there be a discretionary power vested anywhere over the application of the donor's bounty. That, where there exists the least circumstance from which to collect the testator's intention of anything else than an immediate devise to take effect *in præsenti*, then, if confined within legal limits, it is good as an executory devise. That municipal corporations may hold property in trust for charitable uses within the scope of their powers or duties. That, if such trust is repugnant to or inconsistent with

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the proper purposes for which the corporation was created, that may furnish a ground why it may not be compelled to execute it, but it will furnish no ground to declare the trust itself void. That a devise to a corporation for charitable uses operates as an appointment, rather than a bequest. 2 Bl. Com. 376; *Re John*, 30 Or. 494, 36 L. R. A. 242, 47 Pac. 341, 50 Pac. 226; *Pell* v. *Mercer*, 14 R. I. 412; *Zimmerman* v. *Anders*, 6 Watts & S. 218, 40 Am. Dec. 552; *Taylor* v. *Bryn Mawr College*, 34 N. J. Eq. 101; *Goodale* v. *Mooney*, 60 N. H. 528, 49 Am. Rep. 334; *Howe* v. *Wilson*, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. 390; *Ould* v. *Washington Hospital for Foundlings*, 95 U.S. 303, 24 L. ed. 450; *Miller* v. *Chittenden*, 2 Iowa, 315, 4 Iowa, 252; *Atty. Gen.* v. *Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349; *Wade* v. *American Colonization Soc.* 7 Smedes & M. 663, 45 Am. Dec. 324; *Fink* v. *Fink*, 12 La. Ann. 301; *Doughten* v. *Vandever*, 5 Del. Ch. 51; *Williams* v. *Pearson*, 38 Ala. 299; *Burr* v. *Smith*, 7 Vt. 241, 29 Am. Dec. 154; *Bell County* v. *Alexander*, 22 Tex. 351, 73 Am. Dec. 268; *Beall* v. *Fox*, 4 Ga. 404; *Hinckley's Estate*, 58 Cal. 457; *Grissom* v. *Hill*, 17 Ark. 483; *McIntire Poor School* v. *Zanesville Canal & Mfg. Co.* 9 Ohio, 203, 34 Am. Dec. 436; *Missouri Historical Soc.* v. *Academy of Science*, 94 Mo. 459, 8 S. W. 346; *Moore* v. *Moore*, 4 Dana, 354, 29 Am. Dec. 417; *Chambers* v. *St. Louis*, 29 Mo. 543; *Tappan* v. *Deblois*, 45 Me. 122; *Heuser* v. *Harris*, 42 Ill. 425; *Sears* v. *Chapman*, 158 Mass. 400, 33 N. E. 604; *Craig* v. *Secrist*, 54 Ind. 419.

It may be stated as a general proposition of law that a corporation capable of holding real estate is capable also of executing a charitable trust, unless the statute or the articles of incorporation prohibit it. And, unless specially restrained, municipal corporations may take and hold property in their own right by direct gift, conveyance, or devise, in trust for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So in this case, unless the objects of the incorporation of the city of Denver are foreign to the purposes expressed in this trust, the city of Denver is capable of taking the property and executing the trust in accordance with the provisions of the will.

It is said that by the Constitution and laws of Colorado the municipalities of the state are inferentially prohibited from maintaining schools, that that function of government is left to the school districts of the state, and that this provision of the will of George W. Clayton should not be enforced, because of the policy of the state so expressed. As far as the policy of the state is concerned, the act of 1901 enabling the city of Denver to take gifts by devise declares it to be in favor of the city's accepting such devise. Gilbert Hatheway died in 1871, and by will gave to the corporation of the village of New Baltimore $15,000, to be used in the erection of a school building to be used as a high school, and to be suitable for that purpose, and to be known as the "Hatheway School." The legislature of Michigan in the year 1873 passed an act enabling the village to accept the gift. In the case of *Hatheway* v. *Sackett*, 32 Mich. 99,—a case in which this legacy was under consideration,—the court said: "They [the plaintiffs in error] insist that our general state policy is opposed to all connection between village government and school administration, and then seek to infer that this general policy is applicable to this specific case. But the act of 1873 negatives this inference, because, whatever its force as an enabling act, it is at least a direct and explicit expression of the sense of the legislature that in truth it is not impolitic for the village of New Baltimore to accept this very bequest. We have, then, distinct and solemn evidence that the legislature have considered it entirely consistent for the corporation to have the identical legacy in question." It is said by Judge Dillon, in his work on Municipal Corporations, that "municipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which property and revenues are absolutely necessary; and therefore legacies of personal property, devises of real property, and grants or gifts of either species of property directly to the corporation, or for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burden of its citizens, are, in the absence of disabling or restraining statutes, valid in law. Thus, a conveyance of land to a town or other public corporation for benevolent or public purposes, as a site for a schoolhouse, city or town house, and the like, is based upon a sufficient consideration; and such conveyances are liberally construed in support of the object contemplated." § 566. And in Perry, Tr. § 43, it is said: Municipal corporations cannot "act as trustees if they are forbidden to take and hold lands, as by the statutes of mortmain, nor if they are not empowered to take the property. But if the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but germane to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them, if it accepts them. Thus, towns, cities, and parishes may take and hold property in trust for the establishment of colleges, for the purpose of educating the poor, for the relief of the poor, though not paupers, by furnishing them fuel at a low price, and for the support of schools," or for any educational or charitable purposes within the scope of its charter. And cases are cited in support of the text. Charles McMichen, a citizen and resident of Cincinnati, made

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his will in 1855, and died in 1858 without issue. He devised certain real and personal property to the city of Cincinnati and its successors in trust, forever, for the purpose of building, establishing, and maintaining, as far as practicable, two colleges for the education of boys and girls. The Supreme Court of the United States, in *Perin* v. *Carey*, 24 How. 465, 16 L. ed. 701, held that this was a valid devise, and that "the city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMichen." Upon this subject of the authority of municipal corporations to administer a trust, Mr. Justice Wayne, speaking for the court, said: "The law is that, where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that, if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself, being good, will be executed under the authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such a trust in a state where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers." Stephen Girard died in the year 1831, and by his will devised and bequeathed to the city of Philadelphia the residue of his estate in trust for the establishment and support of a permanent college for the education of poor white male orphans. This devise was sustained by the Supreme Court of the United States, and the court held that the corporation of the city of Philadelphia is capable of taking under a devise of real and personal estate in trust for the establishment and support of a college for poor orphan boys, and can execute the trust. *Vidal* v. *Philadelphia*, 2 How. 127, 11 L. ed. 205. Bryan Mullanphy died in the year 1851, and by his will devised and bequeathed the undivided one-third of his property to the city of St. Louis in trust, "to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way to settle in the west," and this trust was sustained by the supreme court of Missouri in the case of *Chambers* v. *St. Louis*, 29 Mo. 543.

It is said that the legislature has not granted to the city of Denver authority to acquire and hold real and personal property, except as it is necessary for the public uses of the inhabitants thereof, and that for that reason the bequest and devise to the city of Denver is an invalid one, and should be declared void, and the court should hold that as to his residuary estate George W. Clayton died intestate. The decisions are, as we have cited, to the effect that, where municipal corporations are organized for purely governmental purposes, they may accept gifts for charity, if the charity is germane to the general purposes of the organization. The general purpose of all municipal corporations is to promote the general welfare and happiness of the people residing therein. Such was the purpose of the legislature in granting to the city of Denver its charter. To say that, because this devise is for the benefit of a class of the inhabitants of the city of Denver or elsewhere, it is a private, and not a public, charity, is contrary to the decisions upon the subject. The sections of the charters of Philadelphia, Cincinnati, and St. Louis quoted in the cases cited show that the charters of these cities and the charter of Denver are practically alike. In each are contained the general provisions found in nearly all charters that tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness. If the city of Philadelphia can hold property in trust for the education of poor white male orphans, and the city of Cincinnati can lawfully execute a trust for the education of boys and girls, and the city of St. Louis can, without violating its organic law, administer a trust "for the purpose of furnishing aid to poor emigrants" passing through the city, there is no apparent reason why Denver, under her charter, which provides for the entertainment of visitors (trade), for the encouragement of manufactures (industry), for the assistance of charitable organizations, and for the good order, health, good government, and general welfare of the city, cannot accept and execute a trust for the education of poor white male orphans. Furthermore, the legislature, by the act of 1901, clothed the city of Denver with full power and authority to accept the trust created under the will, and to administer it according to the terms and provisions of the devise. It is said that this devise must be construed with reference to the capacity of the city at the time of the death of George W. Clayton; that the estate at the time of George W. Clayton's death vested either in the heirs or in the trustee named. We cannot agree with counsel in this contention. The devise to the trustee is in the nature of an executory devise. It is to take effect when the executor, Moses Hallett, or an ad-

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ministrator with the will annexed, marshals the assets of the estate, selects a site, and erects a building in accordance with the provisions of the will. Then, and not till then, in our judgment, is the city of Denver called upon to accept or reject the trust imposed.

An act of the New York legislature was passed after the death of a testator, authorizing a town to accept a gift for charitable purposes made by a resident of Massachusetts. The validity of the gift was contested in the Massachusetts court. In *Fellows* v. *Miner*, 119 Mass. 541, the court says: "This bequest is 'to the town of Kinderhook, New York, in its corporate capacity,' in trust for the charitable uses and purposes declared in the will. N. Y. Stat. 1875, chap. 200, § 1, expressly authorizes that town, in its corporate capacity, to receive and hold in trust all property bequeathed to it by this will, for the uses and purposes therein mentioned. The bequest being valid by the law of this state, the town named in the will as trustee being now enabled, by a special act of the legislature of the state in which it is situated, to take the bequest, and the trust being directed by the will to be executed in that state and for the benefit of the inhabitants of that town, the court might properly direct the fund be paid over to the town, if it were clear that the trust could thereupon be lawfully administered according to the will of the testator." In the case of *De Camp* v. *Dobbins*, 29 N. J. Eq. 36, the court says: "If a corporation takes land by grant or devise, in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers. The state alone can interfere. . . . And again, if the limitation did in fact exist, the legislature might remove the restriction to permit the corporation to execute the trust, or authorize it to receive the gift and administer the trust notwithstanding the limitation. This court will not suffer a trust to fail for want of a trustee; will uphold a trust for a reasonable time, when necessary, in order to enable the trustee to obtain the requisite authority to take and execute it. . . . But, again, the restriction insisted upon does not in fact exist. It was removed by the act of 1872." Mr. Justice Thompson, in the case of *Inglis* v. *Sailor's Snug Harbour*, 3 Pet. 99, 7 L. ed. 617, said in reference to the will of Robert Richard Randall, and the act of the legislature passed after his death: "If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against, and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose, it will form an exception to what we find so universally laid down in all our books as a cardinal rule in the construction of wills,—that the intention of the testator is to be sought after and carried into effect. But no such difficulty, in my judgment, is here presented. If the intention of the testator cannot be carried into effect precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which, with the aid of the act of the legislature, must remove all difficulty." And Mr. Justice Johnson, in a concurring opinion, said: "But as a charity, to be governed by the law of the state of New York, it appears to me almost idle to view this case with reference to any other rule of decision than their own adjudications. The case of *Coggeshall* v. *Pelton*, 7 Johns. Ch. 292, 11 Am. Dec. 471, was a case of greater difficulties than the present; for there the devise is immediate *in præsenti*, to a devisee having no capacity to take at the time. The legislature afterwards gave that capacity, and the court held the devise valid; nor is it unimportant in that case to observe that the case in [*Atty. Gen.* v. *Clarke*] 1 Ambl. 422, of the devise to 'the poor inhabitants of Saint Leonard Shore ditch,' is recognized as authority, as well as that of *Jones* v. *Williams*, in the same book (2 Ambl. 651). Now, this decision seems full to these points: (1) That the legislature of that state can, *ex post facto*, give a capacity to take a charity, where there was no such capacity existing at the time of devise over, is a case where the future existence of that capacity was not contemplated by the testator; (2) that an act of incorporation, with capacity to take, dispenses with the presence of the representative of the state, in a suit to recover such a charity. . . . It is, in general, true that where there is a present, immediate devise, there must exist a competent devisee, and a present capacity to take. But it is equally true that if there exists the least circumstance from which to collect the testator's contemplation or intention of anything else than an immediate devise, to take effect *in præsenti*, then, if confined within the legal limits, it is good as an executory devise. . . . Upon the whole, I am of opinion that the act of incorporation was at least equivalent to the King's sign manual, and vested a good legal estate in the tenant; that, although in the interval it should have descended upon the heir, it descended subject to be devested and passed over by that exercise of prerogative power. But I perceive no necessity for admitting that it ever descended upon the heir, since the right of succession seems rather to be in the commonwealth in the case of charities, as *parens patriæ*."

Counsel say that the will provides no method by which the beneficiaries shall be selected; and, there being no prescribed means by which they can be ascertained as a class or as individuals, the trust is therefore void because of this indefiniteness. The will provides that as many poor white male orphans, born of reputable parents, as the income shall be adequate to maintain, shall be admitted to the college. And it is said that the word "reputable" is not defined by the testator, and that no person is designated to determine who are entitled to admission as students. In the books it is said

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the thing given becomes a charity when the uncertainty of the recipient begins. It is no objection, then, to the enforcement of this devise, that the beneficiaries are uncertain. But let us see whether the will itself is so vague and uncertain. These words appear in the will of Mr. Clayton: "The college building shall be of stone, substantially built upon a plat of ground of sufficient size to admit of the construction of additional college buildings if the same shall become necessary or expedient. The institution above mentioned shall be established within ten years from and after my decease, as may be practicable in the judgment of my executors. They shall carefully devise and promulgate such rules and regulations as they shall deem proper for the government of the institution, and which shall be carried out and be obligatory with the same force and effect as if herein set forth at large." This is, in our judgment, an express authority for the executors of the will of Mr. Clayton to promulgate rules and regulations for the control and management of this college, which shall be obligatory upon the trustees of the college after it is erected and turned over to them, and in the making of these rules and regulations it will undoubtedly be necessary for them to designate how and in what manner the persons to receive the benefits of the college education and to receive the benefits of Mr. Clayton's bounty shall be selected and determined; and, if there were no express provisions in his will, we think there is an implied authority granted to the board of trustees of the college to make such rules and regulations, and thereby determine who shall be the recipients of the charity. In the case of *Hunt* v. *Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, the court had under consideration a devise of the residue of an estate, directing that the income be distributed annually "among the worthy poor of the city of La Salle in such manner as a court of chancery may direct;" and it was held that the residuary bequest was a valid charitable gift, and should be carried into effect by a court of chancery; and, further, that in the case of a charitable bequest it is immaterial how vague, indefinite, and uncertain the object of the testator's bounty may be, provided there is a discretionary power vested in someone over its application to those objects. Mr. Justice Sheldon, delivering the opinion of the court, at page 276, 121 Ill., and page 333, 12 N. E., states: "The entire contention in this case arises upon the construction, validity, and effect of this residuary clause of the codicil. It is insisted this clause is void for uncertainty as to the beneficiaries. This is not a bequest to charity generally or to the poor generally, but to the worthy poor of the city of La Salle. The class here is definite,—the worthy poor of the city of La Salle,—but the individuals of the class to whom the bounty is to be distributed are uncertain. There is always this uncertainty as to individuals in the case of public charities, and it is this feature of uncertainty which distinguishes public charities from private charities,—charitable trusts from private trusts; and to hold charitable gifts to be void because of such uncertainty is to reject this whole distinctive doctrine of charitable trusts. . . . In *Hesketh* v. *Murphy*, 36 N. J. Eq. 304, the testator's will empowered and directed the trustees to employ the annual income of the fund 'for the relief of the most deserving poor of the city of Paterson aforesaid, forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral, or undeserving to receive any benefit from said fund.' It was objected that the gift could not be applied to its objects, and was void, because the will did not confer upon anyone the power of ascertainment of the individuals who should receive the benefit of the bequest. But the court held that the power given the trustee by the will to distribute the fund carried with it, by necessary implication, the power to select the beneficiaries from the designated class, and upheld the bequest. We entirely agree with the criticism there made by Chief Justice Beasley upon the case of *White* v. *Fisk*, 22 Conn. 31, that there was a mistaken assumption on the part of the court in that case that there was no power to select the objects of the charity lodged by the testator in the trustees; that, when a power is conferred on the trustees to distribute the fund to members of a class, such members having certain qualifications, which can be ascertained only by the exercise of judgment and discretion, as the act of distribution cannot be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the moneys carries with it the incidental and necessary power of selection. And this upon the ordinary doctrine that, when an act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is, by intendment of law, comprised in such grant of power."

We are, therefore, of the opinion that not only is power expressly granted by the terms of this will to the executors to designate and appoint persons to be entitled to the privileges conferred by the will of Mr. Clayton, but that the appointment of trustees, granting them authority to control and supervise the college, carries with it, by necessary implication, the authority to designate the beneficiaries. "A charity," said Mr. Justice Gray, when of the supreme court of Massachusetts, "in a legal sense, may be fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." [*Jackson* v. *Phillips*, 14 Allen, 539.] Here, then, is a public charity. Through it Mr. Clayton seeks to bring the minds and

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hearts of poor orphans under the refining influence of education. After making such provision as he thought proper for the natural objects of his bounty, he has selected, as deserving of his benevolence, the poor white orphan boys of Denver and Colorado, and has devoted the residue of his great fortune to the erection and support of a permanent college for their free instruction and maintenance, that they may become useful citizens and honorable members of society. It is an indulgent, edifying, and worthy charity. It will lessen Denver's burdens of government. To thousands of poor orphan boys it will be a blessing forever, and it will be by them forever blest. Our conclusions, therefore, are that "the education and preferment of orphans," being one of the subjects mentioned in the statute of 43 Eliz. chap. 4, is to be regarded in Colorado as a public charity; that, there being power vested in the executor and the board of trustees of the college to select the objects of the testator's bounty, the trust created by the 14th section of the will is valid; that the city of Denver, in its corporate capacity, has power to accept the trust created, and to execute it in accordance with the intention of the testator, as declared in the 14th section of his will.

For the reasons given, *the judgment of the District Court is affirmed.*

Rehearing denied October 6, 1902.

ILLINOIS SUPREME COURT.

FITZSIMONS & CONNELL COMPANY, *Appt.*, *v.* BRAUN & FITTS.

(199 Ill. 390.)

1. **Volunteered statements of a witness as to the effect of blasting** on his own building, in reply to questions as to noises, in an action for damages for injuries to a building by blasting, of which all irrelevant parts to which the attention of the court is called are stricken out, furnish no reason for the admission of testimony of other property owners that the blasting did not affect their buildings.
2. **Courts will judicially notice** the fact that the use of dynamite as an explosive is intrinsically dangerous.
3. **One who uses high explosives in excavating** so near the property of another that the natural and probable result of an explosion will be injury to such property is liable for injuries caused, even by the vibration of earth or air, however high a degree of care he may have exercised in their use.
4. **The measure of damages** for injuring a building by the use of explosives near it is the cost of restoring it to its former condition.

(October 25, 1902.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of plaintiffs in an action brought to recover damages for injuries to plaintiffs' property through blasting by defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Lorin C. Collins** and **William Meade Fletcher,** with *Messrs.* **Meek, Cochrane, & Munsell,** for appellant:

A contractor, lawfully engaged in a public work, who makes use of an explosive in the performance of such work, near the property of another, is not liable for any resulting injury, where it results merely from vibration of the earth, and he uses due care in handling or using such explosive.

Sullivan v. *Dunham*, 161 N. Y. 290, 47 L. R. A. 715, 55 N. E. 923; *Booth* v. *Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 35 N. E. 592; *Tucker* v. *Mack Paving Co.* 61 App. Div. 521, 70 N. Y. Supp. 689; *Benner* v. *Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328; *Simon* v. *Henry*, 62 N. J. L. 486, 41 Atl. 692; *French* v. *View*, 143 N. Y. 90, 37 N. E. 612; *Losee* v. *Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *John Morris Co.* v. *Southworth*, 154 Ill. 118, 39 N. E. 1099; *Marshall* v. *Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394.

The city of Chicago had the right to build the tunnel, and to use all lawful means in so doing. Contractors and employees of the city enjoy the same immunity from liability which the city enjoys, therefore appellee has no remedy against appellant, unless the latter was guilty of negligence.

Hurd's Rev. Stat. (Ill.) 1899, chap. 24, art. 10, §§ 169–177, 254–261, 270*a*–270*g*; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Rigney* v. Chicago, 102 Ill. 64; *Smith* v. *Chicago, A. & St. L. R. Co.* 67 Ill. 191; *Penn Mut. L. Ins. Co.* v. *Heiss*, 141 Ill. 35, 31 N. E. 138; *Chicago & E. I. R. Co.* v. *Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; *Merriam* v. *United States*, 29 Ct. Cl. 250; *Bates* v. *Holbrook*, 35 Misc. 342, 71 N. Y. Supp. 1013; *Calking* v. *Baldwin*, 4 Wend. 667, 21 Am. Dec. 168; *Smith* v. *Gould*, 59 Wis. 631, 18 N. W. 457; *Colorado C. R. Co.* v. *Mollandin*, 4 Colo. 154; *British Cast Plate Mfrs.* v. *Meredith*, 4 T. R. 790; *Sutton* v. *Clarke*, 6 Taunt. 29; *Lesher* v. *Wabash Nav. Co.* 14 Ill. 86, 56 Am. Dec. 494; *Benner* v. *Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328; *Lorie* v. *North Chicago City R. Co.* 32 Fed. 270; *Parker*

NOTE.—As to liability for injuries to land and buildings from blasting, see also, in this series, Benner v. Atlantic Dredging Co., (N Y.) 17 L. R. A. 220, and *note;* Emry v. Roanoke Nav. & Water Power Co. (N. C.) 17 L. R. A. 699; and Booth v. Rome, W. & O. T. R. Co. (N. Y.) 24 L. R. A. 105.

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v. *Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *Stetson* v. *Chicago & E. R. Co.* 75 Ill. 76; *McKinney* v. *Monongahela Nav. Co.* 14 Pa. 64, 53 Am. Dec. 517; *Colcough* v. *Nashville & N. W. R. Co.* 2 Head, 171; *Johnson* v. *St. Louis, I. M. & S. R. Co.* 32 Ark. 758; *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 394, 8 N. E. 119; *Rogers* v. *Bradshaw*, 20 Johns. 735; *Wheelock* v. *Young*, 4 Wend. 647; *Chicago* v. *Joney*, 60 Ill. 387; *Chicago* v. *Dermody*, 61 Ill. 431; *Chicago, St. P. & F. R. Co.* v. *McCarthy*, 20 Ill. 385, 71 Am. Dec. 285.

The court erred in assuming that blasting was intrinsically dangerous.

Simon v. *Henry*, 62 N. J. L. 486, 41 Atl. 692; *Kratzer* v. *Saratoga Springs*, 8 App. Div. 613, 40 N. Y. Supp. 475, 158 N. Y. 736, 53 N. E. 1127; *Brown* v. *Piper*, 91 U. S. 37, 23 L. ed. 200; *Miller* v. *Texas & N. O. R. Co.* 83 Tex. 518, 18 S. W. 954; Thayer, Ev. 308, 309.

To render the appellant liable, either the work engaged in by it must have been a nuisance *per se*, or it must have been guilty of negligence.

Myers v. *Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; Wood, Nuisances, § 126.

Blasting in the interior of the earth, on the land of one person, does not necessarily or naturally produce any injury to a building situated on the land of another person.

Hart v. *Washington Park Club*, 157 Ill. 14, 29 L. R. A. 492, 41 N. E. 620; *New York, C. & St. L. R. Co.* v. *Blumenthal*, 160 Ill. 49, 43 N. E. 809; *Kearney* v. *London, B. & S. C. R. Co.* L. R. 5 Q. B. 411.

That which is lawfully done in the prosecution of a public work, duly authorized, cannot be a nuisance.

Kratzer v. *Saratoga Springs*, 8 App. Div. 613, 40 N. Y. Supp. 475, Affirmed in 158 N. Y. 736, 53 N. E. 1127; *Simon* v. *Henry*, 62 N. J. L. 486, 41 Atl. 692; *Myers* v. *Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Heeg* v. *Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Prussak* v. *Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761; *Lounsbury* v. *Foss*, 80 Hun, 206, 30 N. Y. Supp. 89; Starr & C. Anno. Stat. chap. 24, art. 10, parts 1, 2, ¶¶ 442, 461; *Centralia* v. *Wright*, 58 Ill. App. 51; Lewis, Em. Dom. 2d ed. § 173; *Reddall* v. *Bryan*, 14 Md. 445, 74 Am. Dec. 550; *St. Helena Water Co.* v. *Forbes*, 62 Cal. 182, 45 Am. Rep. 659; *Piche* v. *Bar Harbor Water Co.* 75 Me. 91; *Thorn* v. *Sweeney*, 12 Nev. 251; *Olmsted* v. *Morris Aqueduct*, 47 N. J. L. 311; *State, Slingerland, Prosecutor*, v. *Newark*, 54 N. J. L. 62, 23 Atl. 129; *Stamford Water Co.* v. *Stanley*, 39 Hun, 494; *Pocantico Waterworks Co.* v. *Bird*, 130 N. Y. 249, 29 N. E. 246; Wood, Nuisances, 3d ed. p. 242; *Rice* v. *Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Lee* v. *Vacuum Oil Co.* 54 Hun, 156, 7 N. Y. Supp. 426; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Harris* v. *Thompson*, 9 Barb. 364; *Benner* v. *Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328; *Rigney* v. *Chicago*, 102 Ill. 70; *Hammersmith & C. R. Co.* v. *Brand*, L. R. 4 H. L. 171; *Bellinger* v. *New York C. R. Co.* 23 N. Y. 48.

The proper measure of damages was the depreciation of the property resulting from the injuries.

Osgood v. *Chicago*, 154 Ill. 194, 41 N. E. 40; *Pacific Exp. Co.* v. *Lasker Real Estate Asso.* 81 Tex. 81, 16 S. W. 792; *Burke* v. *Louisville & N. R. Co.* 7 Heisk. 451, 19 Am. Rep. 618; *Ulrick* v. *Dakota Loan & T. Co.* 2 S. D. 285, 49 N. W. 1054, 3 S. D. 44, 51 N. W. 1023.

If appellee had reasonable ground to anticipate injury to its building by the construction of the tunnel, and by reasonable care could have prevented such injury, but failed to do so, then it can only recover what it would have cost to have prevented such injury, with legal interest thereon from the time of the incurring of such expense.

Sutherland, Damages, 2d ed. § 88; *Hogle* v. *New York C. & H. R. R. Co.* 28 Hun, 363; *Fitzpatrick* v. *Boston & M. R. Co.* 84 Me. 33, 24 Atl. 432; *Simpson* v. *Keokuk*, 34 Iowa, 568; *Toledo, P. & W. R. Co.* v. *Pindar*, 53 Ill. 447, 5 Am. Rep. 57; *Illinois C. R. Co.* v. *McClelland*, 42 Ill. 355.

On petition for rehearing.

A clear distinction exists between the effect of the use of dynamite upon the persons using it or in its immediate vicinity, and the effect of dynamite upon persons or property situated at a considerable distance therefrom.

Barnes v. *Zettlemoyer* (Tex. Civ. App.) 62 S. W. 111; *Central R. Co.* v. *Bernstein*, 113 Ga. 175, 38 S. E. 394.

Messrs. **Moran, Mayer, & Meyer** for appellee.

Boggs, J., delivered the opinion of the court:

This is an appeal from the judgment of the appellate court for the first district affirming the judgment entered in the superior court of Cook county in favor of the appellees against the appellant company in the sum of $2,750. The declaration was in trespass on the case, and, in substance, alleged that the appellant company and the city of Chicago, in the prosecution of the work of constructing a tunnel intended for the use of the city in supplying the inhabitants thereof with water, near, through, or under certain premises belonging to the appellees, in excavating and digging the tunnel exploded heavy charges of dynamite, which so shook and jarred the foundations, walls, and floors of the building on the premises of appellees, and boilers, engines, machinery, and fixtures in said building, that the foundations, walls, and floors were made to sag, crack, and separate, which greatly, permanently, and irreparably impaired the appearance, strength, and stability of the said foundations, walls, and floors, and rendered said building less safe and useful, and much less valuable to plaintiffs, and because said building was originally constructed with the intention and in such a manner that other and additional stories would and could be added to it, which said

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additions have been rendered impossible by such injuries to said building, as the foundations and walls are now, on account of the said injuries, too weak to sustain additional weight. Each of the defendants filed a plea of not guilty, and the cause was submitted to a jury for trial. During the hearing of the cause the same was dismissed as to the city of Chicago. Verdict in the sum of $2,750 was returned, and judgment entered thereon against the appellant company, and on appeal the judgment was affirmed by the appellate court.

The judgment should not be reversed because of any ruling of the court in connection with the testimony of the witness Harms or that of the witness Berrinson. The complaint, as framed by the appellant, is that Harms, a witness for the appellees, was allowed to testify in regard to the effect of the explosions on his property, and that the appellant company was denied the right to prove by the witness Berrinson that the explosions had no effect on his (Berrinson's) property. The contention of the appellees was that their property was injured by the explosions in the months of August and September, 1896. Harms testified that he owned property adjoining that of the appellees, and that he had frequently been in the building of the appellees since it was erected; that the walls of the building were in good condition "down to the summer of 1896;" that he saw them in August and September, 1896, and saw cracks in the walls on the Union street side. He was then asked, "Did you, during the latter part of August and fore part of September, 1896 — Were you disturbed by any noises there, or did you hear any noises?" The witness then proceeded to tell that he had frequently heard explosions during those months, and spoke of one which he denominated "a heavy shot," and incidentally mentioned that the chimney fell from his building, and that a picture fell from the wall, and that a few days afterwards he heard another shock; and he went over to his building and found that his tenants were moving out; that he looked up at the factory of the appellees, and saw a crack opening in the wall of their building from the second story upward. The question was not propounded to Harms for the purpose of showing the injury to his building, but for the purpose of showing that the walls of appellees' building were cracked and broken by the explosions in the tunnel. The witness volunteered the statements as to the damage that resulted to his building, and on a motion of counsel for the appellant company that portion of his testimony relating to the tenants moving out of his building was stricken out by order of the court. It appears counsel later moved the court to strike out all the answer generally, and that no ruling was made on the motion. Counsel for appellant then cross-examined the witness, and brought out other details, which counsel for the city, then a codefendant with appellant, moved the court to strike out. The court granted the motion. Thus it appears the court ordered stricken out all irrelevant matter to which its attention was specifically called. The answer of the witness Harms was in part proper, and the motion to strike out the entire answer, which was not ruled upon, should have been denied. This testimony furnished no reason for the admission of the testimony of the witness Berrinson, to the effect, as counsel stated it would be, that the tunnel passed directly under the building of the witness, and that his building sustained no damage whatever by reason of the explosions in the tunnel. That other buildings at various distances from that of the appellees were not injured would not be competent, and would tend to introduce collateral issues likely to mislead and confuse the jury.

The remaining assignments of error present for decision the correctness of the rulings of the court in giving and refusing instructions. We need not set forth in full the instructions with relation to the liability of the appellant company for any injury or damage resulting from the use of dynamite. They announced, in substance, the proposition that one who makes use of an explosive in the ground near the property of another, when the natural and probable, though not the inevitable, result of the explosion is injury to such property of the other, is liable for the resulting injury, however high a degree of care or skill may have been exercised in making use of the explosive. The evidence disclosed that appellant was engaged in constructing a tunnel under contract with the city of Chicago. The contract forbade the use of explosives except where the excavation was in rock. The tunnel was of the depth of about 90 feet beneath the surface of the ground, and passed within a few feet of the corner of appellees' building. The appellant company used dynamite in excavating that portion of the tunnel, and the evidence showed that the explosions of the dynamite caused the earth upon which appellees' building stood to shake and vibrate, and that the walls of appellees' building were cracked and injured because of the explosions. The excavation at the time of the explosions in question was not in rock, but in indurated clay, with some gravel and bowlders embedded in it. It was clearly shown that the excavation through the clay and gravel might have been effected without the use of explosives, but that it could be more cheaply done with the aid of dynamite. As before said, however, the contract with the city forbade the use of explosives except where the excavation was in rock.

The performance of the work of excavating the tunnel underneath the buildings of a populous city with dynamite was intrinsically dangerous, no matter how carefully and skilfully the explosions were conducted. The nature and power of dynamite as an explosive have been demonstrated by universal experience, and it is a matter of common knowledge that the use of dynamite as an explosive is intrinsically dangerous, and of this the courts will take judicial notice. 17

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Am. & Eng. Enc. Law, 2d ed. p. 909; *Norwalk Gaslight Co.* v. *Norwalk*, 63 Conn. 527, 28 Atl. 32. In some jurisdictions (notably, New York and New Jersey) it has been held that one who discharges blasts upon ground where he has the lawful right to blast, if he exercises due care in the process and manner of handling the explosive, is not liable for an injury to adjacent property caused by the mere disturbance of the earth or air, if no substance is thrown upon the premises so as to constitute a physical invasion of it. In New York (*Benner* v. *Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328) and Massachusetts (*Murphy* v. *Lowell*, 128 Mass. 396, 35 Am. Rep. 381) the rule was announced that in the construction of public works, as by the general government or by cities, the contractors with government or the municipal authorities could not be held liable for the vibrations caused by explosions, in the absence of proof of want of care in the performance of the work. But a different rule obtains in other jurisdictions. In California the opposing doctrine was stated in *Colton* v. *Onderdonk*, 69 Cal. 155, 55 Am. Rep. 556, 10 Pac. 395, thus: "The fact that the defendant used quantities of gunpowder — a violent and dangerous explosive—to blast out rocks upon his own lot contiguous to another person's, situate in a large city, must be taken as an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling house, as the natural and proximate result of his blasting. For an act which in many cases is in itself lawful becomes unlawful when by it damage has accrued to the property of another. And it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling house, or a concussion of the air around it, which had either damaged or entirely destroyed it. The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken." The doctrine of this case was reaffirmed by the same court in *Munro* v. *Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 24 Pac. 303. In *Bradford Glycerine Co.* v. *St. Mary's Woolen Mfg. Co.* 60 Ohio St. 560, 45 L. R. A. 658, 54 N. E. 528, the injury resulting from an explosive was by concussion or vibration; *i. e.*, consequential injury. The supreme court of Ohio said: "Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining landowner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked." In that case the ground of liability invoked and asserted was the storing of nitroglycerin upon the defendant's own premises, and the court, in affirming a liability without regard to any negligence in the manner of storing, and without distinction as to direct or consequential injury, and because of the inherent dangers of storing it at all, based its conclusions, by analogy, upon the rule as to blasting as above quoted. Mr. Thompson, in his Commentary on the Law of Negligence (vol. 1, § 764), says decisions can be collected responding to three propositions: (1) If by an explosion dirt or stones are thrown upon the property of the adjoining owner, injuring such property, such owner may recover damages, irrespective of the question of negligence, since this is a trespass upon his property; (2) where the work of blasting is done in a situation where it is necessarily dangerous to the public, as in a thickly settled portion of a city, damages are recoverable without proof of negligence, for the reason that in such case the work itself is so inherently dangerous that the doing of it, no matter how carefully, is of itself negligence; (3) liability will attach to the person carrying on the dangerous work, where the work has been negligently done.

Though the law as to the liability arising in such instances does not seem to have been harmoniously declared in the courts of the different states to which we have referred, the rule in this jurisdiction was indicated by this court in the case of *Joliet* v. *Harwood*, 86 Ill. 110, 29 Am. Rep. 17. In that case it appeared that it was necessary, in the construction of a public work, that blasting of rocks should be done in a public street of the city. The contractor used all due care, skill, and caution in performing the work of blasting. A stone was thrown by the blast against a building of the plaintiff, and injury thereby caused. Judgment was given against the city, and, in affirming, we said: "In this case the work which the contractor was required by the city to do was intrinsically dangerous, however carefully or skilfully done. The right of recovery in this case does not rest upon a charge of negligence on the part of the contractor. It rests upon the fact that the city caused work to be done which was intrinsically dangerous, the natural, though not the necessary, consequence of which was the injury to plaintiff's property. In such case the city is responsible." It is true that in that case there was an actual invasion of the property of the plaintiff, the explosion having precipitated a rock against his building; but liability for injuries caused by actual invasion of the property, or by the concussion or vibration of the earth or air, are within the doctrine there announced. If one who, for his own purposes and profit, undertakes to perform a work, by means of explosives inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by

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the explosives on the property of such other, it is only by the merest subtilty of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction. The case of *Bradford Glycerine Co.* v. *St. Mary's Woolen Mfg. Co.* 60 Ohio St. 560, 45 L. R. A. 658, 54 N. E. 528, may be regarded as authority for the view that liability in such cases is not restricted to an actual invasion of the property, but damages for consequential injuries may be recovered. The doctrine of the charge to the jury we think correct.

The instructions advised the jury to adopt as the measure of damages the cost of repairing the building so that it would be in as good condition as it was before it was damaged by the explosions. It is insisted the proper measure of damages was the depreciation in value of the property resulting from the injuries. We think the cost of repairing the building and restoring it to its proper condition was the true measure of the damages. It was so held in *Hide* v. *Thornborough*, 2 Car. & K. 250, and in *Shrieve* v. *Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401, in which cases the injuries were occasioned by excavations made on adjoining lots to those on which the buildings injured were situate. Mr. Sutherland, in his work on Damages (vol. 3, § 1018), says: "And that valuation should be adopted which will be most beneficial to the injured party, for he is entitled to the benefit of the premises intact, and to the value of any part separated. The damages for injury done to a house are measured by the cost of restoring it to its previous condition."

The judgment is affirmed.

Petition for rehearing denied December 3, 1902.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

John Jay Harvey WILLIAMS, *Appt.*,
v.
Christopher C. CRABB *et al.*

(117 Fed. 193.)

1. **The extension by a state of equity jurisdiction to suits to set aside probated wills** will permit the maintenance of such suits in Federal courts sitting in such state, which acquire jurisdiction through diverse citizenship of the parties.
2. **A state cannot, by its legislature, confer a substantial right or remedy** in the way of a suit *inter partes*, upon its own citizens, that will not be available to the citizens of the other states; nor can it, by any device, restrict such right or remedy thus made available, to enforcement in its own courts, the conditions of citizenship being such that they would otherwise be enforceable in the Federal courts.
3. **Joinder of causes of action for setting aside a deed and a will** does not render the bill multifarious, where both grow out of the same subject-matter.
4. **All parties to a suit need not have an interest** in every matter contained therein; it is sufficient if each party has an interest in some material matters in the suit, and they are connected with the others.
5. **That the statutes require an issue as to the validity of a will to be tried by jury,** while the question of fraud in the procurement of a deed may be tried by the court, will not prevent an attempt to set aside both instruments by one bill in equity.
6. **One of two heirs to an estate is not an indispensable party** to a suit by the other to set aside conveyances and a will executed by decedent as having been procured by fraud.
7. **A Federal court will not require parties to be brought into a suit** whose presence would defeat the jurisdiction of the court, if they are not indispensable.

(May 6, 1902.)

APPEAL by plaintiff from a judgment of the Circuit Court of the United States for the Northern District of Illinois in favor of defendants in a suit to set aside a will. *Reversed.*

The facts are stated in the opinion.

Argued before *Jenkins* and *Grosscup*, Circuit Judges, and *Bunn*, District Judge.

Mr. **F. F. Crozier** with *Mr.* **S. S. Gregory,** for appellant:

Under similar statutes, where requisite citizenship exists the Federal courts take jurisdiction of cases falling within their purview. *State* v. *McGlynn*, 20 Cal. 234, 81 Am. Dec. 118; *Broderick's Will*, 21 Wall. 503, *sub nom. Kicley* v. *McGlynn*, 22 L. ed. 599; *Gaines* v. *Fuentes*, 92 U. S. 21, 23 L. ed. 528; *Ellis* v. *Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; *Hyde* v. *Stone*, 20 How. 170, 15 L. ed. 874; *Richardson* v. *Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; *Brodhead* v. *Shoemaker*, 11 L. R. A. 567, 44 Fed. 518; *Scott* v. *Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Cates* v. *Allen*, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977.

The bill is not multifarious.

Brown v. *Guarantee Trust & S. D. Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127; *Gaines* v. *Chew*, 2 How. 619, 642, 11 L. ed. 402, 411; *Sheldon* v. *Keokuk Northern Line Packet Co.* 10 Biss. 470, 8 Fed. 769; *Von Auw* v. *Chicago Toy & Fancy Goods Co.* 69 Fed. 448; *Kelley* v. *Boettcher*, 29 C. C. A. 14, 56 U. S. App. 368, 85 Fed. 55; *Barcus* v. *Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783; *Stafford Nat. Bank* v. *Sprague*, 19 Blatchf. 529, 8 Fed. 377.

NOTE.—As to right of citizen of other state to bring suits in a state court where a citizen of that state may, see cases in *note* to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. on page 583.

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A bill will not be dismissed as multifarious because complainant, in addition to praying for the relief appropriate to the only cause of action supported by facts set up in the bill, has also asked for other relief to which he is not entitled.

De Neufville v. *New York & N. R. Co.* 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10.

Only those whose interest is directly and injuriously affected by the suit or decree therein are indispensable parties.

Payne v. *Hook*, 7 Wall. 427, 19 L. ed. 260; *West* v. *Randall*, 2 Mason, 181, Fed. Cas. No. 17,424; *Hamilton* v. *Savannah, F. & W. R. Co.* 49 Fed. 412; *McArthur* v. *Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *McArthur* v. *Allen*, 3 Fed. 313; *Reed* v. *Reed*, 31 Fed. 49; *Re Storey*, 120 Ill. 244, 11 N. E. 209.

To hear a bill involving the contest of a will is the exercise of chancery jurisdiction.

Moyer v. *Swygart*, 125 Ill. 262, 17 N. E. 450; *King* v. *Lawless*, 190 Ill. 520, 60 N. E. 881.

Messrs. **T. A. Moran** and **Levy Mayer**, for appellees in support of petition for rehearing:

The Illinois Laws of 1869 (Hurd's Rev. Stat. [Ill.] 1901, § 1, p. 356) limit the jurisdiction of a court of equity over bills to quiet title and remove clouds to cases in which either the complainant is in possession of the property, or the property is vacant and unoccupied.

Gage v. *Abbott*, 99 Ill. 366; *Gage* v. *Curtis*, 122 Ill. 520, 14 N. E. 30; *Gage* v. *Griffin*, 103 Ill. 41; *Glos* v. *Goodrich*, 175 Ill. 20, 51 N. E. 643; *People ex rel. McDonald* v. *White*, 130 Ill. 493, 22 N. E. 599; *Wetherell* v. *Eberle*, 123 Ill. 666, 14 N. E. 675; *Hardin* v. *Jones*, 86 Ill. 313; *McArthur* v. *Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Delmas* v. *Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *Swift* v. *Tyson*, 16 Pet. 1, 10 L. ed. 865; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Bergman* v. *Bly*, 13 C. C. A. 319, 21 U. S. App. 650, 66 Fed. 40; *Andrews* v. *National Foundry & Pipe Works*, 36 L. R. A. 139, 22 C. C. A. 110, 23 C. C. A. 454, 46 U. S. App. 281, 610, 76 Fed. 166, 77 Fed. 774; *O'Brien* v. *Wheelock*, 37 C. C. A. 309, 95 Fed. 883; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; note to *Wilson* v. *Perrin*, 11 C. C. A. 77; note to *Hill* v. *Hite*, 29 C. C. A. 557; *Beebe* v. *Louisville, N. O. & T. R. Co.* 39 Fed. 481; *Frost* v. *Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129.

The bill can only be regarded as a bill to set aside a will under the Illinois statute.

People ex rel. McDonald v. *White*, 130 Ill. 493, 22 N. E. 599; *Keister* v. *Keister*, 178 Ill. 103, 52 N. E. 946.

A stranger cannot file a bill to contest a will.

Gaines v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524; *People ex rel. McDonald* v. *White*, 130 Ill. 493, 22 N. E. 599; *Storrs* v. *St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185.

While this proceeding may be *inter partes*, it is still in the nature of a proceeding *in rem*.

McArthur v. *Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652.

The will, being an entire subject-matter, which no party can claim to be void in part only, must be disposed of *in toto*.

Shields v. *Barrow*, 17 How. 130, 15 L. ed. 158; *Kincheloe* v. *Kincheloe*, 11 Leigh, 393; *Rogers* v. *Thomas*, 1 B. Mon. 390; *Luther* v. *Luther*, 122 Ill. 558, 13 N. E. 166; *Rigg* v. *Wilton*, 13 Ill. 18, 54 Am. Dec. 419; *Singleton* v. *Singleton*, 8 B. Mon. 340; *McArthur* v. *Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Reformed Presby. Church* v. *Nelson*, 35 Ohio St. 638; *Ward* v. *Vickers*, 3 N. C. (2 Hayw.) 165; *Dower* v. *Church*, 21 W. Va. 23; *Brown* v. *Riggin*, 94 Ill. 560.

An absent legatee is an indispensable party.

Vancleave v. *Beam*, 2 Dana, 155; *Hall* v. *Gilbert*, 31 Wis. 691; *Re Valentine*, 93 Wis. 45, 67 N. W. 12; *Thompson* v. *McDermott*, 19 Fla. 852; *Eddie* v. *Parke*, 31 Mo. 513; *Reformed Presby. Church* v. *Nelson*, 35 Ohio St. 638; *McMacken* v. *McMacken*, 18 Ala. 576; 22 Enc. Pl. & Pr. p. 1217; *Morgan* v. *Morgan*, 2 Wheat. 290, 4 L. ed. 242; *Hoe* v. *Wilson*, 9 Wall. 501, *sub nom. Hooey* v. *Wilson*, 19 L. ed. 762; *Loomis* v. *Rosenthal*, 67 Fed. 369; *Greene* v. *Sisson*, 2 Curt. C. C. 171, Fed. Cas. No. 5,768; *Re Frazer*, 18 Alb. L. J. 353, Fed. Cas No. 5,068; *Bradford* v. *Andrews*, 20 Ohio St. 208, 5 Am. Rep. 645; *McArthur* v. *Scott*, 113 U. S. 389, 28 L. ed. 1030, 5 Sup. Ct. Rep. 652; *Meese* v. *Keefe*, 10 Ohio, 362; *Mallow* v. *Hinde*, 12 Wheat. 193, 6 L. ed. 599; *California* v. *Southern P. Co.* 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591; *Keister* v. *Keister*, 178 Ill. 103, 52 N. E. 946.

If Crabb is beaten here he must give up one half of the estate to the absent heir. He is bound by the decree, but Helen is not.

Estoppels must be mutual.

Deery v. *Cray*, 5 Wall. 795, 18 L. ed. 653; *First Nat. Bank* v. *Northwestern Nat. Bank*, 152 Ill. 296, 26 L. R. A. 289, 38 N. E. 739; 1 Herman, Estoppel, 2d ed. pp. 147, 483; 2 Herman, Estoppel, 2d ed. pp. 834, 848, 850.

The plaintiff can take advantage of a lack of jurisdiction, and that, too, after he has been defeated on the merits.

Capron v. *Van Noorden*, 2 Cranch, 126, 2 L. ed. 229; *Dred Scott* v. *Sandford*, 19 How. 473, 15 L. ed. 729; *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 382, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 208, 39 L. ed. 672, 15 Sup. Ct. Rep. 563.

The bill is multifarious.

Walker v. *Powers*, 104 U. S. 245, 26 L. ed. 729; *Emans* v. *Emans*, 14 N. J. Eq. 114; *Luther* v. *Luther*, 122 Ill. 558, 13 N. E. 166; *Hollenbeck* v. *Cook*, 180 Ill. 65, 54 N. E. 154; *Keister* v. *Keister*, 178 Ill. 103, 52 N. E. 946; *McArthur* v. *Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Coalter* v. *Bryan*, 1 Gratt. 18; *Connolly* v. *Connolly*, 32

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Gratt. 657; *Lamberts* v. *Cooper*, 29 Gratt. 61; *Hartman* v. *Strickler*, 82 Va. 225; *Kirby* v. *Kirby*, 84 Va. 627, 5 S. E. 539; *Mears* v. *Mears*, 15 Ohio St. 90; *Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Green* v. *Green*, 5 Ohio, 279; *Cox* v. *Cox*, 101 Mo. 168, 13 S. W. 1055; *Lilly* v. *Tobbein*, 103 Mo. 477, 15 S. W. 618.

The Federal jurisdiction, being dependent upon a state statute, must be governed entirely by that statute.

Beebe v. *Louisville, N. O. & T. R. Co.* 39 Fed. 481; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Bergman* v. *Bly*, 13 C. C. A. 319, 27 U. S. App. 650, 66 Fed. 40; *Andrews* v. *National Foundry & Pipe Works*, 36 L. R. A. 139, 22 C. C. A. 110, 23 C. C. A. 454, 46 U. S. App. 281, 619, 76 Fed. 166, 77 Fed. 774; *O'Brien* v. *Wheelock*, 37 C. C. A. 309, 95 Fed. 883.

Bunn, District Judge, delivered the opinion of the court:

This was a suit in equity, brought by the appellant, a citizen of Michigan, against the appellees, citizens of Illinois, to set aside the will of one Ellen Williams, a sister of the appellant, for fraud and undue influence, and also to set aside and cancel a deed of certain real estate situate in the city of Chicago, made by Ellen Williams to the appellee Christopher C. Crabb, on the like grounds of fraud and undue influence, and have him charged with a trust in relation to the real estate alleged to be held under the will and deed. There is other incidental relief prayed for in the bill, as the appointment of a receiver, but these are the grounds of the action and the principal relief sought, the purpose of the suit being to recover from Crabb a one-half interest in the real estate so held by him, and to set aside as a cloud upon the complainant's title the will and deed alleged to have been obtained by fraud. The allegations of the bill are, in substance, as follows: That on September 2, 1896, at the city of Chicago, Ellen Williams died, unmarried and without issue, leaving as her sole heirs at law her brother, the complainant, John Jay Harvey Williams, and her sister, Helen Alexander; that at the time of her death she was seised in fee of certain described real estate, situate in Chicago, of much value; that for some time prior to her death the land was held by the Chicago & South Side Rapid Transit Company under a lease purporting to have been executed by Ellen Williams on June 15, 1892, and that lots and parcels of land were still in possession of the South Side Elevated Railroad Company under a lease dated October 1, 1897, executed by the defendant Christopher C. Crabb, who claims to hold the premises under the will of Ellen Williams and under a warranty deed executed to him by Ellen Williams, the company paying therefor an annual rent of $6,165; that at the time of her death Ellen Williams was also seised in fee of certain other lands in Chicago, now occupied and in possession of a person known and styled as "Nellie Tuttle," under a lease to her by defendant Crabb, who claims title to the land by virtue of the last will and testament of Ellen Williams; that on January 8, 1894, a deed by Ellen Williams, dated on December 13, 1893, was filed of record in the recorder's office of Cook county, purporting to convey such lands in fee to defendant Crabb. The bill further charges that, although the title to the lands appears of record in the defendant Crabb, the purchase price thereof was paid by him out of the funds of Ellen Williams, and on her behalf and by her direction, and that the title thereto was held in trust by Crabb for Ellen Williams, as he, the said Crabb, had admitted to divers persons; that a house, costing $95,000, was built by Crabb upon the premises, and paid for out of the funds of Ellen Williams, and that he held the lands in trust for the use and benefit of Ellen Williams, upon a mere naked legal title without equity; that after the death of Ellen Williams, Crabb seized, and still holds possession and enjoys, the rents and profits of the said premises; that the will of Ellen Williams, under which defendant Crabb claims to hold the land, dated on May 19, 1896, was on September 10, 1896, admitted to probate before the probate court of Cook county, Illinois, and admitted to record as the last will and testament of Ellen Williams, and letters testamentary issued thereon to Crabb, as the executor, without bonds, as directed in the will. The will is set out verbatim in the bill, the effect of which is to devise all of the testatrix's estate, real and personal, to Christopher C. Crabb, and to appoint him her sole executor, with request that he be not required to give any bond or security as executor. That on the 17th day of August, 1896, there was filed in the recorder's office of Cook county a warranty deed by Ellen Williams, dated on May 19, 1896, purporting to convey to Crabb the premises known as No. 47 Congress street and No. 2131 Dearborn street, in Chicago, Illinois, setting out the deed and description of the land in full. The bill further charges that the writing purporting to be the last will and testament of Ellen Williams was not such; that she was not aware of the contents, but that the same was procured by the fraud of the defendant Crabb, and should be set aside and annulled; that prior to the making of the will Crabb was, and for many years had been, the attorney in fact and confidential agent and adviser of Ellen Williams, and the manager of her business affairs, and was intrusted with the care and custody of her property; and that he, starting as her agent some years before, in small matters, gradually assumed and took upon himself the entire control of her business and affairs, and was so trusted and acquired such influence over her mind that she was almost entirely excluded from any participation in the management of her own estate, and was almost entirely controlled and dominated in the conduct of her estate by Crabb, who, having such control, retained and in-

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structed his own solicitor to draw up the will, directing him to make himself (Crabb) the sole executor, without bonds, and to vest her entire estate in him upon her death. Similar allegations are made in regard to the procurement of the deed to Crabb, that it was obtained from Ellen Williams by the same fraud and undue influence. Then follow allegations to the effect that early in her life Ellen Williams, who was living with her parents in humble circumstances, had been led astray by one much above her station, left her home, and led an immoral life, and for many years conducted, under the name of "Lizzie Allen," a house of prostitution in Chicago; and that the defendant Crabb, then a clerk in a dry goods store in Chicago, became acquainted with her, and fastened himself upon her and her estate, and became a parasite in such house of prostitution, managing and directing it for her; that Crabb, for many years before her death, professed to be her lover, and passed much of his time in her apartments; that while so pretending and deceiving Ellen Williams he was sustaining relations with a person calling herself "Frankie Leland," who now claims to be his wife; that upon Ellen Williams's death Crabb removed her from her house of prostitution, and installed therein as keeper the said Frankie Leland, who entered into the private apartments of Ellen Williams, and conducted the house of prostitution for the benefit of the defendant Crabb for some months, when Crabb, claiming to own the same, sold all the furniture, fixtures, etc., to Nellie Tuttle, a public woman, for a large sum of money, who is now conducting the business under contract with Crabb. Wherefore the complainant asks that an issue be made whether the writing so admitted to probate be the last will and testament of Ellen Williams or not, and that the said warranty deed to Crabb be declared null and void, and set aside, and that an undivided one-half of the premises be declared to vest in complainant in fee simple. The defendants Christopher C. Crabb and Frankie Leland appeared, and filed their demurrer to the amended bill, the principal grounds insisted upon being: (1) That the bill was multifarious in seeking to set aside a will and a deed and to declare a trust, and asking for a partition of the property; (2) that Helen Alexander, the sister of complainant, and his coheir, was an indispensable party to the bill, and alleged in the bill to be a citizen and resident of the state of Illinois; (3) that the Federal court was without jurisdiction of the case made by the bill. The court below sustained the demurrer, and dismissed the bill, upon what ground does not clearly appear, no opinion being filed.

It is claimed by appellant's counsel that all of the grounds of the demurrer except the one of multifariousness were overruled by the court, but the decree shows that the bill was dismissed for want of equity. That in this case must mean for want of jurisdiction, as upon the merits of the allegations no question has or could be made against the sufficiency of the bill to make a case for setting aside both the will and the deed. And, granting the want of jurisdiction to set aside the will for fraud, it is clear that the court would have jurisdiction to set aside the deed. The bill shows an equitable case for setting aside the deed for fraud, and, if within the jurisdiction of the court, the complainant should not be dismissed out of court because a greater measure of relief is demanded than he is entitled to, unless there have been joined irreconcilable and inconsistent causes of action. In the original bill Helen Alexander was joined as one of the defendants, the same demurrer being put in; but being a citizen, as was alleged and is conceded, of the state in which the suit is brought and where the defendants reside, it was thought that the court would not have jurisdiction of the suit, for want of proper diverse citizenship of all the parties, and therefore the complainant amended his bill, omitting his sister as a defendant, and not joining her as a complainant. The principal question argued in this court was the one of jurisdiction, it being urged with earnestness and force that, the case involving the setting aside of a will already allowed and admitted to probate by the probate court of Cook county, the United States circuit court has not jurisdiction of the case for the purpose of setting it aside. It is, no doubt, well settled by authority, both in this country and in England, that, under the general powers of a court of chancery in England, or a court of equity in this country, a bill to set aside a will for fraud cannot be entertained, except under special circumstances. This is because the proof and allowance of wills has always properly belonged, formerly in England to the ecclesiastical courts, and in this country to the courts of probate, or to the courts especially empowered by the statutes of the states to pass upon the proof and allowance of wills. But these adjudications go not upon any ground connected especially with a want of jurisdiction in the Federal courts, but upon the more general ground that they are not cases either of common law or general equity jurisdiction, but belong especially to the ecclesiastical and probate courts, which have always exercised jurisdiction over this class of cases. It has not been made a question of the jurisdiction of any particular court, but one of jurisdiction in equity. But in those states where equity jurisdiction is extended by the legislature over cases to set aside wills after probate for fraud, there would seem to be no good reason why the jurisdiction of the Federal court, the requisite citizenship existing, should not be concurrent with that of the state courts, as in other cases. The jurisdiction of the Federal court has never been denied on the ground that the courts were Federal courts, but on the ground that this class of cases are not the subject of legal or equitable jurisdiction, and so was denied equally to the state and to the Federal courts. If the state courts of general equitable jurisdiction may, under the law, entertain these cases by suit originally brought

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there, and not coming up on appeal from the probate court so as to form part and parcel of the probate proceedings for the probate of wills, it is difficult to see why the Federal courts should not entertain a concurrent jurisdiction when the requisite diverse citizenship exists. Otherwise this class of litigants would not be placed upon the same footing as litigants in other cases, where the jurisdiction of the court is conceded. These cases seem to come fairly within the provision of the jurisdiction act of 1888, giving original jurisdiction in all civil cases at law and in equity arising between citizens of different states. It is well settled that rights and remedies, legal or equitable, provided by the statutes of the states to be pursued in the state courts, may be enforced and administered in the Federal courts, and that the terms "law" and "equity," as used in the Constitution, although intended to mark a distinction between the two systems of jurisprudence as known and practised at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace, as well, not only rights newly created by the statutes of the states, but new forms of remedies, to be administered in the courts of the United States according to the nature of the case. A state cannot, by its legislature, confer a substantive right or remedy in the way of a suit *inter partes*, upon its own citizens, that will not be available to the citizens of the other states; nor can it, by any device, restrict such right or remedy thus made available, to enforcement in its own courts, the conditions of citizenship being such that they would otherwise be enforceable in the Federal courts. By any other view it would be in the power of a state by legislation to deprive citizens of other states either of the new right or remedy given by the state statute or of the forum granted by the Federal Constitution and laws. The citizen of another state cannot be compelled to make such election, or to accept a remedy upon condition that he forego the constitutional forum to which he would otherwise be entitled. *Chicago & N. W. R. Co.* v. *Whitton*, 13 Wall. 270, 20 L. ed. 571; *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200; *Mississippi & R. River Boom Co.* v. *Patterson*, 98 U. S. 406, 25 L. ed. 207; *Bigelow* v. *Nickerson*, 30 L. R. A. 336, 17 C. C. A. 1, 34 U. S. App. 261, 70 Fed. 113; *Darragh* v. *Wetter Mfg. Co.* 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 7. And in *Payne* v. *Hook*, 7 Wall. 425, 19 L. ed. 260, it was decided that the jurisdiction of the circuit court of the United States, in a case for equitable relief, was not excluded because, by the laws of the state, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res* which is the subject of the litigation is entitled to administer it. *Williams* v. *Benedict*, 8 How. 107, 12 L. ed. 1007; *Bank of Tennessee* v. *Horn*, 17 How. 160, 15 L. ed. 70; *Yonley* v. *Lavender*, 21 Wall. 276, 22 L. ed. 536; *Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028; *Freeman* v. *Howe*, 24 How. 454, 16 L. ed. 750; *Hook* v. *Payne*, 14 Wall. 255, 20 L. ed. 889.

Section 7 of chapter 148 of the Revised Statutes of Illinois, so far as is important to the consideration of this case, is as follows: "Provided, however, that if any person interested shall, within two (2) years after the probate of any such will, testament, or codicil in the county court, as aforesaid, appear, and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament, or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all of the parties concerned, saving to infants or [and persons] *non compos mentis*, the like period after the removal of their respective disabilities. And in all such trials by jury, as aforesaid, the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence, and to have such weight as the jury shall think it may deserve."

It is peculiarly within the province of courts of equity to set aside deeds of conveyance for fraud, and this statute in express terms confers a like power upon the state courts of general chancery jurisdiction in regard to probated wills. No doubt has been raised in regard to the power and jurisdiction of the proper state court of general equity jurisdiction to entertain such a suit as this to set aside a will in the proper case. If the courts of equity of the state can do it, there is no reason to deny concurrent jurisdiction to the Federal courts as between citizens of different states. The question is of importance, and, the authorities on the subject being not uniform, we have given it careful consideration. We think, both upon principle and the weight of authority, the jurisdiction should not be withheld. So far as the Supreme Court has spoken upon the subject, if it cannot be said to be fairly adjudicated, it has clearly been in favor of the jurisdiction. That court said, in *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524, Judge Field rendering the opinion: "In the case of *Broderick's Will*, 21 Wall. 503, *sub nom. Kieley* v. *McGlynn*, 22 L. ed. 599, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and, whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country from the full jurisdiction over the subject of wills vested in the probate courts and the revisory power over their adjudications in the appellate courts. But that such

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jurisdiction may be vested in the state courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in the states where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties. There are, it is true, in several decisions of this court, expressions of opinion that the Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered or of other states. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the Federal courts have concurrent jurisdiction with the state courts under the judiciary act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties."

Again, the court says in the same opinion: "The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony."

In *Ellis* v. *Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327, it was held that "circuit courts, as courts of equity, have no general jurisdiction for annulling or affirming the probate of a will. . . . Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte*, and merely administrative, it is not conferred; and it cannot be exercised by them at all, until in a case at law or in equity its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties."

The same principle seems also to have been conceded in *Broderick's Will*, 21 Wall. 509, *sub nom. Kieley* v. *McGlynn*, 22 L. ed. 602, where the Supreme Court, speaking through Mr. Justice Bradley, says: "The statute of 1862 has been referred to, which gives to the district courts of California power to set aside a will obtained by fraud or undue influence or a forged will, and any probate obtained by fraud, concealment, or perjury. Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts, as well as by the courts of the state. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding. Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties. But the statute referred to cannot affect this suit, inasmuch as the statute of limitations would still apply in full force, and would present a perfect bar to the suit."

In *Richardson* v. *Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423, this question, under a similar statute of Oregon, came directly before the United States circuit court of appeals of the ninth circuit. Very much like the case at bar, that case was brought to cancel a certain deed purporting to have been made by Philanda Terwilliger to her daughter, and also to cancel a will devising to the daughter certain real estate. The circuit court had overruled a demurrer to the bill, upon which a decree was entered, which was affirmed by the circuit court of appeals. It was held that the proceeding under the laws of Oregon to contest the validity of a will which had already been admitted to probate, being a suit between parties, was one of which the United States court may take jurisdiction, when the amount in controversy is sufficient, and the parties are citizens of different states. Judge Knowles, delivering the opinion in chief, says: "The suit for contesting a will after the probating of the same in Oregon is undoubtedly one between parties, and binding only the parties thereto, . . . Here it will be seen that, if a suit is essentially a suit of a civil nature for equitable relief, and it is customary to prosecute the same in any state court where the action arose, whether the same is a county court, or a probate court, or a district or circuit court, the proper Federal court will have concurrent jurisdiction of the same with such state courts, where the amount is sufficient, and the parties are citizens of different states, as prescribed by the United States statutes. It should be observed, also, that when it is customary for such state courts to hear and determine such equitable suits, a United States court, under proper conditions, may hear them."

And Judge McKenna, in his concurring opinion says: "I concur in the reasoning and conclusion of my associate as to the deed and will, and think both are forgeries. I believe, also, that the authorities cited by him establish that courts of equity, by virtue of their general authority to enforce equitable rights and remedies, have no power to avoid a will, or to set aside its probate on the ground of fraud, mistake, or forgery; this being within the exclusive jurisdiction of courts of probate. But where such a rem-

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edy is given to a state court by an action *inter partes*, the remedy may be adopted by the Federal courts, if the controversy is between citizens of different states."

The proper distinction between a proceeding to probate a will in common form, and contesting the validity in a court of equity after being probated, is properly drawn in *Brodhead* v. *Shoemaker*, 11 L. R. A. 567, 44 Fed. 518. It is there said: "Under § 2423 of the Code of Georgia, a proceeding to probate a will in common form is a probate proceeding pure and simple, the probate and record not being conclusive upon anyone interested in the estate adversely to the will, and, if afterwards set aside, not protecting the executor in any of his acts further than the payment of the debts of the estate. Under the same section, and §§ 2424 and 2427 of the same Code, a proceeding to probate a will in solemn form is a proceeding *inter partes* to establish the will conclusively and as a muniment of title; and when, in such a proceeding, the heirs at law are brought in, and they contest the validity of the will and the capacity of the testator, an issue or controversy is formed or made which can be classified as a suit at law. . . . From the statutes cited, and the record of the case as made up to the time of removal, it appears perfectly clear that the proceeding pending in the superior court of Floyd county, Georgia, taken in connection with the removal statutes of the United States, was a suit in which there was a controversy removable by the defendants to the circuit court of the United States for the northern district of Georgia upon compliance with the conditions prescribed in said removal statutes; and this, within the rule laid down by the Supreme Court in *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Ellis* v. *Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327."

In *Kirby* v. *Chicago & N. W. R. Co.* 106 Fed. 551, in the United States circuit court for the southern district of Iowa, the jurisdiction is conceded. In that case the court says (p. 556): "Neither by an original action, nor by an attempted removal from a state court, can this court acquire jurisdiction so as to probate a will, or appoint an administrator, or in determining the validity of a will preliminary to the appointment of an executor or administrator. That is clear. And it is equally clear that this court will take jurisdiction to contest the validity of a will already admitted to probate, if a controversy of the requisite amount and the parties citizens of different states, etc."

The case of *Oakley* v. *Taylor*, 64 Fed. 245, decided by the district judge of the eastern district of Missouri, is, no doubt, an authority for the appellees. The statute in that state was similar to that in Illinois, except that it provided for contesting the rejection as well as the allowance of a will by the probate court. The court in that case declined the jurisdiction because it was doubtful, and was derivative, and not original, and the statute, not in form, but in effect, provided for appeal from a probate to a state circuit court.

Reed v. *Reed*, 31 Fed. 49, is cited as an authority against the jurisdiction, and such it may be, though, according to the opinion in that case, by Judge Welker, it was a case of attempted removal from a state court of proceedings under special statutory proceedings classed with special remedies, and which make the common pleas court of that state an assistant to the probate court in the probate of wills and settlement of estates. These two cases seem to be more nearly in point against the jurisdiction than any other cases cited.

Copeland v. *Bruning*, 49 L. R. A. 68, 72 Fed. 5, is also relied upon as an authority for appellees, but the case is clearly distinguishable from the one at bar. That was a case of removal, and the ground upon which a motion to remand was made was that a proceeding to contest the validity of a will which has not been admitted to probate is not a suit at common law or in equity, but is a proceeding to determine whether the will is valid, and entitled to probate; and the holding of the court was that the Federal courts have no jurisdiction, either original or upon removal from a state court, of a suit instituted to determine the validity of a will, as a preliminary step in determining whether its probate should be granted or not.

The cases of *Re Cilley*, 49 L. R. A. 62, 40 C. C. A. 638, 58 Fed. 977, and *Wahl* v. *Franz*, 40 C. C. A. 638, 100 Fed. 680, are also relied upon as authority for the appellees, but are clearly distinguishable from the case at bar in that they were cases to establish the original probate of a will. *Re Cilley* is a strong case upon the points decided, and the opinion by Aldrich, J., concurred in by Judge Colt, is able and exhaustive; but so far as the case being an authority against the jurisdiction in a case like the one at bar, it is an authority the other way, so far as the opinion of the court could be an authority upon a question not directly involved in the case,—as the court in the opinion expressly recognize the jurisdiction of the Federal courts in a case like this. The court, in its opinion, says: "The petitioner places great stress upon a class of cases like *Gaines* v. *Fuentes* and *Ellis* v. *Davis*, which put in issue the validity of wills. An examination of these cases will disclose that they are not inconsistent with the repeated declarations of the Supreme Court that Federal courts have no jurisdiction over the probate of wills; and the apparent confusion arises from the fact that the cases either came from the territorial courts, or from states where, by statute, courts of equity have been clothed with jurisdiction to entertain bills to set aside wills on the ground of fraud. *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524, was a direct proceeding to annul a will already established, based upon a local law vesting the ordinary courts with jurisdiction to that end. Mr. Justice Field, in sustaining jurisdiction in that case, reaffirms the doctrine of the case of *Broderick's Will*,

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that by the general jurisdiction of courts of equity as established both in England and in this country, independent of the statutes, a bill will not lie to set aside a will or its probate. 'And,' he says (p. 21, L. ed. p. 528), 'whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But,' he says, 'that such jurisdiction may be vested in the state courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in states where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties,'—thus distinctly putting the decision upon the local law conferring equity jurisdiction, and disclaiming that jurisdiction exists over probate proceedings coming from a state where courts of equity are not clothed with such statutory power. And *Ellis* v. *Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327, was a bill in equity to recover property, and to set aside a will already established. The court, in its opinion, expressly distinguishes the case then under consideration from those involving proceedings to establish wills, over which it disclaims jurisdiction, and likewise puts the decision sustaining jurisdiction to administer relief in that particular case upon the ground that the law obtaining in the state authorized suits in equity to annul and set aside the probate of a will."

The case of *Wahl* v. *Franz*, 40 C. C. A. 638, 100 Fed. 680, decided by the circuit court of appeals for the eighth circuit, is relied upon perhaps more than any other to fortify the position taken by appellees against the jurisdiction. But that case was decided by a divided court, Sanborn, J., delivering a vigorous and able dissenting opinion. As we understand the case, it was essentially one for the probate of a will, and it was held that a proceeding for the probate of a will is not a suit of a civil nature at law or in equity, within the meaning of the Federal judiciary act of 1888. The law provided for an appeal to the circuit court of the state as a part of the machinery for the probate of a will, and it was held that the proceeding in that court was not removable to the United States circuit court under the act of Congress. The distinction seems to have been taken that in the case of an appeal the appeal forms a part of the machinery provided by the state law for the probate of wills, and, unless the will is probated, the United States court cannot have jurisdiction.

In view of these express adjudications of the circuit courts and of the circuit courts of appeal, with so many recognitions of the jurisdiction by the Supreme Court, there would seem to be little ground for doubt of the jurisdiction of the Federal courts in such a case; and we have no hesitation in holding that the want of jurisdiction alleged cannot be sustained.

The other grounds of demurrer, the jurisdiction being conceded, do not seem formidable; the objection for multifariousness and want of parties being more under the control of the court, to be adjudged and administered so as to best preserve the rights of the parties and do justice to all. In the judgment of the court the bill is not multifarious. It may be said that two causes of action, one for setting aside a will and the other for setting aside a deed, are joined; but, if so, they are both of an equitable nature, and, what is more, both grow out of the same transaction and subject-matter, which is the fraud and gross overreaching alleged to have been practised by Crabb upon the deceased, Ellen Williams. These two causes for equitable relief, growing, as they do, out of the same circumstances of fraud and undue influence, may properly be united in the same bill. They will naturally depend upon substantially the same proofs and circumstances, and nothing would be gained by separate suits. It is difficult to believe that the interests of any of the defendants can be jeopardized by uniting the two causes of action, if they can be said to constitute two causes. It is very true that the interests of all the defendants are not identical, but that is by no means necessary. They all have an interest, however,—Crabb as the principal defendant, and who is charged with a trust in case the deed and will are set aside; and the others as having some interest under and derived from him. Certainly the relief sought is not wholly disconnected, but is properly asked, as growing out of the same transaction. The rule in regard to multifariousness is not very well settled, and each case must depend mainly upon its own facts and circumstances. If the court can see that justice to all parties may be done, it will exercise a discretion not to put the complainant out of court for such a cause. In *Brown* v. *Guarantee Trust & S. D. Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127, the Supreme Court says: "It is contended by the appellant that the decree below should be reversed on the ground that the cross bill is multifarious. In *Shields* v. *Thomas*, 18 How. 253, 15 L. ed. 368, this objection was urged against a bill, and in considering the objection the court says: 'There is, perhaps, no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application than has attended this relating to multifariousness. This effect, flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule; and that conclusion is that each case must be determined by its peculiar features.' So, in *Gaines* v. *Chew*, 2 How. 619, 642, 11 L. ed. 402, 411, the court says: 'In general terms a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. In illustration of this it is

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said if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract. . . . It is well remarked by Lord Cottenham in *Campbell* v. *Mackay*, 7 Sim. 564, and in 1 Myl. & C. 603, "to lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, utterly impossible." Every case must be governed by its own circumstances, and, as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.' "

It is not indispensable that all parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. *Addison* v. *Walker*, 4 Younge & C. Exch. 442; *Parr* v. *Atty. Gen.* 8 Clark & F. 435; *Worthy* v. *Johnson*, 8 Ga. 238, 52 Am. Dec. 399. The rule, so far as there is any rule upon this subject, is perhaps as well as anywhere stated by Mr. Justice Harlan in *Sheldon* v. *Keokuk Northern Line Packet Co.* 10 Biss. 470, 8 Fed. 769, as follows: "It has been held by the Supreme Court of the United States to be impracticable to lay down any fixed, unbending rule as to what constitutes multifariousness or misjoinder of causes of action. *Oliver* v. *Piatt*, 3 How. 333, 11 L. ed. 622; *Gaines* v. *Chew*, 2 How. 619, 11 L. ed. 402; *Barney* v. *Latham*, 103 U. S. 205, 26 L. ed. 514. The court must necessarily exercise a large, though, of course, a sound, legal discretion in allowing the union in the same suit of matters which do not alike or equally affect all the parties. Each case must depend upon its special circumstances, and the necessities which may arise out of the due administration of justice in that case. As a general rule, the court will not subject parties to the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant whose object was not simply to harrass his adversary, but to ascertain what were his just legal rights. As to the general propositions, there can be no doubt under the authorities."

See also, to the like effect, *Von Auw* v. *Richmond Toy & Fancy Goods Co.* 69 Fed. 448; *Kelley* v. *Boettcher*, 29 C. C. A. 14, 56 U. S. App. 368, 85 Fed. 55, and cases cited; *Barcus* v. *Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783; *Stafford Nat. Bank* v. *Sprague*, 19 Blatchf. 529, 8 Fed. 377; *De Neufville* v. *New York & N. R. Co.* 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10.

Under these authorities, it seems clear that the objection for multifariousness cannot be sustained.

If, in regard to the will, it be objected that under the Illinois statute an issue must be made up for trial by jury, while the question of fraud in the procurement of the deed might be tried by the court, the answer is that the objection is neither grave nor insuperable. A court of equity is elastic in its procedure, and can adapt itself to the varied circumstances of a case in order to do justice. It is not uncommon for a court of equity to impanel a jury to try questions of fact, and especially questions of fraud; and it may set aside or disregard verdicts, according to the justice of the case. Quite likely the court might order one jury to try both issues, or it might try one by one jury and the other by another, or one by a jury and the other by the court. The verdict of the jury under the issue made up under this statute might, no doubt, be set aside by the court, if it should appear to be against the justice of the case. So that there is no hard and fast rule to prevent the court from meting out justice according to the principles of equity, which it is its prime function to administer.

Nor can the objection prevail that Helen Alexander is not made a party defendant or a party complainant with her brother, having an equal interest in the estate of her sister with the complainant. She is not an indispensable party. The ground of demurrer is that she was not made a defendant, but she has no interest adverse to that of the complainant, and so should not be made a defendant. It is not objected that she is not made a cocomplainant. She would have been a proper party complainant, and possibly a necessary, as distinguished from an indispensable, party. *Lake Street Elev. R. Co.* v. *Zeigler*, 39 C. C. A. 431, 99 Fed. 114. By the original bill Helen Alexander was made a party defendant, and she was alleged to be a citizen of Illinois. In the amended bill she was not made a party, nor is there any allegation as to her citizenship, but the demurrer alleges that she is a citizen of Illinois. The briefs of counsel on both sides concede that she is a citizen of the same state with the defendants, and we think the court may assume that to be the fact; so that, if she were made a party, the requisite citizenship to give the Federal court jurisdiction would be wanting, as the court would, in determining the question of jurisdiction, arrange the parties according to their interests in the controversy, and, her interest being with the complainant, she

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would be placed on that side, which would deprive the court of jurisdiction, as one of the complainants in that case would be a citizen of the same state with the defendants. It seems clear that under the adjudications that would be a good reason that the court should not require her to be brought in. In *West* v. *Randall*, 2 Mason, 181, Fed. Cas. No. 17,424, one of the beneficiaries in a trust deed filed a bill against the trustee to secure settlement of the estate. The other beneficiaries were not made parties, and it was objected that they were indispensable. The opinion was delivered by Mr. Justice Story, who decided that the other beneficiaries were not indispensable parties, basing his decision upon the propositions that, if they were brought into court, they would oust jurisdiction of the court, and that there was no controversy with them which required their presence. It was insisted by counsel in that case, as in this case, that a decree would not close the matter, but would leave the absent parties to again litigate the whole matter, and thus vex the defendants with double inconvenience and perils. Judge Story said: "This is certainly true, and it is as certain that they could not be plaintiffs without ousting the present plaintiff of his remedy here." While admitting the general rule that all parties of interest must be before the court, he said: "The rule is not, then, so inflexible that it may not fairly leave much to the discretion of the court; and upon the facts of the present case it being impossible to make the other heirs plaintiffs consistently with the preservation of jurisdiction of the court, or to make them defendants from any facts which can be truly charged against them, I should hesitate a good while before I should enforce the rule, and, if the cause turned solely upon this objection, I should not be prepared to sustain it."

And in *Elmendorf* v. *Taylor*, 10 Wheat. 152, 6 L. ed. 289, Chief Justice Marshall delivering the opinion, the court says: "It is contended that he [the plaintiff] is a tenant in common with others, and ought not to be permitted to sue in equity without making his cotenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy, of the court. Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not like the description of parties,—an inflexible rule, a failure to observe which turns the party out of court because it has no jurisdiction over his cause,—but, being introduced by the court itself for the purposes of justice, is susceptible of modification for the promotion of those purposes. In this case the persons who are alleged to be tenants in common with the plaintiffs appear to be entitled to a fourth part, not of the whole tract, but of a specially described portion of it, which may or may not interfere with the part occupied by the defendants. Neither the bill nor the answers allege such an interference, and the court ought not, without such allegation, to presume it."

In *Payne* v. *Hook*, 7 Wall. 425, 19 L. ed. 260, it was held that in a bill in equity by one distributee of an estate against the administrator it is not indispensable that such distributee make the others parties, if the court is able to proceed to a decree, and do justice to the parties before it without injury to absent parties equally interested. The court says: "But this rule, like all general rules, being founded in convenience, will yield whenever it is necessary that it should yield in order to accomplish the ends of justice. It will yield if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons equally interested in the litigation, but who cannot conveniently be made parties to the suit." Cooper, Eq. Pl. 35.

These adjudications are also in line with equity rule No. 47, which is as follows: "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

According to the decision of the United States court already cited, this is not a proceeding *in rem*, but a suit *inter partes*. Considered simply as a suit to set aside a will, already probated, for fraud, it is not a proceeding *in rem*. But in its largest aspect it is a suit to recover complainant's one-half interest in the valuable estate of which he is one of two heirs. It is not simply a suit to contest a will, or the legal probate thereof, but it is to establish the right of the complainant to the possession and enjoyment of real estate, and to relieve his title thereto from encumbrances fraudulently put upon it, which cloud the title. At common law ejectment would lie, but the complainant's remedy under our system is by bill in equity. Nobody will be bound by any decree except the parties thereto. Without being joined as complainant, and without bringing suit on her own behalf, Helen Alexander's interest in the estate cannot be affected by a decree in favor of this complainant. The defendant Crabb cannot justly complain that the suit is not brought to recover the entire estate of Ellen Williams, rather than a one-half interest. The utmost consequence that could follow would be that the defendants might be subjected to another suit by Helen Alexander, but that would be no hardship compared with turning the complainant out of court, who would now, no doubt, be barred, under the statute,

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from commencing another action so far as the will is concerned.

The decree of the court below is reversed, and the cause remanded for further proceedings.

Petition for rehearing denied.

Petition for writ of certiorari denied by Supreme Court of United States, December 1, 1902.

INDIANA SUPREME COURT.

STATE of Indiana, *Appt.*,
v.
Sheridan BAILEY.

(157 Ind. 324.)

1. **A title, "Concerning the Education of Children,"** is sufficient to cover matter relating to the duties of parents and guardians concerning the attendance of children at school, the appointment of a truant officer, and the definition of a misdemeanor, in failing to comply with the law.
2. **A title, "An Act Entitled 'An Act Amending An Act Concerning the Education of Children.' Approved March 8, 1897,"** sufficiently refers to the title of the former act to comply with the requirements of the Constitution as to the amendment of statutes, where the title of the former act was "An Act Concerning the Education of Children."
3. **The rights of a parent are not infringed** by a law compelling the education of children.
4. **Refusal to send a child to school** need not be charged to be "unlawful" if the facts averred show that it is.

(October 29, 1901.)

APPEAL by the state from a judgment of the Circuit Court for Jay County reversing a judgment of a justice of the peace which convicted defendant of violating the compulsory education law. *Reversed.*

The facts are stated in the opinion.

Messrs. **Rowland Evans, Cassius C. Hadley,** and **Merrill Moores,** with *Mr.* **William L. Taylor,** Attorney General, for the State:

The title is sufficient, and does not conflict with Ind. Const. art. 4, § 19.

Hingle v. *State*, 24 Ind. 28; *Crawfordsville & S. W. Turnp. Co.* v. *Fletcher*, 104 Ind. 97, 2 N. E. 243; *Gustavel* v. *State*, 153 Ind. 613, 54 N. E. 123; *Marion County* v. *Winkley*, 29 Kan. 40; *Sweet* v. *Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *Abeel* v. *Clark*, 84 Cal. 226, 24 Pac. 383; *People* v. *O'Neil*, 71 Mich. 325, 39 N. W. 1; *People* v. *Miller*, 88 Mich. 383, 50 N. W. 296; *McAunich* v. *Mississippi & M. R. Co.* 20 Iowa, 341; *Smith* v. *Bohler*, 72 Ga. 546; *State ex rel. Atty. Gen.* v. *Covington*, 29 Ohio St. 102; *Ross* v. *Davis*, 97 Ind. 79; *Wishmier* v. *State use of Dickey*, 97 Ind. 160; *Williams* v. *State*, 48 Ind. 306; *State* v. *Adamson*, 14 Ind. 296; *Thomasson* v. *State*, 15 Ind. 449; *Kane* v. *State ex rel. Woods*, 78 Ind. 103; *Bright* v. *McCullough*, 27 Ind. 223.

The act is not invalid as an amendatory act as not containing a proper reference to the title of the act amended.

Bush v. *Indianapolis*, 120 Ind. 476, 22 N. E. 422; *Shoemaker* v. *Smith*, 37 Ind. 122; *Greencastle Southern Turnp. Co.* v. *State ex rel. Malot*, 28 Ind. 382; *Draper* v. *Talley*, 33 Ind. 465; *People ex rel. Drake* v. *Mahaney*, 13 Mich. 481; *Mok* v. *Detroit Bldg. & Sav. Asso. No. 4*, 30 Mich. 511.

The act is not invalid as invading the natural right of a man to govern and control his children.

State v. *Clottu*, 33 Ind. 409; *Hedderich* v. *State*, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; *Eastman* v. *State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Phenix Ins. Co.* v. *Burdett*, 112 Ind. 204, 13 N. E. 705; *Maxwell* v. *Fulton County*, 119 Ind. 20, 19 N. E. 617; *Johnston* v. *State ex rel. Sefton*, 128 Ind. 16, 12 L. R. A. 235, 27 N. E. 422; *Jamieson* v. *Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76.

The affidavit is sufficient, the word "unlawfully" not being essential.

Wharton, Crim. Pl. & Pr. 8th ed. § 269; Clark, Crim. Law, § 20, p. 42; 10 Enc. Pl. & Pr. p. 495; *State* v. *Murphy*, 43 Ark. 179; *Capps* v. *State*, 4 Iowa, 502; *McWaters* v. *State*, 10 Mo. 169; *State* v. *Tibbetts*, 86 Me. 189, 29 Atl. 979; *Nash* v. *State*, 2 G. Greene, 286.

Messrs. **Snyder & Bergman** for appellee.

Dowling, J., delivered the opinion of the court:

The appellee was charged upon affidavit before a justice of the peace with having neglected, omitted, and refused to send his child, Vory Bailey, to school, in violation of the provisions of the compulsory education law of this state of March 8, 1897 (Acts 1897, p. 248), as amended by the act of March 6, 1899 (Acts 1899, p. 547). He was convicted before the justice, and upon an appeal from that judgment to the circuit court the affidavit was quashed. The state appeals.

The constitutionality of the act of March 6, 1899, is assailed by the appellee upon the

NOTE.—As to state guardianship of children, see *note* to Whalen v. Olmstead (Conn.) 15 L. R. A. 593; also, in this series, Van Walters v. Marion County Bd. of Children's Guardians (Ind.) 18 L. R. A. 431.

For a case holding that a statute prohibiting employment of young girls as dancers in theatrical exhibitions is not invalid as depriving parents of right to employ their children in any lawful occupation, see, in this series, People v. Ewer N. Y.) 25 L. R. A. 794.

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following grounds: (1) Because it is in conflict with § 19, art. 4, of the Constitution of Indiana; (2) because it is in conflict with § 21, Id.; (3) because it invades the natural right of a man to govern and control his own children. The additional point is made by counsel for the appellee that the facts stated in the affidavit are not sufficient to constitute a public offense.

The title of the act of March 6, 1899, is, "An Act Entitled 'An Act Amending An Act Concerning the Education of Children,' Approved March 8, 1897, and Declaring an Emergency." It is contended that this does not conform to that provision of the Constitution which prescribes that every act shall embrace but one subject and matters properly connected therewith, and that such subject shall be expressed in the title. It is also objected that the title of the act is so vague and uncertain as to render it nugatory. It is said that the subject of the act is declared to be the education of children, but that the provisions of the statute relate to subjects of an entirely different nature, —such as the duties of parents and guardians concerning the attendance of children at school, the creation of an office, the appointment of a truant officer, and the definition of a misdemeanor. The law of the case seems to be well settled by the decisions of this court. Such a title as "An Act to Promote the General Welfare of the State" or "An Act to Promote Good Morals," would give no indication of the character of the subject of the statute, and therefore would fail to meet the requirement that the subject of the act must be expressed in the title. *Indiana C. R. Co.* v. *Potts*, 7 Ind. 681; *Gillespie* v. *State*, 9 Ind. 380; *Henderson* v. *London & L. Ins. Co.* 135 Ind. 23, 20 L. R. A. 827, 34 N. E. 565; *State* v. *Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Bright* v. *McCullough*, 27 Ind. 223. But the title , "An Act Concerning Drainage," properly embraces legislation authorizing the appointment of a board of drainage commissioners. It is sufficient, also, to include provisions for the making and collecting of assessments upon the lands benefited by the work, and the recovery of attorneys' fees. *Ross* v. *Davis*, 97 Ind. 79; *Wishmier* v. *State use of Dickey*, 97 Ind. 160. The title, "An Act to Regulate the Sale of Intoxicating Liquors," was held a sufficient expression of the subject of the act, and to authorize provisions prohibiting the sale of liquor, and imposing penalties for violation of the statute. *Williams* v. *State*, 48 Ind. 306; *Kane* v. *State ex rel. Woods*, 78 Ind. 103. "An Act Defining Felonies, and Prescribing Punishment Therefor," and "An Act Defining Certain Felonies, and Prescribing Punishment Therefor," were held sufficiently certain to embrace all felonies mentioned in them, with the punishments for the same. *Peachee* v. *State*, 63 Ind. 399. The title of a statute was, "An Act to Provide for the Incorporation of Railroad Companies." Held a sufficient statement of the subject to embrace a provision for the individual liability of the stockholders. *Shipley* v. *Terre Haute*, 74 Ind. 279. "An Act Concerning Bank Officers, Brokers, etc., Receiving Deposits after Insolvency, Repealing All Laws in Conflict Herewith," was decided to be "comprehensive enough, omitting the 'etc.,' to express the subject of the act." *State* v. *Arnold*, 140 Ind. 628, 38 N. E. 820. *Bright* v. *McCullough*, 27 Ind. 223, contains a luminous and forcible explanation of the meaning of § 19 of article 4 of the Constitution: "The Constitution does not assume to divide the general scope of legislation, and classify the parts under particular heads or subjects, but, of necessity, has left that power to be exercised by the legislature as it, in its wisdom and discretion, shall deem proper. The Constitution assumes that different subjects of legislation do exist, and requires that each act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. The purposes of the provision, in view of the evils intended to be guarded against, can only be effected by requiring that the subject expressed should be reasonably specific, or, in other words, should be such as to indicate some particular branch of legislation, as a head under which the particular provisions of the act might reasonably be looked for. With this restriction, the subject of an act may be enlarged or restricted at the will of the legislature, and the subject must be determined by reference to the language used in the title. It sometimes occurs that the draftsman, intending to provide a title sufficiently comprehensive to cover various provisions, all, however, relating to a common subject, instead of selecting a subject which is sufficiently comprehensive to embrace all the provisions of the act, and expressing it in general terms, attempts to accomplish the desired object by stating in the title, in detail, the character or purpose of the various provisions of sections, thereby often limiting the subject expressed to the particular matters thus specified. But it should be borne in mind that the Constitution only requires that a proper subject of legislation should be expressed in the title, and not the particular features or details of the law. If these relate to the subject expressed, it satisfies the constitutional provisions. The words 'An Act Concerning Highways' would express but a single subject, and yet would constitute a comprehensive title, under which almost any desired provision relating to highways might be enacted, and every effort to express in the title the details of the act would only tend to limit the subject." See also *Gustavel* v. *State*, 153 Ind. 613, 54 N. E. 123; *Maule Coal Co.* v. *Partenheimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710; *Clarke* v. *Darr*, 156 Ind. 692, 60 N. E. 688. We think the title of the statute in question specific enough to guard against the evils intended to be prevented by the Constitution. It sufficiently indicates "some particular branch of legislation as a head under which the particular provisions of the act might reasonably be looked for." The subject of the act, as ex-

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pressed in the title, is "the education of children." Is this any less specific than "drainage" or "highways?" Is it not as definite as "to regulate the sale of intoxicating liquors," or "to provide for the organization of railroad companies?" Yet, each of these has been held a sufficient statement of the subject of the act to which it applies.

The validity of the act of March 6, 1899, is denied, also, because of its supposed conflict with § 21 of article 4 of the Constitution, upon the ground that its title does not refer to the title of the act of March 8, 1897, which it purports to amend. The grammatical construction of the title is awkward and inaccurate, but it indicates with sufficient precision that the act of 1899 is an amendment of "An Act Concerning the Education of Children," which was the full title of the act of March 8, 1897. And the statute amended is further identified by reference to the date of its approval. The rule in such cases is that an act of the legislature is not to be held void because of trivial and unimportant defects in its title. If any reference to the title of the act amended was necessary, as held in *Feibleman* v. *State ex rel. Brown*, 98 Ind. 516, this requirement was sufficiently complied with in the title of the amendatory act of 1899.

The next question presented is whether the statute is an unauthorized invasion of the natural rights of the appellee as a parent. The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and regulated by municipal laws. One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes, not to the child only, but to the commonwealth. If he neglects to perform it, or wilfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods during certain years of the life of such children have not only been upheld as strictly within the constitutional power of the legislature, but have generally been regarded as necessary to carry out the express purposes of the Constitution itself. Ind. Const. art. 8, §§ 1–8; Hochheimer, Custody of Infants, § 79; Fraser, Parent & Child, 77; *Bennet* v. *Bennet*, 13 N. J. Eq. 114; *English* v. *English*, 32 N. J. Eq. 738; *Re Bort*, 25 Kan. 308, 37 Am. Rep. 255; *People* v. *Ewer*, 141 N. Y. 129, 25 L. R. A. 794, 36 N. E. 4; *Sheers* v. *Stein*, 75 Wis. 44, 5 L. R. A. 781, 43 N. W. 728; *Lally* v. *Fitz Henry*, 85 Iowa, 49, 16 L. R. A. 681, 51 N. W. 1155. "The matter of education is deemed a legitimate function of the state, and, with us, is imposed upon the legislature as a duty by imperative provisions of the Constitution. . . . The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment, and to do so would be to invade the province which by the Constitution is assigned exclusively to the lawmaking power." *State* v. *Clottu*, 33 Ind. 409, 411. To carry out the enlightened and comprehensive system of education enjoined by the Constitution of this state, a vast fund, dedicated exclusively to this purpose, has been set apart. Revenues to the amount of more than $2,000,000 annually are distributed among the school corporations of the state. No parent can be said to have the right to deprive his child of the advantages so provided, and to defeat the purposes of such munificent appropriations.

In the last place, it is objected that the affidavit is insufficient because it does not allege that the appellee "unlawfully" neglected, etc., to send his child to school. The facts averred sufficiently show that the act of the appellee was unlawful. All of the exceptions and legal excuses named in the statute are negatived in the affidavit, and the conduct of the appellee, as described in that instrument, could not have been lawful. The rule applicable here is well stated in Wharton, Crim. Pl. & Pr. 8th ed. § 269, as follows: "The phrase 'unlawful' is in no case essential unless it be a part of the description of the offense as defined by some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful. If the fact stated be legal, the word 'unlawful' cannot render it indictable." The affidavit sufficiently charged a public offense.

For the error of the court in sustaining the appellee's motion to quash the affidavit, *the judgment is reversed.*

IOWA SUPREME COURT.

STATE of Iowa
v.
Fred HEIGHT, *Appt.*
(.....Iowa.....)

1. Testimony of physicians who examined a prisoner against his will to determine if he had venereal disease cannot be excluded because relating to a privileged communication, where accused made no communications while they were acting as his physicians.

NOTE.—As to power of court to compel physical examination, see prior cases in this series 59 L. R. A.

as follows: McQuigan v. Delaware, L. & W. R. Co. (N. Y.) 14 L. R. A. 466; Graves v. Bat-

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2. **The rule excluding involuntary confessions** does not apply to testimony of physicians as to the condition of a prisoner whom they examined against his will with reference to having a venereal disease.
3. **The disclosure by physicians of knowledge obtained as to the condition,** with reference to venereal disease, of a prisoner whom they examined against his will upon his trial for rape, is prohibited by a constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, and securing persons against unreasonable searches.
4. **Where to establish rape of a child under the age of consent** evidence is admitted that defendant had a venereal disease which he communicated to her, he may show that at about the time of the alleged rape she had connection with other men from whom she might have contracted the disease.
5. **Testimony that one had no venereal disease cannot be impeached** by declarations as to the condition of the sheets of his bed, without laying a proper foundation by questions as to specific matter tending to show venereal disease to which the declaration had reference.
6. **The warrant of arrest and return thereon** are inadmissible in evidence upon a trial for rape.

(October 23, 1902.)

APPEAL by defendant from a judgment of the District Court for Linn County convicting him of rape. *Reversed.*

The facts are stated in the opinion.

Mr. **E. H. Crocker,** for appellant:

It was error to admit evidence of physical examination of defendant, under § 4608 of the Code of Iowa, precluding any physician or surgeon from disclosing any communication to him, or information obtained by him, and properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the regular course of practice or discipline.

Prader v. *National Masonic Acci. Asso.* 95 Iowa, 150, 63 N. W. 601; *Baxter* v. *Cedar Rapids,* 103 Iowa, 604, 72 N. W. 790; *Raymond* v. *Burlington, C. R. & N. R. Co.* 65 Iowa, 152, 21 N. W. 495.

It is the policy of both the state and national governments to prevent a person's being compelled to give evidence against himself, and to guarantee him in the security of his person, as well as his papers.

Boyd v. *United States,* 116 U. S. 616, 629, 29 L. ed. 746, 751, 6 Sup. Ct. Rep. 524; *People* v. *McCoy,* 45 How. Pr. 216; *Day* v. *State,* 63 Ga. 669; *Stokes* v. *State,* 5 Lax. 619, 30 Am. Rep. 72.

A confession made under the same circumstances as this examination was had, should be excluded.

State v. *Chambers,* 39 Iowa, 182; *State* v. *Storms,* 113 Iowa, 385, 85 N. W. 610; *Com.* v. *Cuffee,* 108 Mass. 285; *People* v. *Howes,* 81 Mich. 396, 45 N. W. 961; *Burdge* v. *State,* 53 Ohio St. 512, 42 N. E. 594; *Bradford* v. *State,* 104 Ala. 68, 16 So. 107; *People* v. *Rodriguez,* 10 Cal. 50; *State* v. *Fidment,* 35 Iowa, 542; 3 Russell, Crimes, 6th ed. 478; *Bram* v. *United States,* 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 187; *Kelly* v. *State,* 72 Ala. 244; *People* v. *Barric,* 49 Cal. 342; *People* v. *Thompson,* 84 Cal. 598, 24 Pac. 384; *Beery* v. *United States,* 2 Colo. 186; *State* v. *Bostick,* 4 Harr. (Del.) 563; *Green* v. *State,* 88 Ga. 516, 15 S. E. 10; *Rector* v. *Com.* 80 Ky. 468; *Biscoe* v. *State,* 67 Md. 6, 8 Atl. 571; *Com.* v. *Nott,* 135 Mass. 269; *Com.* v. *Myers,* 160 Mass. 530, 36 N. E. 481; *People* v. *Wolcott,* 51 Mich. 612, 17 N. W. 78; *Territory* v. *Underwood,* 8 Mont. 131, 19 Pac. 398; *State* v. *York,* 37 N. H. 175; *People* v. *Phillips,* 42 N. Y. 200; *State* v. *Whitfield,* 70 N. C. 356; *State* v. *Drake,* 113 N. C. 624, 18 S. E. 166; *Vaughan* v. *Com.* 17 Gratt. 576.

Whether the defendant consented to such examination was a question for the court, or, in case of doubt or conflict, for the jury; and a witness should not, therefore, be permitted so to state as a conclusion, and thereby determine the ultimate fact himself.

Hicks v. *Williams,* 112 Iowa, 691, 84 N. W. 935.

When objected to, the burden is upon the state to show that a confession is voluntary before it can be admitted in evidence.

Bradford v. *State,* 104 Ala. 68, 16 So. 107; *State* v. *Storms,* 113 Iowa, 385, 85 N. W. 610.

The state seeking to connect defendant with this crime by showing this diseased condition of prosecutrix, it became competent and proper for the defendant to question the prosecutrix as to previous acts of sexual intercourse with specified persons before the alleged offense, for the purpose of ascertaining whether the disease was in fact communicated to her by defendant as she alleged, and of putting him in a position where he could investigate and ascertain the cause of the disease.

State v. *Sutherland,* 30 Iowa, 570; *People* v. *Abbot,* 19 Wend. 192; *State* v. *Johnson,* 28 Vt. 512; *People* v. *Benson,* 6 Cal. 221, 65 Am. Dec. 506; *Shepard* v. *Parker,* 36 N. Y. 517; *Wilbur* v. *Flood,* 16 Mich. 40. 93 Am. Dec. 203; *Hill* v. *State,* 42 Neb. 503, 60 N. W. 916; *State* v. *Pratt,* 121 Mo. 566, 26 S. W. 556; *People* v. *Webster,* 139 N. Y. 73, 34 N. E. 730; *State* v. *Woodworth,* 65 Iowa, 142, 21 N. W. 490; *Nugent* v. *State,* 18 Ala. 521.

A confession is incompetent if any sort of

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tle Creek (Mich.) 19 L. R. A. 641; Lyon v. Manhattan R. Co. (N. Y.) 25 L. R. A. 402; Carrico v. West Virginia C. & P. R. Co. (W. Va.) 24 L. R. A. 50; Hall v. Manson (Iowa) 34 L. R. A. 207; Cleveland, C. C. & St. L. R. Co. v. Huddleston (Ind.) 36 L. R. A. 681; O'Brien v. La Crosse (Wis.) 40 L. R. A. 831; Lane v. Spokane Falls & N. R. Co. (Wash.) 46 L. R. A. 153; 59 L. R. A.

Stack v. New York, N. H. & H. R. Co. (Mass.) 52 L. R. A. 328; and South Bend v. Turner (Ind.) 54 L. R. A. 396.

As to right to compel accused to exhibit himself for identification, including physical examination by physicians, see *note* to People v. Gardner (N. Y.) 28 L. R. A. 699.

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threats, force, duress, or inducements is used to obtain it.

State v. *Chambers*, 39 Iowa, 179; *State* v. *Jay* (Iowa) 89 N. W. 1070.

The testimony as to this physical examination of defendant should have been excluded as a confession.

State v. *Jay* (Iowa) 89 N. W. 1070; *Bram* v. *United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 187.

It is generally held that an accused person cannot be compelled to exhibit those portions of his body which are usually covered for the purpose of securing identification, or in other ways affording evidence against him.

State v. *Nordstrom*, 7 Wash. 506, 35 Pac. 382.

Messrs. **Charles W. Mullan**, Attorney General, and **Charles A. Van Vleck**, for appellee:

There was no error in admitting the warrant and return.

State v. *Anderson*, 10 Or. 448; *Batten* v. *State*, 80 Ind. 394; *Revel* v. *State*, 26 Ga. 275; *People* v. *Fredericks*, 106 Cal. 554, 39 Pac. 944; *Com.* v. *Bezek*, 168 Pa. 603, 32 Atl. 109.

This evidence was not a privileged communication under § 4608 of the Code.

State v. *Grimmell* (Iowa) 88 N. W. 342; *People* v. *Glover*, 71 Mich. 303, 38 N. W. 874.

The objections to this testimony were properly overruled for the reason that by receiving it, it was not compelling appellant to testify against himself.

State v. *Graham*, 74 N. C. 648, 21 Am. Rep. 493; *United States* v. *Cross*, 9 Mackey, 382; *State* v. *Reasby*, 100 Iowa, 231, 69 N. W. 451; *People* v. *Kemmler*, 119 N. Y. 580, 24 N. E. 9; *State* v. *Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530; *State* v. *Prudhomme*, 25 La. Ann. 522; *State* v. *Garrett*, 71 N. C. 85, 17 Am. Rep. 1; *Walker* v. *State*, 7 Tex. App. 265, 32 Am. Rep. 595.

The court did not err in refusing to permit cross-examination of the prosecutrix as to her acts and conduct with other persons.

People v. *Glover*, 71 Mich. 303, 38 N. W. 874; *People* v. *Abbott*, 97 Mich. 484, 56 N. W. 862.

This testimony was not receivable for the purpose of affecting the credibility of the testimony of the prosecutrix.

People v. *Abbott*, 97 Mich. 484, 56 N. W. 862.

Evidence of specific acts of intercourse with persons other than the appellant could not be given.

People v. *McLean*, 71 Mich. 309, 38 N. W. 917; 3 Greenl. Ev. § 214; *Rex* v. *Hodgson*, Russ. & R. C. C. 211; *Rex* v. *Clarke*, 2 Starkie, 241; Phillipps, Ev. 222, 223; *Strang* v. *People*, 24 Mich. 1; *McDermott* v. *State*, 13 Ohio St. 332, 82 Am. Dec. 444.

The testimony was not admissible for the purpose of showing that prosecutrix might have become inoculated with the venereal disease by contact or intercourse with another than the appellant.

People v. *Glover*, 71 Mich. 303, 38 N. W. 874.

Evidence of physical examination showing bruises and other injuries received are admissible, the weight of such evidence depending upon the length of time that has elapsed after the alleged injury before the making of the examination; but the length of time is a matter going to the credibility of the evidence, and not to its competency.

State v. *McLaughlin*, 44 Iowa, 82; *State* v. *Watson*, 81 Iowa, 380, 46 N. W. 868; *State* v. *Teipner*, 36 Minn. 535, 32 N. W. 678; *Com.* v. *Allen*, 135 Pa. 483, 19 Atl. 957.

McClain, J., delivered the opinion of the court:

The crime is charged to have been committed by having sexual intercourse with a female under the age of consent. The evidence tends to show that the prosecutrix, a child ten years of age, did not make complaint of the alleged outrage until about eleven days after its commission, and then, on examination by physicians, was found to be affected with venereal disease. The prosecuting attorney claimed in his opening statement that he would be able to show that the defendant at the time of the alleged intercourse was afflicted with the same disease, which he might have communicated to prosecutrix at that time, and thereby produced in her the diseased condition which was found on such examination; and for the purpose of establishing this fact he called as witnesses certain physicians who had made an examination of defendant's private parts while he was confined in jail under arrest for the crime charged, and found that he then had, or had recently had, the disease in question. It is contended for appellant that this physical examination of him was made without his consent and against his protest, and, proper objections having been made to the introduction of the evidence, it is now argued, first, that the testimony of these physicians is with reference to a privileged communication. But it is enough to say in answer to this contention that the physicians were not called by defendant, and that no communications were made to them by the defendant in that capacity; nor did the defendant, even if he submitted to the examination, do so with the idea that the physicians making it were acting as his physicians. The objection to the testimony that it disclosed a privileged communication was not well taken. *People* v. *Glover*, 71 Mich. 303, 38 N. W. 874. In any event, the privilege is not available to defeat the punishment of crime. *State* v. *Grimmell* (Iowa) 88 N. W. 342.

It is further argued that the testimony related to a confession by the defendant which was not voluntary, and that the evidence should have been excluded for this reason. There is ample ground in the record for saying that, if the testimony did relate to a confession, then the confession was not so far voluntary on the part of the defendant as to render it admissible. But defendant

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made no confession of guilt, nor admission that he was afflicted with the disease for which he was examined. And it has been well settled by decisions without conflict, from the earliest rulings on the subject to the present time, that, even though a confession be involuntarily made, inculpating facts discovered by means thereof may be established against the defendant. *King* v. *Warickshall*, 1 Leach, C. L. 263; *King* v. *Lockhart*, 1 Leach, C. L. 386; *Rex* v. *Griffin*, Russ. & R. C. C. 151; *Com.* v. *Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *State* v. *Motley*, 7 Rich. L. 327. There is nothing, therefore, in the rule excluding involuntary confessions to prevent the physicians who made the examination of defendant's person from testifying as to his condition with reference to having venereal disease.

But while the condition of defendant's privates was not, on the one hand, a confession or an admission, nor, on the other, an independent circumstance discovered by means of a confession or admission, it is nevertheless necessary to inquire further as to the admissibility of the evidence thereof, in view of the fact that it appears without reasonable doubt from the evidence that defendant was compelled to submit to such examination, and was therefore compelled to furnish evidence against himself. The examination by physicians was made under the direction of the prosecuting attorney, and was at first resisted by defendant, who finally consented thereto, if at all, only after he had been told by one of the officers who made the arrest, and who was present, acting under the direction of the county attorney, and in his presence, that the state had the right to require such an examination to be made, and that the defendant must submit to it. The showing is amply sufficient to indicate legal duress, and we must therefore inquire whether the evidence against defendant secured by such duress, and which could not have been secured otherwise, was admissible over defendant's objection.

In many of the states are found constitutional provisions similar to those of the 5th Amendment to the Federal Constitution, which, of course, has no application to proceedings in state courts (*Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Presser* v. *Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *Twitchell* v. *Pennsylvania*, 7 Wall. 321, 19 L. ed. 223), to the effect that the defendant in a criminal prosecution shall not be compelled to be a witness against himself; and it is argued by counsel for the prosecution that, even if such provision would render the evidence in question incompetent in such states, the absence of a like provision from our Constitution renders such an objection unavailing in our courts, for Code, § 5484, which seems to contain the only statutory language on the subject, simply provides that "defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state." Perhaps this language is not broad enough to cover the general ground of the usual constitutional guaranty, but we cannot concede that there is in the Constitution of our state no guaranty against inquisitorial proceedings for the purpose of compelling a defendant to disclose criminating evidence. Our Constitution does explicitly provide (art. 1, § 9) that "no person shall be deprived of life, liberty, or property without due process of law," and the term "due process of law" has received by this court, as well as by all the courts of this country, a very broad and liberal interpretation. In *Foule* v. *Mann*, 53 Iowa, 42, 3 N. W. 814, it is said (quoting from *Westervelt* v. *Gregg*, 12 N. Y. 209, 62 Am. Dec. 160) that it "undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights," and (quoting from *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 4 L. ed. 559) that it was intended thereby "to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice." In *Griswold College* v. *Davenport*, 65 Iowa, 633, 22 N. W. 904, we said: "The rule in respect to due process of law, stated in a general way, is said to be this: That everyone is entitled to the protection of 'those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions.'" But further citation of authorities is not necessary to establish the general proposition that fundamental principles of judicial procedure, whether in civil or criminal cases, as they existed and were recognized in the courts of England and the American colonies prior to the adoption of the Federal and state Constitutions, are intended to be preserved by this guaranty of due process of law, and that, while forms may be changed, essential guaranties cannot be taken away, even by attempted legislative enactment. For instance, the rule of evidence that involuntary confessions cannot be shown as against the defendant in a criminal prosecution is not only not expressly recognized anywhere in our Constitution, but it is not even embodied in the statutory provisions with reference to evidence; and yet can anyone suppose that an act of the legislature abrogating this rule, and allowing confessions of a defendant, extorted by promises or threats, to be shown in a criminal proceeding, would be upheld? A complete answer to any such legislation would be that it deprived the accused of one of the protections afforded him from time immemorial by rules of evidence so fully recognized and so fundamental with reference to criminal procedure that it must be contrary to due process of law in criminal cases. In the Federal courts, and in the courts of those states whose Constitutions contain guaranties against compelling one accused of crime to be a witness against himself, it is well settled that in neither criminal nor civil cases can a witness be required to give self-criminating evidence.

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Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *State* v. *Simmons Hardware Co.* 109 Mo. 118, 15 L. R. A. 676, 18 S. W. 1125. It is true that in most of the cases in which the maxim, *Nemo tenetur seipsum accusare*, has been considered with reference to its effect as applied to statutory provisions tending to deprive the witness of the benefit thereof, the constitutional provisions against compelling the defendant in a criminal proceeding to testify against himself have been referred to; but, in determining whether such an express constitutional guaranty is essential to the preservation of the principle as a fundamental rule of criminal procedure, it is pertinent to suggest, first, that, no matter how restricted the constitutional guaranty, it has been given the same broad and liberal interpretation. Thus, it is held that although the language of the constitutional provision may simply be that no person shall be required to testify against himself in a criminal case, yet this guaranty amounts to a prohibition against requiring a witness in a civil case to disclose facts tending to show him guilty of a crime. *State* v. *Simmons Hardware Co.* 109 Mo. 118, 15 L. R. A. 676, 18 S. W. 1125. Such guaranty is applicable to a witness before any tribunal and in any proceeding. *State* v. *Young*, 119 Mo. 495, 24 S. W. 1038. And statutes which require witnesses in certain penal actions to testify, regardless of whether their evidence will tend to criminate them, guaranteeing them at the same time against their testimony being used to convict for a crime thus disclosed, are unconstitutional, notwithstanding the guaranty. See *Counselman* v. *Hitchcock*, 142 U. S. 547, 565, 35 L. ed. 1110, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, and many cases there cited and reviewed. The rule against requiring a witness to give self-criminating evidence in any judicial proceeding is much older than our Constitution. It is one of the fundamentals of the common law. The rule itself and the reasons for it are thus stated by an eminent authority: "Upon a principle of humanity, as well as of policy, every witness is protected from answering questions by doing which he would criminate himself,—of policy, because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors. It is pleasing to contrast the humanity and delicacy of the law of England in this respect with the cruel provisions of the Roman law, which allowed criminals, and even witnesses in some instances, to be put to the torture for the purpose of extorting a confession." 1 Starkie, Ev. 41. And see 1 Roscoe, Crim. Ev. 150; Broom, Legal Maxims, 968. In *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, 227, 38 N. E. 303, 305, this language is used: "These constitutional and statutory provisions [referring to the Constitution and statutes of New York on this subject] have long been regarded as safeguards of civil liberty quite as great and important as the privileges of the writ of habeas corpus, or any of the other fundamental guaranties for the protection of personal rights. When a proper case arises, they should be applied in a broad and liberal spirit, in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed. The security which they afford to all citizens against the zeal of the public prosecutor and public clamor for the punishment of crime should not be impaired by any narrow or technical views." The origin of the doctrine embodied in the maxim, *Nemo tenetur seipsum accusare*, seems to be obscure. Perhaps it originated in a protest against the inquisitorial procedure of the ecclesiastical courts, and was introduced by statute. See article by Prof. Wigmore in 5 Harvard Law Review, 71. But at any rate it became a general principle of the common-law system of jurisprudence before the settlement of this country, and was regarded as a guaranty against inquisitorial proceedings. In *Brown* v. *Walker*, 161 U. S. 591, 596, 40 L. ed. 819, 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. 644, 646, this language is used with reference to it: "The maxim, *Nemo tenetur seipsum accusare*, had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne, in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists, that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in Eng-

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land was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment." And in *Bram* v. *United States*, 168 U. S. 533, 545, 42 L. ed. 568, 574, 18 Sup. Ct. Rep. 183, 187, after quoting this language, the court continues: "There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguishing attributes." And in *Counselman* v. *Hitchcock*, 142 U. S. 547, 563, 35 L. ed. 1110, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, 198, the court says: "It is an ancient principle of the law of evidence that a witness shall not be compelled in any proceeding to make disclosures or to give testimony which will tend to criminate him, or subject him to fines, penalties, or forfeitures."

Notwithstanding the fact, already suggested, that the cases heretofore cited refer to a form of constitutional provision not found in our own Bill of Rights, we are convinced that the principle itself is too fundamental to have been purposely omitted from the charter of liberties of the people of Iowa, and that, had there been no such specific provision anywhere, the same result would have been reached under the general guaranty of due process of law. If such a guaranty is not thus to be implied, then we have in this state the anomalous situation that by legislative provision the inquisitorial proceedings, so generally referred to as reprehensible, and the absence of which is so constantly mentioned as one of the excellencies of the common law, might be introduced. There would be nothing unconstitutional, under such a construction, in a statute which should restore torture by the thumbscrew or the boot as a legitimate means of securing evidence in a criminal prosecution. A constitutional guaranty against self-criminating evidence does not make it unlawful to require defendant to uncover his face or hands, or take his feet from under a chair, in the courtroom, for purposes of identification. *State* v. *Prudhomme*, 25 La. Ann. 523; *Johnson* v. *Com.* 115 Pa. 369, 395, 9 Atl. 78; *State* v. *Garrett*, 71 N. C. 85, 17 Am. Rep. 1; *Myers* v. *State*, 97 Ga. 76, 99, 25 S. E. 252. Some courts have gone to the extent of receiving evidence obtained by compelling defendant to "make tracks." *State* v. *Graham*, 75 N. C. 256; *Walker* v. *State*, 7 Tex. App. 265, 32 Am. Rep. 595. Other courts have held such evidence inadmissible. *Stokes* v. *State*, 5 Baxt. 619, 30 Am. Rep. 72; *Day* v. *State*, 63 Ga. 667; *Blackwell* v. *State*, 67 Ga. 76, 44 Am. Rep. 717; *People* v. *Mead*, 50 Mich. 228, 15 N. W. 95. And see *Jordan* v. *State*, 32 Miss. 382. This court has gone no further than to sustain the right to require defendant to stand up in court for the purpose of identification. *State* v. *Keasby*, 100 Iowa, 231, 69 N. W. 451. The only case sustaining the right to require disclosure of those parts of the person not usually exposed is that of *State* v. *Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530, where it was held not improper to require the exposure of the forearm to discover tattoo marks for identification, and even in this case it is said that accused should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever. In *People* v. *McCoy*, 45 How. Pr. 216, it was held improper to receive evidence that a female defendant charged with the murder of a bastard child had, on a forcible examination of her person without her consent, been found to have been recently delivered of a child. *Blackwell* v. *State*, 67 Ga. 76, 44 Am. Rep. 717, is also in point, to the effect that evidence derived from compulsory examination of the person is not admissible. The case of *People* v. *Glover*, 71 Mich. 303, 38 N. W. 874, relied on by the state, is not in point on this question, as defendant consented to the examination of his person, and voluntarily testified with reference to the subject. In *State* v. *Nordstrom*, 7 Wash. 506, 35 Pac. 382, it is held that an accused person "cannot be compelled to exhibit those portions of his body which are usually covered, for the purpose of securing his identification, or in other ways affording evidence against him." It would seem, therefore, that such an investigation as that made in the case before us is without authority as against defendant's objection, and the receipt of the evidence was error, on the ground that it was the result of the invasion of defendant's constitutional right, impliedly guaranteed under the provision of our Constitution as to due process of law, not to criminate himself. We have, however, in our state Constitution an express guaranty against any proceeding under the guise of law such as that resorted to by the officers in this case for the purpose of securing criminating evidence from the person of the defendant. It is provided by article 1, § 8, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized." This guaranty, which is, in substantially the same terms, found in the Constitution of the United States (art. 4 of Amendments), and in the Constitutions of many, if not all, of the other states, has also received a broad and liberal interpretation for the purpose of preserving the spirit of constitutional liberty. In *Boyd* v. *United States*, 116 U. S. 616, 622, 29 L. ed. 746, 748, 6 Sup. Ct. Rep. 524, 528, the court, in construing this provision of the Federal Constitution, uses this language: "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the 4th Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material in-

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gredient, and effects the sole object and purpose, of search and seizure. The principal question, however, remains to be considered: Is a search and seizure, or, what is equivalent thereto, a compulsory production, of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws,—is such a proceeding for such a purpose an 'unreasonable search and seizure,' within the meaning of the 4th Amendment of the Constitution? or, Is it a legitimate proceeding? It is contended by the counsel for the government that it is a legitimate proceeding, sanctioned by long usage and the authority of judicial decision." And the court continues (p. 624, 116 U. S., p. 748, 29 L. ed., and p. 529, 6 Sup. Ct. Rep.): "In order to ascertain the nature of the proceedings intended by the 4th Amendment to the Constitution, under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English lawbook,' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" And that this guaranty applies to the person of the defendant, as well as to his papers, is made evident by the language of Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1030, quoted at length in *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, a portion of the quotation being as follows (p. 629, 116 U. S., p. 750, 29 L. ed., and p. 531, 6 Sup. Ct. Rep.): "Lastly, it is urged as an argument of utility that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes—such, for instance, as murder, rape, robbery, and housebreaking, to say nothing of forgery and perjury—that are more atrocious than libeling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law toward criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent, as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty." And the court, after this quotation, continues as follows (p. 630, 116 U. S., p. 751, 29 L. ed., and p. 532, 6 Sup. Ct. Rep.): "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances. They apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation, but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other." That there can be no doubt as to the continued acquiescence of the Supreme Court of the United States in these general expressions of view, whatever question may have been raised as to the application of them in the *Boyd Case*, is apparent from the fact that they are quoted with approval in the dissenting opinion in *Brown* v. *Walker*, 161 U. S. 591, 615, 40 L. ed. 819, 827, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, and are at the basis of, though not expressly relied upon in, the majority opinion. And see, in general, with reference to a similar provision in a state Constitution, *Newberry* v. *Carpenter*, 107 Mich. 567, 31 L. R. A. 163, 65 N. W. 530. There are, of course, limitations as to immunity from search and seizure for the purpose of securing evidence of crime. It is well settled that, when one charged with an offense is arrested, the officers may, without further legal procedure, seize weapons with which the crime has been committed, property which has been obtained by means of a criminal act, or articles which may give a clew to the commission of the crime or identification of the criminal. *Chastang* v. *State*, 85 Ala. 29, 3 So. 304; *Commercial Nat. Bank*

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v. *McLeod*, 65 Iowa, 665, 54 Am. Rep. 36, 19 N. W. 329, 22 N. W. 919; *Reifsnyder* v. *Lee*, 44 Iowa, 101, 24 Am. Rep. 733. And the officer making such search may testify as to any facts, even though criminating, which were discovered thereby. *Starchman* v. *State*, 62 Ark. 538, 36 S. W. 940; *Shields* v. *State*, 104 Ala. 35, 16 So. 85; *State* v. *Flynn*, 36 N. H. 64. But "a party to a suit can gain nothing by fraud or violence under the pretense of process; nor will the fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by the fraud, violence, or abuse of legal process." *Reifsnyder* v. *Lee*, 44 Iowa, 101, 24 Am. Rep. 733. As to the general constitutional immunity from unlawful searches and seizures, see also Cooley, Const. Law, 6th ed. pp. 364, 370, 371*n*. None of the exceptions recognized cover such a case as we have before us. The search was for the mere purpose of securing evidence by an invasion of the private person of the defendant, and we think there is no consideration whatever which will justify it. Without further elaboration or the multiplication of authorities, it is enough to say that the officers acted unlawfully in compelling defendant to submit to this examination, and all evidence with reference to information secured thereby should have been excluded on defendant's objection.

2. After the evidence already referred to had been admitted, tending to show that defendant was afflicted with a venereal disease which he might have communicated to prosecutrix by the alleged rape, it was proposed to show in behalf of the defendant that prosecutrix had at about the time of the commission of the alleged crime had sexual intercourse with others than the defendant, by whom the disease with which she was found to be afflicted might have been communicated to her. This evidence was, as we think, wrongfully excluded. No doubt it is true that, as consent is immaterial in such a prosecution, the female being under the age of consent, evidence of unchaste character or acts of intercourse with other men is immaterial; but, where it is sought to show that the venereal disease was contracted by intercourse with defendant, it is open to the defendant to show that it might have been contracted otherwise. *Nugent* v. *State*, 18 Ala. 521. And see, as analogous in part, *State* v. *Woodworth*, 65 Iowa, 141, 21 N. W. 490. If on a retrial there is competent evidence that defendant had venereal disease at the time of the connection with prosecutrix, should any be shown, evidence of her having had sexual connection with others near the same time should be admitted.

3. The mother of defendant, with whom he lived, having testified that he had no venereal disease, the state sought to impeach her evidence by showing declarations made by her as to the condition of the sheets of defendant's bed. This evidence, received over defendant's objection, was improperly admitted, for the reason that proper foundation therefor had not been laid; the question asked of the witness not having covered the specific matter tending to show venereal disease, to which the conversation sought to be subsequently established had reference.

4. The state offered in evidence the warrant of arrest of defendant, and the return of the officer thereon. This evidence was erroneously received. We can hardly imagine any case in which the warrant and return would be competent evidence. There was nothing connected with the defendant's arrest, so far as appeared from the return, which had any bearing on the question of his guilt.

5. We find the assignment of error on the instructions not to be well taken. Some complaint is made as to the impaneling of the jury, but as a similar error, if there was error in this respect, is not likely to occur on another trial, the assignment with reference to the matter need not be considered.

While it is with reluctance that we reverse a criminal case where the evidence is sufficient to go to the jury on the question of guilt, yet the fundamental rules of procedure adopted for the protection of the innocent must be applied, not only in cases where it appears that an innocent man has been convicted, but in all cases, regardless of our views as to defendant's guilt. We are compelled to say in this case that, in view of the errors committed, a new trial must be granted.

Reversed.

MAINE SUPREME JUDICIAL COURT.

Michael J. FRYE, Admr., etc., of Arthur J. Frye, Deceased,
v.
BATH GAS & ELECTRIC COMPANY *et al.*

(97 Me. 241.)

1. A contract to indemnify an employer against loss by reason of liability for accidental injuries to employees does not inure to the benefit of an injured employee so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment, so that the judgment cannot be enforced,—especially where the contract pro-

NOTE.—For another case in this series as to right of injured employee to recover against insurance company which has insured employer against liability for personal injuries to employees, see Bain v. Atkins (Mass.) 57 L. R. A. 791.

For a case holding that recovery against employer for death of employee precludes any right of the latter's representatives to recover on an insurance policy taken out by the employer, see Embler v. Hartford Steam Boiler Inspection & Ins. Co. (N. Y.) 44 L. R. A. 512.

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vides that no action shall lie against the insurer, as respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.

2. **A common-law assignment for benefit of such creditors as become parties** thereto is not a payment of a judgment for accidental injury in favor of an employee who does not become a party to the assignment, so as to raise a liability on the part of one who has insured the employer against loss by reason of liability for accidental injuries to employees, which is expressly limited to loss actually sustained and paid in satisfaction of a judgment after trial of the issue.

(January 1, 1903.)

REPORT by the Supreme Judicial Court for Sagadahoc County for the opinion of the full bench of a bill in equity to apply to plaintiff's claim the liability of one who had undertaken to indemnify an employer against loss by reason of accidental injury to employees. *Bill dismissed.*

The facts are stated in the opinion.

Messrs. **F. E. Southard** and **S. L. Fogg** for plaintiff.

Mr. **George E. Hughes,** for defendants:

There is a vast difference between the liability of the insurance company and a contract to indemnify.

New Haven v. *New Haven & D. R. Co.* 62 Conn. 253, 18 L. R. A. 256, 25 Atl. 316.

The relation of debtor and creditor does not exist between this insurance company and Frye, but only between said company and the gas company when that gas company satisfies the judgment in accordance with the terms of the policy.

Keller v. *Ashford,* 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494; *Klapworth* v. *Dressler,* 13 N. J. Eq. 62, 78 Am. Dec. 69; *Champion* v. *Brown,* 6 Johns. Ch. 398, 10 Am. Dec. 343.

In this contract the injured party who obtained the judgment is not a party, nor could he at common law bring an action against the insurer, because there is no privity between them.

Moses v. *Travelers' Ins. Co.* (N. J.) 49 Atl. 720; *Beacon Lamp Co.* v. *Travellers' Ins. Co.* 61 N. J. Eq. 59, 47 Atl. 579.

It is a good defense to an action on a contract that the obligation to perform the act required was dependent upon some other things which the other party was to do, and has failed to do.

Parsons, Contr. pp. 87, 88.

The insurance company is regarded as a surety to the gas and electric company and a recovery can be had from it only upon proof that the gas and electric company has paid the money or some portion of it.

Maloney v. *Nelson,* 144 N. Y. 186, 39 N. E. 82; *Gilbert* v. *Wiman,* 1 N. Y. 561, 49 Am. Dec. 359.

An obligation to pay is not the same thing as actual payment.

Sedgw. Damages, § 315; *Kohler* v. *Matlage,* 72 N. Y. 266.

Mr. **C. W. Larrabee** also for defendants.

Wiswell, Ch. J., delivered the opinion of the court:

At the December term, 1898, of this court for Sagadahoc county, the plaintiff's intestate entered an action against the Bath Gas & Electric Company to recover damages for personal injuries sustained by him on March 10, 1898, while in the employ of that company, and by reason of its alleged negligence. After a trial before a jury, in which a verdict was rendered for the plaintiff, the case was taken to the law court upon the defendant's motion for a new trial, and finally, at the April term, 1900, judgment was rendered against the gas and electric company in favor of the complainant as administrator of the plaintiff in that action, the latter having previously died, for the sum of $4,416.65 and costs.

At the time of the accident wherein the plaintiff's intestate received the injuries complained of in the suit above referred to, the defendant in that suit had a contract of indemnity with the Fidelity & Casualty Company, one of the present respondents, wherein the latter, for a valuable consideration, had agreed to indemnify the Bath Gas & Electric Company, for the term of twelve months from December 1, 1897, "against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any employee or employees of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given, caused by the negligence of the assured, and resulting from the work described in the said schedule, subject to the following special and general agreements, which are to be construed as coordinate, as conditions." One of these conditions was as follows: "No action shall lie against the company (the insurer) as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

The defense of the original suit was partially assumed by the casualty company, and was conducted by its counsel in conjunction with that of the gas company, under a clause of the contract of insurance which gave the insurer the right to defend such suits.

In August, 1898, the Bath Gas & Electric Company, being insolvent, made a common-law assignment for the benefit of such of its creditors as became parties to the assignment within the time limited therein, of all its property of every description. The assignees subsequently sold and conveyed all of such property to George F. West, one of the respondents; and on September 6, 1898, this contract of insurance with the casualty company was transferred by the assignees to West, with the consent of the insurer.

Execution was duly issued upon the judgment recovered by the complainant, and was

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placed in an officer's hands for enforcement, but he was unable to find any property of the judgment debtor, and the judgment has remained wholly unsatisfied; this judgment, as against the gas company, is entirely worthless.

The complainant has commenced this bill in equity against the defendant in the original suit, its assignees under the common-law assignment, the transferee of the property, the trustee of a mortgage given by the gas company to secure its bonds, and the Fidelity & Casualty Company, alleging, in addition to some of the facts above stated, that the Fidelity & Casualty Company refuses to pay the judgment above referred to; that the gas company, its assignees, and the transferee of its property, neglect to enforce the contract of the casualty company, or to pay the amount of the judgment; and praying that the casualty company be compelled to pay to the complainant the amount of such judgment.

We are unable to perceive any ground upon which the bill can be sustained and the relief prayed for granted. The contract of the insurer was with the gas company to indemnify that company "against loss" from liability for damages on account of bodily injuries accidentally suffered by an employee and caused by the negligence of the assured. The use of the word "indemnify" shows the object and nature of the contract. It was to reimburse, or make whole, the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guarantee the gas company's liability for negligence to its employees. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability.

This distinction was clearly recognized in the case of *Anoka Lumber Co.* v. *Fidelity & Casualty Co.* 63 Minn. 286, 30 L. R. A. 689, 65 N. W. 353. There is no stipulation in this contract that the insurer shall pay to the employer "all sums for which it shall become liable to its employees," as in *Hoven* v. *Employers' Liability Assur. Corp.* 93 Wis. 201, *sub nom. Hoven* v. *West Superior Iron & Steel Co.* 32 L. R. A. 388, 67 N. W. 46. Nor did the insurer contract to pay "all damages with which the insured might be legally charged, or required to pay, or for which it might become legally liable," as in *American Employers' Liability Ins. Co.* v. *Fordyce*, 62 Ark. 562, 36 S. W. 1051, in which this distinction is noticed in this language: "The difference between a contract of indemnity and one to pay legal liabilities is, that upon the former an action cannot be brought and a recovery had until the liability is discharged, whereas, upon the latter, the cause of action is complete when the liability attaches."

In this case, as we have seen, the contract was one of indemnity only. It was not obtained by the gas company for the benefit of its employees, but for its own benefit exclusively, to reimburse it for any sum that the company might be obliged to pay, and had paid, on account of injuries sustained by an employee through its negligence. Independently of the condition in the contract of insurance above quoted, we should be compelled to construe this contract as one of indemnity only.

But this provision puts an end to all question or doubt, if any there could be. The parties have expressly provided in the contract which they chose to make, that "no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." By reason of the unequivocal language of this provision, the undertaking of the insurer was expressly limited to liability in an action brought by the insured, "to reimburse him for loss actually sustained and paid by him." There can be no doubt about the meaning of this language, and no question about the right of the contracting parties to insert such a provision in their contract for the purpose of making clear the nature and limit of the liability of the parties or of either of them.

Precisely similar language in a contract of this nature was construed by the court in *Moses* v. *Travellers' Ins. Co.* (N. J.) 49 Atl. 720, wherein it was held "that not the amount of the employee's judgment, but the amount paid by the employer thereon, was the sum for which the insurer was responsible." In this case the court decided that the transfer of the employer's property to a trustee in bankruptcy, by operation of the United States bankrupt act, was payment, within the requirement of this clause, and perfected the liability of the insurer for so much as the employee was entitled to receive out of the bankrupt's estate; that this liability of the insurer passed to the trustee in bankruptcy; and that the amount for which the insurer was liable would be determined by ascertaining what percentage all the assets of the bankrupt, outside of the insurance policy, would pay on all the debts proved against the estate, outside of the employee's judgment.

But this doctrine is not applicable to the case under consideration for various reasons. The common-law assignment of the gas company was for the benefit of such of its creditors as became parties thereto within the time limited, long since elapsed, and neither the complainant, nor his intestate during his lifetime, became a party to this assignment. Again, it does not appear that any dividend has ever or will ever be paid; upon the contrary, it is said in argument that there were no assets to be divided.

For these reasons the bill cannot be sustained against any of the respondents. *A decree will be made below dismissing the bill*, at which time such order will be made in regard to costs as seems proper to the justice who makes the decree. So ordered.

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MINNESOTA SUPREME COURT.

STATE of Minnesota *ex rel.* W. F. McCARTHY
v.
John S. MOORE.

(.....Minn.....)

*1. **The legislature may recognize the existence of political parties,** and within reasonable limits regulate the means by which partisan voters should be protected in exercising individual preferences for party candidates, which is the general purpose of the primary election law of this state.

2. **Under the Constitution every person who is entitled to vote is eligible to office,** but eligibility does not entitle a candidate to equal advantages in all the practical conditions under which he may seek office, nor prohibit the legislature from imposing fair and reasonable restrictions upon him in soliciting the support of his fellow citizens at the polls.

3. **Section 9, chap. 216, Gen. Laws 1901, which prohibits a candidate who sought a nomination from a political party** at a primary election, and had been unsuccessful, from having his name printed on the official ballot as an independent candidate for the same office, is a reasonable regulation, since the blank space provided for by law in the official ballot, where the voters may write the name of any qualified citizen if they wish to vote for him, protects his eligibility, and enables him to be elected if he receives the requisite votes.

4. **Held, that portion of § 9, chap. 216, Gen. Laws 1901, which prohibits an unsuccessful contestant** for a party nomination at the primary election from having his name placed on the official ballot, is not obnoxious to § 7, art. 7, of the state Constitution.

(October 31, 1902.)

APPLICATION for a rule on the auditor of Scott County to show cause why he should not place relator's name upon the county official ballot as a candidate for superintendent of schools. *Discharged.*

The facts are stated in the opinion.

Mr. **H. J. Peck** for relator.

Messrs. **W. C. Odell and E. Southworth** for respondent.

Lovely, J., delivered the opinion of the court:

This is an order directed to the auditor of Scott county requiring him to show cause why he should not place the name of petitioner upon the county official ballot as an independent candidate for superintendent of schools of Scott county. At the last primary election held in that county petitioner and one H. J. Fitzpatrick were properly placed upon the primary election ballot as the contesting candidates for the Democratic nomination for superintendent of schools. Fitzpatrick received a majority of the votes, and has been duly accorded a place on the official ballot. Petitioner thereafter caused a petition signed by more than 10 per cent in number of the voters voting at the last general election in his county to be presented to the respondent, demanding in due form a place on the official ballot as an independent candidate for the office he sought at the primary election as a Democrat. The auditor declined to accede to this request. We have held that, petitioner's name having been placed upon the primary election ballot, at which he was a contestant for the Democratic nomination of school superintendent, he comes within the provision of § 9, chap. 216, Gen. Laws 1901, which provides that "no names of candidates . . . upon a primary election ballot . . . shall be placed upon the official election ballot unless such candidates have been chosen in accordance with this act, except in case of vacancy occasioned by death, resignation, or removal," etc. There is no vacancy by death or otherwise among the candidates for superintendent of schools in Scott county, and it is very clear that petitioner, having been an aspirant for the nomination of a political party at the primary election, after failure to obtain the same has no right to secure a place on the official ballot within the express terms of § 9, *supra*, unless upon the contention of petitioner that this statutory prohibition is in violation of § 7, art. 7, of the Constitution, which is as follows: "Every person who, by the provisions of this article, shall be entitled to vote at any election, shall be eligible to any office which now is or hereafter shall be elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this Constitution, or the Constitution and laws of the United States." It is claimed for petitioner that this statute, in forbidding one who voluntarily becomes a candidate for a party nomination at the primary election and fails to secure it from having his name on the official ballot, interferes with and materially impairs his eligibility for the office for

*Headnotes by LOVELY, J.

NOTE.—For other cases in this series as to validity of statutory regulations as to form of ballots and placing of names thereon, see *Re* Ballot Act (R. I.) 6 L. R. A. 773; Detroit v. Rush (Mich.) 10 L. R. A. 171; De Walt v. Bartley (Pa.) 15 L. R. A. 771; State *ex rel.* Mize v. McElroy (La.) 16 L. R. A. 278; State *ex rel.* Ransom v. Black (N. J.) 16 L. R. A. 769; Eaton v. Brown (Cal.) 17 L. R. A. 697; Cole v. Tucker (Mass.) 29 L. R. A. 668; State *ex rel.* Lamar v. Dillon (Fla.) 22 L. R. A. 124; State *ex rel.* Plimmer v. Poston (Ohio) 42 L. R. A. 237; State *ex rel.* Runge v. Anderson (Wis.) 42 L. R. A. 239; Higgins v. Berg (Minn.) 42 L. R. A. 245; Slaymaker v. Phillips (Wyo.) 47 L. R. A. 842; Britton v. San Francisco City & County Election Comrs. (Cal.) 51 L. R. A. 115; Chamberlin v. Wood (S. D.) 56 L. R. A. 187; and Murphy v. Curry (Cal.) *ante*, 97.

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which he failed to be nominated; and it is further claimed that every person who is eligible thereto has the right to be a candidate for an office, whether he has already sought it as a party representative or not. This guaranty of the organic law relates to essential qualifications, and dispenses with any other test to hold office (as birth, education, and the like) than the right to vote, and this, we apprehend, is the extent of the guaranty. It is not attempted therein to provide regulations for voting, nor the details of the candidacy of the aspirant. The right to vote and the right to hold office are declared to be co-ordinate. The methods by which these rights shall be protected and enforced are, of necessity, left to legislative action; but we shall readily assume that it is an inherent right of citizenship that only such a system of regulation be provided for as will be just and reasonable, and operate in its application to all voters and to candidates equally. That any system will accomplish absolute equality in all things must not and cannot be expected. Under the previous methods of voting there were many defects, which have been in a measure remedied by the primary election law; but no plan will ever place all candidates on a perfectly similar footing. The primary system was to secure inviolate secrecy to the voter, with protection from corrupt and improper influences. In it the essential utility of political parties is recognized, while the corrupt control by party managers of caucuses and conventions was sought to be obviated by legal recognition of political organization, and an attempted guardianship thereof, whereby the partisan voter could express his choice for his candidate under the protection of the state with absolute freedom in judgment by means similar in practice to the Australian ballot in use at general elections. Of necessity, there must be upon such a ballot a regular order in which the names shall be placed, and other features incident to the procedure that tend to create incidental advantages to one candidate over another; but it would seem proper that any candidate who seeks the assistance of the primary election law to aid him in securing party support should be bound by the obligations of good faith and the dictates of fair play to which he has voluntarily subjected himself. It is said by this law to a candidate, "If you prefer the advantages of a party nomination which is quite desirable, you may seek it: but if the state prepares and prints your ballot and regulates nominations so as to secure the utmost freedom of choice among the members of your party, it does so upon the submission by you to the condition that, if you are unsuccessful, it will not thereafter print your name upon the ballot to defeat your opponent;" and it should not be said, because this is refused, that it is an unreasonable condition, but rather an imposition of even-handed justice that would have been bestowed upon his previous contestant, had the result been otherwise. The conditions he accepted and the consequences he would have imposed upon his adversary should impel him upon every sanction of justice and common honesty to submit to results he should have been prepared for, and it cannot be said either that in this effort at regulation of political methods the unsuccessful aspirant for a party nomination is deprived of the right to run for office, or the majority of voters deprived of his services in office, if they desire to secure them; for by the terms of § 24, chap. 4, Gen. Laws 1893; Gen. Stat. 1894, chap. 1, it is provided that, "after the name of the last-named candidate for each office shall be placed on the ballot there shall be left as many blank lines thereon as there are like offices to be filled." That is, a blank line is to be left on the official ballot, where voters, or a majority of them, may express their preferences for a person by writing his name therein. That it is more advantageous to the candidate to have his name printed on the ballot instead of requiring it to be written is true, but in this case, under the prohibition of the statute to which he submitted, petitioner voluntarily denied himself that advantage. While he cannot have his name printed, because he has for supposed benefits surrendered that right, he is still eligible, and may aspire to the office, invite his fellow citizens to vote for him in the blank space provided for, and secure the office, if he can obtain the requisite support.

NEW HAMPSHIRE SUPREME COURT.

John F. MACDONALD *et al.*
v.
GRAND TRUNK RAILWAY COMPANY of Canada.

(.....N. H.....)

1. The owners of goods shipped on a through bill of lading which exempted the carrier from loss by fire occurring through its own negligence, and destroyed by fire occurring through the carrier's negligence in a state where such contract is void, cannot, after unsuccessfully litigating the question of the carrier's liability in the country of their residence, relitigate such question in the state where the loss occurred, on the theory that the judgment is a foreign one, and not binding in such state.

2. A foreign judgment rejecting a claim after a fair trial upon the merits is a bar to a subsequent attempt by the same plaintiff to recover the same claim from the same defendant in the local courts, although such judgment involves a mistake

NOTE.—*As* to conclusiveness of judgment rendered in foreign country, see also, in this series, Dunstan v. Higgins (N. Y.) 20 L. R. A. 668, and *note;* Fisher v. Fielding (Conn.) 32 L. R. A. 236; and Newcomb v. Newcomb (Ky.) 51 L. R. A. 419.

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as to the force and effect of the local laws,—at least, if such mistake was caused by plaintiff's failure to inform the court as to such law.

(June 3, 1902.)

CASE transferred by the Superior Court for Coos County for the opinion of the Supreme Court, which was brought to recover the value of certain property destroyed by fire while in defendant's possession for transportation. *Judgment for defendant.*

The goods were shipped from Glasgow, Scotland, destined to Toronto, Canada. They were received at Portland, Maine, by defendant from the steamship company. While in transportation across the state they were destroyed by fire following a collision at Shelburne which resulted from defendant's negligence. Plaintiffs sought to hold defendant liable for this loss in the Canadian courts, in which they were unsuccessful, and they then instituted this action.

Further facts appear in the opinion.

Mr. **William H. Sawyer,** for plaintiffs:

The provision that the carrier shall not be responsible for loss, damage, or injury arising from fire is no defense for loss caused by the defendant's negligence.

Rand v. *Merchants' Despatch Transp. Co.* 59 N. H. 363; *Louisville & N. R. Co.* v. *Touart,* 97 Ala. 514, 11 So. 756; *Little Rock, M. R. & T. R. Co.* v. *Talbot,* 39 Ark. 523; *Lamb* v. *Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; 2 Greenl. Ev. 14th ed. 219; *Mann* v. *Birchard,* 40 Vt. 326, 94 Am. Dec. 398; *Grogan* v. *Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360, 7 Atl. 134; *Doyle* v. *Fitchburg R. Co.* 166 Mass. 492, 33 L. R. A. 844, 44 N. E. 611; *Compania de Navigacion* v. *Brauer,* 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12.

Defendant cannot avail itself of the insurance.

Rolfe v. *Boston & M. R. Co.* 69 N. H. 476, 45 Atl. 251; Ray, Negligence of Imposed Duties, p. 1016; *Inman* v. *South Carolina R. Co.* 129 U. S. 128, 139, 32 L. ed. 612, 9 Sup. Ct. Rep. 249.

No reduction of rates or special consideration for this clause has been shown or alleged; nor was any alternative offer of transportation under the rules of common law offered; all of which are essential to the validity of such a clause.

Louisville & N. R. Co. v. *Gilbert,* 88 Tenn. 430, 7 L. R. A. 162, 12 S. W. 1018; *Little Rock & Ft. S. R. Co.* v. *Cravens,* 57 Ark. 112, 18 L. R. A. 527, 20 S. W. 803.

No state is bound to recognize or enforce contracts which are injurious to its own interests, the welfare of its own people, or which are in fraud and violation of its own laws.

Hill v. *Spear,* 50 N. H. 253, 9 Am. Rep. 205; *Fisher* v. *Lord,* 63 N. H. 514, 3 Atl. 927; *Smith* v. *Godfrey,* 28 N. H. 379, 61 Am. Dec. 617; Wharton, Confl. L. § 490; *Nugent* v. *Boston, C. & M. R. Co.* 80 Me. 62, 12 Atl. 797; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 185, 23 L. ed. 872, 876.

When a railway seeks to ply its calling and to enjoy the emoluments that follow the business of the common carrier within the borders of this state, it must exercise that right under, and in conformity with, the laws of the state; and it is not within its power to say that it will and may not.

Barter v. *Wheeler,* 49 N. H. 9, 6 Am. Rep. 434; *Gray* v. *Jackson,* 51 N. H. 9, 12 Am. Rep. 1; *Beacham* v. *Portsmouth Bridge,* 68 N. H. 382, 40 Atl. 1066; *Leazotte* v. *Boston & M. R. Co.* 70 N. H. 5, 45 Atl. 1084; *The Iowa,* 50 Fed. 561; *The Brantford City,* 29 Fed. 373; *The Guildhall,* 58 Fed. 796; *Compania de Navigacion* v. *Brauer,* 168 U. S. 104, 118, 42 L. ed. 398, 405, 18 Sup. Ct. Rep. 12; *Hope* v. *Hope,* 8 De G. M. & G. 731; *Limerick Nat. Bank* v. *Howard* (N. H.) 51 Atl. 641.

The judgment of the Canadian court was based entirely on the existence of a valid contract for carriage; this suit, on the basis that there was no such contract, it being void as against public policy; and the decision of the Dominion court does not decide the merits of this case.

Black, Judgm. § 733; *Marsh* v. *Masterton,* 101 N. Y. 401, 5 N. E. 59; *Kittredge* v. *Holt,* 58 N. H. 191; *Meredith Mechanic Asso.* v. *American Twist Drill Co.* 67 N. H. 450, 39 Atl. 330; *Brackett* v. *Hoitt,* 20 N. H. 257; *Keater* v. *Hock,* 16 Iowa, 23; *Indianapolis & C. R. Co.* v. *Clark,* 21 Ind. 150; *Ferrers* v. *Arden,* Cro. Eliz. pt. 2, p. 668; *Livermore* v. *Herschell,* 3 Pick. 33; *Sager* v. *Blain,* 44 N. Y. 445; *Boston & M. R. Co.* v. *Sargent,* 70 N. H. 299, 47 Atl. 605; *Gregg* v. *Page Belting Co.* 69 N. H. 247, 46 Atl. 26; *King* v. *Chase,* 15 N. H. 9, 41 Am. Dec. 675; *Bascom* v. *Manning,* 52 N. H. 132; *Last Chance Min. Co.* v. *Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; Wharton, Confl. L. § 656; Story, Confl. L. §§ 244, 246; *Hilton* v. *Guyot,* 159 U. S. 113, 205, 40 L. ed. 95, 122, 16 Sup. Ct. Rep. 139; *De Brimont* v. *Penniman,* 10 Blatchf. 436, Fed. Cas. No. 3,715; *Hohner* v. *Gratz,* 50 Fed. 369; *Fisher* v. *Fielding,* 67 Conn. 114, 32 L. R. A. 236, 34 Atl. 714; Dicey, Confl. L. pp. 24, 34, 419.

The Dominion judgment offered here as a bar can have no effect other than such as this court is willing to allow.

Crippen v. *Laighton,* 69 N. H. 540, 46 L. R. A. 467, 44 Atl. 538.

Messrs. **C. A. Hight, L. L. Hight,** and **Chamberlin & Rich,** for defendant:

The stipulations and agreements in the bill of lading under which the goods in this case were shipped constitute a good defense, and prevent a recovery by the plaintiffs in this action.

The validity of a contract is to be governed and determined by the law of the place where it was made.

Brown v. *Browning,* 15 R. I. 422, 7 Atl. 403; *McKee* v. *Jones,* 67 Miss. 405, 7 So. 348; *Hill* v. *Spear,* 50 N. H. 253, 9 Am. Rep. 205; *Little* v. *Riley,* 43 N. H. 113;

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Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Swann* v. *Swann*, 21 Fed. 299; *Greenwood* v. *Curtis*, 6 Mass. 358, 4 Am. Dec. 145; *Arbuckle* v. *Reaume*, 96 Mich. 245, 55 N. W. 808; *Blackwell* v. *Webster*, 23 Blatchf. 537, 29 Fed. 614; *Brockway* v. *American Exp. Co.* 108 Mass. 258, 47 N. E. 87; *Smith* v. *Godfrey*, 28 N. H. 379, 61 Am. Dec. 617; *Fonseca* v. *Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665; *O'Regan* v. *Cunard S. S. Co.* 160 Mass. 356, 35 N. E. 1070; *Forepaugh* v. *Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508, 18 Atl. 503; *Hazel* v. *Chicago, M. & St. P. R. Co.* 82 Iowa, 477, 48 N. W. 926; *Talbott* v. *Merchants' Despatch Transp. Co.* 41 Iowa, 247, 20 Am. Rep. 589; *Western & A. R. Co.* v. *Exposition Cotton Mills*, 81 Ga. 522, 2 L. R. A. 102, 7 S. E. 916; *Knowlton* v. *Erie R. Co.* 19 Ohio St. 260, 2 Am. Rep. 395.

The stipulations are perfectly valid and binding in England, where the agreements were entered into.

Re Missouri S. S. Co. L. R. 42 Ch. Div. 321; *Carr* v. *Lancashire & Y. R. Co.* 7 Exch. 704; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Fonseca* v. *Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665; *O'Regan* v. *Cunard S. S. Co.* 160 Mass. 356, 35 N. E. 1070; *Hazel* v. *Chicago, M. & St. P. R. Co.* 82 Iowa, 477, 48 N. W. 926.

After the agreements of exemption were entered into in England, nothing was to be done in the way of performance of the stipulations. These agreements were really executed and completed as soon as they were entered into. They were both made and executed in England, and therefore on every ground governed by English law.

Minor, Confl. Laws, pp. 401, 406; *Barter* v. *Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Hazel* v. *Chicago, M. & St. P. R. Co.* 82 Iowa, 477, 48 N. W. 926; *Cantu* v. *Bennett*, 39 Tex. 303; *Ryan* v. *Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589; *American Freehold Land & Mortg. Co.* v. *Jefferson*, 69 Miss. 770, 12 So. 464; *Dyke* v. *Erie R. Co.* 45 N. Y. 113, 6 Am. Rep. 43.

Express contracts and stipulations may limit and restrict the liability of carriers, even against their own negligence.

Dyke v. *Erie R. Co.* 45 N. Y. 113, 6 Am. Rep. 43; *Nelson* v. *Hudson River R. Co.* 48 N. Y. 498; *Cragin* v. *New York C. R. Co.* 51 N. Y. 61, 10 Am. Rep. 559; *Kenney* v. *New York C. & H. R. R. Co.* 125 N. Y. 422, 26 N. E. 626.

It is consistent with public policy that the carrier make certain restrictions as to the extent of his liability, as to the requiring information about the value of the goods, and certain other matters.

Duntley v. *Boston & M. R. Co.* 66 N. H. 263, 9 L. R. A. 449, 20 Atl. 327; *Durgin* v. *American Exp. Co.* 66 N. H. 277, 9 L. R. A. 453, 20 Atl. 328.

These contracts are not in the class of pernicious contracts, and the contracts, if valid where made, have universally been sustained.

Fonseca v. *Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665; *O'Regan* v. *Cunard S. S. Co.* 160 Mass. 356, 35 N. E. 1070; *Hazel* v. *Chicago, M. & St. P. R. Co.* 82 Iowa, 477, 48 N. W. 926.

The judgment in the Canadian case is a bar to these proceedings.

When a matter has once properly passed to final judgment upon the merits, without fraud or collusion, in a court of competent jurisdiction, it has become *res judicata*, and the same matter between the same parties will not subsequently be considered.

Taylor v. *Barron*, 30 N. H. 78, 64 Am. Dec. 281; *Hillsborough* v. *Nichols*, 46 N. H. 379; *Lyford* v. *Demerritt*, 32 N. H. 234; *Hollister* v. *Abbott*, 31 N. H. 442, 64 Am. Dec. 342; *Morgan* v. *Burr*, 58 N. H. 470; *Eastman* v. *Dearborn*, 63 N. H. 364; *Cleaves* v. *Lord*, 43 Me. 290; *North Bank* v. *Brown*, 50 Me. 214, 79 Am. Dec. 609; *Sweet* v. *Brackley*, 53 Me. 346; *Rankin* v. *Goddard*, 55 Me. 389; *McMullen* v. *Richie*, 8 L. R. A. 268, 41 Fed. 502, 159 U. S. 235, 40 L. ed. 133, 16 Sup. Ct. Rep. 171.

Full effect should be given to the Canadian judgment in this case, for the reason that, by the law of England in force in the Dominion of Canada, a judgment rendered by an American court under like circumstances would be allowed full and conclusive effect.

Scott v. *Pilkington*, 2 Best & S. 11; *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. Div. 295; *Vadala* v. *Lawes*, L. R. 25 Q. B. Div. 310; *Nouvion* v. *Freeman*, L. R. 15 App. Cas. 1; *Fowler* v. *Vail*, 27 U. C. C. P. 417, 4 Ont. App. 267.

Parsons, J., delivered the opinion of the court:

The plaintiffs, prior to the commencement of this suit, voluntarily submitted the claim which they now make against the defendant—their right to damages for the negligent destruction of their property while in the hands of the defendant as a common carrier—to a judicial tribunal established by the government of which they were citizens, and to whose decrees they owe obedience. The tribunal to which they appealed was a court of record of general jurisdiction; it had jurisdiction of the parties and of the subject-matter of the controversy. Both parties appeared and were heard; the plaintiffs had full opportunity to present such matters of fact, and to argue such propositions of law, as they deemed essential to their case. The judgment was upon the merits, and against the plaintiffs. It is not claimed that, by any erroneous ruling of the court, the plaintiffs were prevented from fully and fairly presenting their case. Nor is it suggested that the court erred in its decision of the legal question which the parties considered decisive of their rights. No accident or mistake on the part of the plaintiffs in the

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presentation of their case is suggested. Fraud is not charged. It is apparent that, if the plaintiffs' claims had been sustained in Canada, the defendant would have been bound by the result, and would have been compelled to satisfy any judgment that might there have been obtained against it. Is there any reason why the plaintiffs, having compelled the defendant to litigate the claim made by them in this suit before a tribunal of their own selection, and having suffered defeat without fraud, accident, or mistake, and after a fair hearing as full as they cared to make it, by the results of which the defendant was necessarily bound, should not also be everywhere bound by the judicial determination which they invoked, and be estopped from presenting before any other tribunal the claim once judicially decided against them? The judgment in Canada was final, and is not reversed. It is conclusive against the plaintiffs in their own country. As an expression of the will of the sovereign to whom their allegiance is due, they owe obedience thereto abroad as well as at home. Upon every ground of natural right and justice, it would seem that they should be debarred from invading the courts of another country to retry a controversy settled against them at home.

Against the binding effect upon the plaintiffs here of the judgment in Canada, it is urged that, in this court, that judgment is a foreign judgment. "It is universally agreed that the laws of a state have, *ex proprio vigore*, no extraterritorial force." *Crippen* v. *Laighton*, 69 N. H. 540, 549, 46 L. R. A. 467, 44 Atl. 538, 541; *Smith* v. *Godfrey*, 28 N. H. 379, 381, 382, 61 Am. Dec. 617. But the courts of the state are open to others besides our own citizens. Pub. Stat. chap. 216, § 1. And the controversies our courts are called upon to determine are not limited to those which arise within this sovereignty or under its laws. The substance and effect of foreign laws are, therefore, subjects of frequent consideration. "There is, perhaps, no general principle of law better established than that the validity of a contract is to be decided by the law of the place where the contract is made. If valid there, it is valid elsewhere: but if void or illegal by the law of the place where made, it is void everywhere. . . . But there are some exceptions to this rule, and among them is this, —that no nation is bound to recognize or enforce any contracts which are injurious to its own interests, or to those of its own citizens, or which are in fraud of its laws." *Smith* v. *Godfrey*, 28 N. H. 379, 381, 61 Am. Dec. 617. That the law of the country where a contract is made or to be executed is to be examined to ascertain what the agreement was which the parties made, is elementary. *Limerick Nat. Bank* v. *Howard* (N. H.) 51 Atl. 641; *New York L. Ins. Co.* v. *McKellar*, 68 N. H. 326, 328, 44 Atl. 516. "If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts, the same as in contracts, in respect to the legal effect and incidents of acts." *Beacham* v. *Portsmouth Bridge*, 68 N. H. 382, 40 Atl. 1066. If there is no ground of action in the sovereignty where the tort is alleged to have occurred, there is none anywhere. *Leazotte* v. *Boston & M. R. Co.* 70 N. H. 5, 6, 45 Atl. 1084. To ascertain the rights resulting from acts done or omitted, attention must be paid to the circumstances under which the events took place; and one of the governing circumstances is the law of the place which characterizes the act. It is sometimes said that in such circumstances the courts of one country out of comity give effect to the laws of another (*Smith* v. *Godfrey*, 28 N. H. 379, 381, 61 Am. Dec. 617); but a more exact view has been taken. "When the courts of one country consider the laws of another, in which any contract has been made, . . . in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, *ex comitate;* for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes shows their intention to bind themselves; nay, more, it is the only safe criterion of their having entertained such an intention. Therefore, the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiæ*, and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of,—the meaning and intent of the parties." *Warrender* v. *Warrender*, 2 Clark & F. 488, 530. In like manner, when a right is claimed upon acts occurring in another country, courts look to the law of that country, not to extend the binding force of a foreign law beyond the territorial limits of the sovereignty to which it belongs, but to ascertain whether the right claimed exists or not. It is not the foreign law, but the rights acquired under it, which are enforced by the courts of another country. And this is true whether the question be one of contract, tort, or status. As the will of the sovereign expressed in general law can of itself have no extraterritorial force, the same will expressed in concrete form in a judgment between two suitors can have no greater effect. A plaintiff cannot here have execution upon a foreign judgment, nor a successful defendant have execution for costs, in the absence of legislative direction to that effect. The question is not of the enforcement of the foreign judgment, but it is, What are the rights of the parties? The particular law declared by the judgment is evidence of the rights now in controversy, as would be the general law if the dispute related to matters to which it applied which had not passed into judgment.

The plaintiffs, MacDonald & Co., contracted with the Allan Steamship Company

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for the transportation of certain goods from Glasgow, Scotland, to Toronto, Canada. One of the stipulations of the written contract, called the bill of lading, provided that the carriers should not be liable for loss from fire even if resulting from their own negligence. The goods were delivered to the Grand Trunk Railway Company in Portland, Maine, who accepted them upon the terms of the original bill of lading. While in transport across this state, the goods were destroyed by fire through the negligence of the defendant railroad. The claim in this suit is that the stipulation releasing the carrier from liability for loss through negligence is void by the law of this state, and that, as the loss occurred through the defendant's tort in this state, the plaintiffs can maintain an action for the value of the goods. Assuming this claim to be sound without examination, and that upon the occurrence of the loss the plaintiffs had a valid claim against the defendant for the amount of it, it does not necessarily follow that they can now maintain an action for it. By contract subsequently made in Canada, they could have released the defendant from liability. By an arbitration, and award against them, their claim might be destroyed. Had either event taken place in Canada, the question would be: Was the contract, or arbitration and award, valid by the laws of Canada? The action for the tort being transitory, the Canadian court had jurisdiction of the claim, and to determine, if required, the law of New Hampshire, which apparently was the law of the case. *Hughes* v. *Pennsylvania R. Co.* 202 Pa. 222, 51 Atl. 990. The fact that the defense set up is a legal adjudication, instead of a contract of release, or arbitration and award, does not alter the legal question, which, in respect to the legal effect and incidents of the acts of the parties, is determined by the law of the place. It is conceded that the judgment was upon the merits, is final, valid, and unreversed, and that, by the law of Canada, it conclusively establishes the defendant's right to protection against further litigation of the same claim. This right, resulting from the plaintiffs' acts, is not limited by territorial lines, nor destroyed by the plaintiffs' selection of another sovereignty as the place for the renewal of litigation. This right of the defendant depends, not upon the extraterritorial force of the Canadian judgment, but: (1) Upon the "universal law of justice, . . . which binds one to submit to a final decision resulting from his own acts" (*Fisher* v. *Fielding*, 67 Conn. 91, 32 L. R. A. 236, 34 Atl. 714, dissenting opinion, Hamersley, J., page 132, 67 Conn., page 218, 32 L. R. A., page 725, 34 Atl.; *Schibsby* v. *Westenholz*, L. R. 6 Q. B. Div. 155, 161; *Williams* v. *Jones*, 13 Mees. & W. 628, 633. The principle is that of a voluntary submission to arbitration. Erle, Ch. J., *Barber* v. *Lamb*, 8 C. B. N. S. 95, 99): (2) upon the plaintiffs' obligation of obedience to the government of which they are citizens: "for it is a part of the original contract entered into by all mankind who partake of the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member" (3 Bl. Com. 160); and (3) upon the fundamental principle of the common law, that a matter once litigated and determined before a court of competent jurisdiction shall not again be controverted before any court. "The law as laid down in the *Duchess of Kingston's Case* (20 How. St. Tr. 355) seems to be the law to-day,—that a judgment of a court of competent jurisdiction directly upon the point involved is, as a plea, a bar; as evidence, conclusive." *New York, L. E. & W. R. Co.* v. *McHenry*, 21 Blatchf. 400, 17 Fed. 414, 417.

"The maxim, *Interest reipublicæ ut sit finis litium*, is not restricted in its application to controversies or suits originating in the state before whose courts it is invoked. It does not rest on the excellence of any particular system of jurisprudence. It governs wherever the parties come, in the last resort, before a court constituted under an orderly establishment of legal procedure. No one who has been, or could have been, heard upon a disputed claim, in a cause, to which he was duly made a party, pending before a competent judicial tribunal having jurisdiction over him, proceeding in due course of justice, and not misled by the fraud of the other party, should be allowed, after a final judgment has been pronounced, to renew the contest in another country. The object of courts is hardly less to put an end to controversies than to decide them justly." *Fisher* v. *Fielding*, 67 Conn. 91, 110, 32 L. R. A. 236, 34 Atl. 714. The case from which this quotation is taken was a suit in Connecticut to recover the amount of an English judgment rendered by default, service having been made upon the defendant while temporarily in England. By the majority of the court, the English judgment was held conclusive. Hamersley, J., dissented solely upon the ground that by a default the matter in controversy was not *res judicata* in the sense that it had in fact been submitted by the parties to a court, and heard and determined. The following is from the dissenting opinion in the same case (pp. 130, 131, 67 Conn., p. 247, 32 L. R. A., and p. 724, 34 Atl.): "The principle, broadly stated, is this: A claim once submitted by the parties to a court of competent jurisdiction, fully heard, determined, and decided by that court, shall not thereafter be controverted between the same parties. This principle is entirely distinct from the right given by law to a party to a judgment to ask the state to exercise its sovereign power in compelling obedience to that judgment. It is simply a principle of jurisprudence, firmly established in our municipal law, and based on considerations so general in their application, so clearly equitable and essential in any administration of justice, that it may fairly be called a universal principle of jurisprudence. The principle does not, and from its very nature

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cannot, depend upon the particular court whose judicial action has been invoked, so long as its jurisdiction is competent, and its judgment final. It applies wherever the parties have so submitted their claims to a final decision by a court of competent jurisdiction, whether that court be inferior or superior, of law or of equity, domestic or foreign. . . . Whether we call this law a rule of comity of nations, is immaterial to the matter in hand. It is a part of our law, and derives it force from that fact; and foreign laws, as conclusive evidence of the legal effect of acts done under them, are received, by virtue of our law, with the vital qualification stated by Story: 'unless they are repugnant to its policy or prejudicial to its interest.' . . . In assuming that the real obligations of the parties are controlled by the fact that they arose or were undertaken with reference to the law prevailing where their acts were done, our courts do not assume to execute a foreign law, although the obligation they enforce as legal under our own law may also find its ultimate source in the command of a foreign sovereign; they treat the foreign law as a fact essential, in connection with other facts, to ascertain what the parties really meant by what they have done; and if, in receiving and weighing such fact, they may also theoretically enforce the will of a foreign sovereign, it is only as an incident to the exercise of the judicial power vested in the courts, and does not offend the sovereignty of the state where such law may be proved as a fact."

It is urged that a foreign judgment, though admissible in evidence, is not conclusive, but is merely prima facie evidence. Support for this proposition is to be found in early English cases and *dicta*, where the judgment is offered as evidence of debt in an action to recover the amount found due by the former judgment. In *Philips* v. *Hunter* (1795) 2 H. Bl. 402, 410, a distinction was made by Lord Chief Justice Eyre between cases where a judgment was brought before an English court, upon the application of a successful party, to enforce and obtain the fruits of it against the defendant, and those cases where the defendant sets up the foreign judgment as a bar to a new suit with reference to the former subject-matter. "It is in one way only," he said, "that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. . . . In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." The latter statement does not appear to have been questioned in England. *Burrows* v. *Jemino*, 2 Strange, 733; *Boucher* v. *Lawson*, Cas. *t.* Hardw. 85, 87, 89; *Barber* v. *Lamb*, 8 C. B. N. S. 95; *Ricardo* v. *Garcias*, 12 Clark & F. 368. The distinction has, however, been abandoned, and foreign judgments are not now held examinable there to the extent suggested by Chief Justice Eyre. *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Scott* v. *Pilkington*, 2 Best & S. 11; *Godard* v. *Gray*, L. R. 6 Q. B. 139.

At the time of the Revolution, it appears to have been understood, as the law of England, that a judgment offered as evidence of a debt, in an action by the plaintiff to obtain its fruit, was merely prima facie evidence, and examinable upon the merits. *Hilton* v. *Guyot*, 159 U. S. 113, 187, 40 L. ed. 95, 116, 16 Sup. Ct. Rep. 139. This view was followed by the early American cases, among which is the case of *Robinson* v. *Prescott*, 4 N. H. 450, and to this view is to be ascribed the expressions found in *Bryant* v. *Ela*, Smith (N. H.) 396, 404; *Thurber* v. *Blackbourne*, 1 N. H. 242, 243; *Taylor* v. *Barron*, 30 N. H. 78, 95, 64 Am. Dec. 281. The American cases, however, adopted in full the distinction made in *Philips* v. *Hunter*, which, it is said by Story, "has been very frequently recognized as having a just foundation in international justice," upon the ground that where a defendant sets up a foreign judgment as a bar to the proceedings, "if it has been pronounced by a competent tribunal, and carried into effect, the losing party has no right to institute a new suit elsewhere, and thus to bring the matter again into controversy; and the other party is not to lose the protection which the foreign judgment gave him. It is then *res judicata*, which ought to be received as conclusive evidence of right; and the *exceptio rei judicatæ* under such circumstances is entitled to universal conclusiveness and respect." Story, Confl. L. § 598; 2 Kent, Com. 120. See Bigelow, Estoppel, 196–203; Freeman, Judgm. § 592; Black, Judgm. § 228; Dicey, Confl. L. 417.

It has been said that "all the American cases agree that, where a foreign judgment comes incidentally in question, it is conclusive" (*Cummings* v. *Banks*, 2 Barb. 602, 605); and that "it is an established rule that a foreign judgment, when used by way of defense, is as conclusive to every intent as those of our own courts" (*Griswold* v. *Pitcairn*, 2 Conn. 85, 92). "Foreign judgments are never re-examined unless the aid of our courts is asked to carry them into effect by a direct suit upon the judgment. The foreign judgment is then held to be only prima facie evidence of the demand; but when it comes in collaterally, or the defendant relies upon it under the *exceptio rei judicatæ* it is then received as conclusive." Kent, Ch. J., *Smith* v. *Lewis*, 3 Johns. 157, 169, 3 Am. Dec. 469; *Monroe* v. *Douglas*, 4 Sandf. Ch. 126, 181; *Williams* v. *Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. The only American case apparently questioning the conclusiveness of a foreign judgment when offered as a defense which has been discovered is *Burnham* v. *Webster*, 1 Woodb. & M. 172, Fed. Cas. No. 2,179. The general expressions used by the distinguished author of the opinion in this case, if carried out, would render a foreign judgment of little value, and would, it has been said, "destroy the force and effect of judicial proceedings, and make the judgments of a foreign tribunal, no matter how high its

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rank, or how binding its decisions, within its own jurisdiction, of little greater effect than the original contract or promise sued upon." *McMullen* v. *Ritchie*, 8 L. R. A. 268, 41 Fed. 502. But the precise point in the case to which the decision is expressly limited is not in opposition, but in support, of the general ground upon which, in such case, the foreign judgment has been held conclusive. In that case, in answer to a suit upon a promissory note, the defendant offered a judgment in a suit in New Brunswick, in which the plaintiff declared upon the note then in suit, with others, and had judgment only for the others. The plaintiff offered to prove that, before the former case was submitted to the jury, the note then in suit was, by agreement, withdrawn, and was not submitted to the jury, but, by mistake, the counts upon this note were not struck from the declaration before judgment. The evidence, if true and admissible, established that the former judgment was not an adjudication as to the note in suit, and the only point in fact decided was that the plaintiff could show what was in fact adjudicated in the former suit. *Hohner* v. *Gratz*, 50 Fed. 369, is within the general exception that rights under a foreign law will not be enforced to the injury of the citizens of the forum. The subject-matter and the parties in the two suits were different, and the principle of *res judicata* did not apply. *Dunstan* v. *Higgins*, 20 L. R. A. 677, *note* (138 N. Y. 70, 33 N. E. 729).

Both upon reason and all the authorities, it is clear that a plea of former adjudication, except as a merger of a cause of action, is sustained by proof of such adjudication in a foreign as well as a domestic tribunal. The Supreme Court of the United States, by a bare majority, has considered that the effect to be given to a former judgment is determined by the treatment given our judgments in the courts of the country whose judgment is under consideration; that courts are required to do, not as justice and reason require, but as they are done by. *Hilton* v. *Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139. But this question does not arise in this case, because the courts of Ontario hold judgments of courts of the United States conclusive upon the merits. *Ritchie* v. *McMullen*, 159 U. S. 235, 40 L. ed. 133, 16 Sup. Ct. Rep. 171; *Fowler* v. *Vail*, 27 U. C. C. P. 417, 4 Ont. App. Rep. 267. The contrary contention of the plaintiffs is founded upon earlier cases which are based upon a statute (23 Vict. chap. 24, § 1) which was repealed by 39 Vict. (1875, 1876) chap. 7. *Fowler* v. *Vail*, 27 U. C. C. P. 417, 4 Ont. App. Rep. 267.

The effect of a foreign judgment upon the same subject-matter, as establishing the defense of *res judicata*, is the only question now involved. The tendency of the later American cases seems to be to follow the modern English doctrine as to foreign judgments generally. *Rankin* v. *Goddard*, 54 Me. 28, 89 Am. Dec. 718, 55 Me. 389; *Fisher* v. *Fielding*, 67 Conn. 91, 32 L. R. A. 236, 34 Atl. 714; *Lazier* v. *Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Dunstan* v. *Higgins*, 138 N. Y. 70, 20 L. R. A. 668, 33 N. E. 729; *Baker* v. *Palmer*, 83 Ill. 568; *Roth* v. *Roth*, 104 Ill. 35, 44 Am. Rep. 81; *Hilton* v. *Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *Ritchie* v. *McMullen*, 159 U. S. 235, 40 L. ed. 133, 16 Sup. Ct. Rep. 171; *Godard* v. *Gray*, L. R. 6 Q. B. 139, 5 English Ruling Cases, 746; 1 Freeman, Judgm. § 597. To what extent the doctrine of these cases is the law of this state, need not now be determined. It is stated as a fact agreed that the judgment pleaded was upon the merits of the issue presented. The issue presented in that case, as in this, was the defendants' liability for the destruction of the plaintiffs' property. It may be the fact was agreed to upon a different view by one of the parties, at least, as to what was the issue presented by the case. But, regardless of the agreed fact, it is apparent from the facts stated that the judgment was upon the merits, and was an adjudication of the plaintiffs' right to recover the damages claimed in this suit. The plaintiffs were not defeated because the action which they brought was not a legal remedy for the wrong claimed (*Kittredge* v. *Holt*, 58 N. H. 191), nor upon the ground that the form of their action was misconceived (*Meredith Mechanic Asso.* v. *American Twist Drill Co.* 67 N. H. 450, 39 Atl. 330), but upon the merits of their claim. The matter upon which they proceeded by their declaration, and which the defendants denied by their plea, was the defendants' liability for the loss complained of. This was the issue. *King* v. *Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Metcalf* v. *Gilmore*, 63 N. H. 174. The decision of this question, when the same question as to the same goods is again raised, concludes all matters of fact or law which were or might have been proved or urged in support of or against the decision reached. *Metcalf* v. *Gilmore*, 63 N. H. 189.

If the plaintiffs, in the exigencies of their case as then presented, and in view of their claim that the question was determined by the Canadian statute, thought it wise not to offer proof of New Hampshire law, they must abide by the result so long as that judgment remains unreversed. If the result was due to accident, mistake, or misfortune, which is not claimed, the proper tribunal in which relief should be sought would seem to be the high court of justice of Ontario. A foreign law will not be given effect when it contravenes some established and important policy of the state of the forum, or would involve injustice and injury to the people, of the state whose courts are appealed to. Minor, Confl. L. 9; Story, Confl. L. § 38. It is urged that the policy of this state does not permit common carriers to release themselves from liability by negligence. Assuming this to be so, it only follows that, in rendering the judgment, a mistake was made as to the law of New Hampshire, which does not detract

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from the force of the judgment as an adjudication, especially when, as in this case, the court is led into error by the failure of the complaining parties to inform it as to the foreign law. *Godard* v. *Gray*, L. R. 6 Q. B. 139, 5 English Ruling Cases, 726. A domestic judgment pleaded could not be answered by an averment that it was founded upon a mistaken admission of the parties as to the law. There is no reason why such an averment should avail against a foreign judgment. The plaintiffs are not citizens of this state. The defendant is sued here because found here. Its presence in this state is under our laws. In a sense, it is a citizen here. Public policy, forbidding an application of the principles of comity toward the subjects or laws of a foreign country to the injury of our own citizens, would seem to require us to protect our own citizens from repeated suits upon the same matter. A citizen who has been compelled to litigate a matter in a foreign country, and take there the chance of an unfavorable decision, ought not to be again required to litigate the same question at home. No rule of public policy authorizes such a travesty upon fundamental principles of justice and law. Upon the question raised as to the validity of the contract releasing the defendant from liability for negligence, no opinion is expressed. The defendant's plea of former adjudication states a defense to this action. Upon the facts stated, it is entitled to judgment.

Judgment for the defendant.

All concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Louise E. FIELDERS
v.
NORTH JERSEY STREET RAILWAY COMPANY, *Plff. in Err.*

(.....N. J.....)

***1. Shortly after plaintiff alighted from one of defendant's street cars, she fell** in the street and was hurt. The immediate occasion of her fall was a defect in the street pavement between the rails of defendant's track. She charged the defendant with negligence in three particulars: (a) That the car was brought to a stop at an unsafe and improper place; (b) that the conductor negligently directed her towards her destination; and (c) that the defendant had neglected to repair the street pavement as required by the terms of a municipal ordinance. The trial judge withdrew from the jury's consideration the first and second grounds of complaint, because of want of evidence to support them, and submitted the case to the jury solely upon the third ground. A verdict having thereupon gone against the defendant,—*Held*, that the judgment cannot be sustained on the theory that the evidence would have justified a finding against the defendant on either of the first two grounds.

2. A city ordinance in terms requires all street railway companies to pave, repave, and keep in repair, under the direction and to the satisfaction of the proper municipal authorities, the space between the rails of their tracks, and between the tracks, and the space for 1 foot outside of each outer track, at the same time providing that, if any company fail so to pave or repave or to keep the pavement in repair, the city authorities may cause the work to be done, and the company shall, on demand, pay the cost thereof. *Held*, as a matter of construction, that the ordinance does not confer a right of action upon any member of the traveling public who may sustain damage through the non-repair of the street.

3. Held, further, that the ordinance in question is an assumption of the power of taxation, and cannot be supported under the police powers conferred upon the municipality by the legislature.

(November 17, 1902.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Essex County Circuit in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. **George T. Werts,** for plaintiff in error:

The ordinance did not, as between plaintiff and defendant, impose upon the defendant any duty or obligation to maintain, repave, or repair said highway, for nonperformance or disregard whereof the plaintiff is entitled to maintain this action.

2 Thomp. Neg. 2d ed. § 1356; Elliott, Roads & Streets, § 657; Tiedeman, Mun. Corp. pp. 184, 187; *Morris & E. R. Co.* v. *Newark*, 10 N. J. Eq. 353.

The only remedy against the city for breach or neglect of its public duty to construct and maintain highways is by indictment, and the plaintiff, though sustaining

*Headnotes by PITNEY, J.

NOTE.—As to validity of ordinance requiring street railway companies to sprinkle streets, see, in this series, State v. New Orleans City & Lake R. Co. (La.) 39 L. R. A. 618, and State v. Canal & C. R. Co. (La.) 56 L. R. A. 287.

As to liability of street railways for paving assessments, see also Shreveport v. Prescott (La.) 46 L. R. A. 193, and *note;* Lake Street Elev. R. Co. v. Chicago (Ill.) 47 L. R. A. 624; 59 L. R. A. and Union Trust Co. v. Richmond City R. Co. (Ind.) 48 L. R. A. 41.

As to effect of the violation of ordinance in respect to the operation of street cars to render the companies liable for injuries, see Fath v. Tower Grove & L. R. Co. (Mo.) 13 L. R. A. 74; Cincinnati Street R. Co. v. Murray (Ohio) 30 L. R. A. 508; and Holwerson v. St. Louis & S. R. Co. (Mo.) 50 L. R. A. 850.

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special injury or damage, is not entitled to sue the city therefor.

Sussex County v. *Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Livermore* v. *Camden County*, 29 N. J. L. 245, 31 N. J. L. 508; *Cooley* v. *Essex*, 27 N. J. L. 415; *Callahan* v. *Morris Twp.* 30 N. J. L. 161; *Pray* v. *Jersey City*, 32 N. J. L. 394; *Carter* v. *Railway*, 55 N. J. L. 177, 26 Atl. 96; *Waters* v. *Newark*, 56 N. J. L. 361, 28 Atl. 717.

Where the duty of the defendant to maintain or repair the highway depends upon contract between it and the municipality, the liability of the contractor to the individual arises from the fact that it contracted with the city to do for it, or, in its stead, a public duty devolved upon the city, and that by its failure to perform its contract the municipality (as well as the contractor) is made liable to private suit. In such cases, the municipality being made liable by the negligent act of its contractor or agent, the party injured may, in the first instance (to avoid circuity of action), sue the contractor or agent instead of the municipality.

23 Am. & Eng. Enc. Law, p. 985; *Brooklyn* v. *Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Robinson* v. *Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *McMahon* v. *Second Ave. R. Co.* 75 N. Y. 231.

Persons employed by a municipal corporation in the execution of public duties are mere agencies or instruments by which such duties are performed.

Booth, Street Railways, § 264; *Condict* v. *Jersey City*, 46 N. J. L. 160.

The neglect of agents of the public in the discharge of their legitimate functions cannot constitute the basis of an action in behalf of an individual who has sustained a particular damage.

Sussex County v. *Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Pray* v. *Jersey City*, 32 N. J. L. 394; *Callahan* v. *Morris Twp.* 30 N. J. L. 161.

Quasi corporations created by the legislature for purposes of public policy are subject to an indictment for the neglect of duties enjoined on them, but are not liable to an action for such neglect.

Sussex County v. *Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Pray* v. *Jersey City*, 32 N. J. L. 394; Beach, Contrib. Neg. chap. 10, § 243, p. 567.

The defendant is a quasi public corporation, created by the legislature for purposes of public policy.

23 Am. & Eng. Enc. Law, p. 943; *People* v. *Kerr*, 27 N. Y. 194; *Sussex County* v. *Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Messenger* v. *Pennsylvania R. Co.* 36 N. J. L. 413, 13 Am. Rep. 457; *State ex rel. Bridgeton* v. *Bridgeton & M. Traction Co.* 62 N. J. L. 592, 45 L. R. A. 837, 43 Atl. 715.

The state, or its representative, cannot be compelled to appear as a party defendant.

Shinn v. *Zimmerman*, 23 N. J. L. 150, 55 Am. Dec. 260; *State* v. *Hudson County*, 30 N. J. L. 137; *Lodor* v. *Baker*, 39 N. J. L. 49; *American Dock & Improv. Co.* v. *Trustees for Support of Public Schools*, 32 N. J. Eq. 428, 35 N. J. Eq. 181.

The city, owing no "specific duty" to the plaintiff to maintain the highway, could impose no such duty upon the defendant, for the benefit of the plaintiff.

Aiken v. *Philadelphia*, 9 Pa. Super. Ct. 502.

The remedy against the defendant to compel it to perform the duty imposed by the ordinance is by mandamus at the suit of the municipality. The plaintiff cannot compel such performance.

Elliott, Roads & Streets, § 773.

The ordinance was not a reasonable exercise of the police power of the municipality.

State v. *Jackman*, 69 N. H. 318, 42 L. R. A. 438, 41 Atl. 347; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Gridley* v. *Bloomington*, 88 Ill. 554, 30 Am. Rep. 566; *Chicago* v. *O'Brien*, 111 Ill. 532, 53 Am. Rep. 640.

The existence of the obligation of a street railway company to pave, repave, or repair streets often depends upon the interpretation which may fairly be given to the statute or ordinance prescribing the duties of the company.

Booth, Street Railways, § 240.

The power conferred upon the board of street and water commissioners by Laws 1891, § 12, p. 249, is insufficient to authorize or justify the passage of an ordinance imposing upon defendant the repair of the public streets, and subjecting it, for nonperformance of that duty, to this action at the suit of the plaintiff.

A person traveling on other parts of the highway than the sidewalk is bound at all times to exercise more than ordinary care to avoid possible injury.

Quimby v. *Filter*, 62 N. J. L. 766, 42 Atl. 1051.

If a person injured could by ordinary prudence have prevented the injury, he cannot recover therefor.

Louisville & N. R. Co. v. *Yniestra*, 21 Fla. 700; *Lilley* v. *Fletcher*, 81 Ala. 234, 1 So. 273; *Kennedy* v. *Denver, S. P. & P. R. Co.* 10 Colo. 493, 16 Pac. 210.

A traveler upon the highway must use ordinary care to avoid injury.

Creamer v. *West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490, 31 N. E. 391; *Shonhoff* v. *Jackson Branch R. Co.* 97 Mo. 151, 10 S. W. 618; *Moore* v. *Huntington*, 31 W. Va. 842, 8 S. E. 512; *Nicks* v. *Marshall*, 24 Wis. 139; *McLaury* v. *McGregor*, 54 Iowa, 717, 7 N. W. 91; *Raymond* v. *Lowell*, 6 Cush. 524, 53 Am. Dec. 57; *Smith* v. *Smith*, 2 Pick. 621, 13 Am. Dec. 464; *Harlow* v. *Humiston*, 6 Cow. 189; *Lovenguth* v. *Bloomington*, 71 Ill. 238; *Chicago* v. *Bixby*, 84 Ill. 82, 25 Am. Rep. 429; *Vicksburg* v. *Henneesy*, 54 Miss. 391, 28 Am. Rep. 354.

Messrs. **Frederick E. Hodge** and **Samuel Kalisch**, for defendant in error:

A city ordinance is competent evidence to prove that the act complained of was forbidden by it.

State, Trenton Horse R. Co., Prosecutors,

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v. *Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; *State, Consolidated Traction Co., Prosecutor*, v. *Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146; *State, Cape May, D. B. & S. P. R. Co., Prosecutor*, v. *Cape May*, 59 N. J. L. 396, 36 L. R. A. 653, 36 Atl. 696; *New Jersey Exp. Co.* v. *Nichols*, 32 N. J. L. 169; *State, North Hudson County R. Co., Prosecutors*, v. *Hoboken*, 41 N. J. L. 74; *Jetter* v. *New York & H. R. Co.* 2 Keyes, 154; *Lane* v. *Atlantic Works*, 111 Mass. 136; *Hanlon* v. *South Boston Horse R. Co.* 129 Mass. 310; *McGrath* v. *New York C. & H. R. R. Co.* 63 N. Y. 530; *Beisegel* v. *New York C. R. Co.* 14 Abb. Pr. N. S. 29; *Webb* v. *Portland & K. R. Co.* 57 Me. 117; *Clement* v. *Canfield*, 28 Vt. 302; *Illinois C. R. Co.* v. *Kanouse*, 39 Ill. 272, 89 Am. Dec. 307.

A violation or disregard of the ordinance, while not conclusive evidence of negligence, is some evidence upon the question, to be submitted to the jury with all the other evidence.

Massoth v. *Delaware & H. Canal Co.* 64 N. Y. 531; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Harrison* v. *Sutter Street R. Co.* 116 Cal. 156, 47 Pac. 1019; *Illinois C. R. Co.* v. *Ashline*, 171 Ill. 313, 49 N. E. 521.

The defendant was liable at common law for the injury which the plaintiff sustained.

Worster v. *Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 203; *Fash* v. *Third Ave. R. Co.* 1 Daly, 148; *Cumberland Valley R. Co.* v. *Hughes*, 11 Pa. 141, 51 Am. Dec. 513.

Notice to municipal corporations, express or implied, of defects or obstructions in the street, is requisite to create liability for damages for an injury produced by reason of them; but the authority of these cases has no application here.

Hutson v. *New York*, 9 N. Y. 163, 59 Am. Dec. 526; *Griffin* v. *New York*, 9 N. Y. 456, 61 Am. Dec. 700.

The defendant, having laid down and constructed the road for its own profit, is bound to use reasonable care to keep and maintain the same in safe repair, and when it fails in its duty in that respect it is answerable in damages to a person who has sustained special injury thereby.

Oakland R. Co. v. *Fielding*, 48 Pa. 320; *Conroy* v. *Twenty-Third Street R. Co.* 52 How. Pr. 49; 3 Elliott, Railroads, § 1092, p. 1640; *McLaughlin* v. *Philadelphia Traction Co.* 175 Pa. 565, 34 Atl. 863.

The defendant being a common carrier and the plaintiff a passenger, it was the duty of the defendant to stop its car at a safe place for the plaintiff to alight.

Camden, G. & W. R. Co. v. *Young*, 60 N. J. L. 193, 37 Atl. 1013; Joyce, Electric Law, § 565; *Flack* v. *Nassau Electric R. Co.* 41 App. Div. 399, 58 N. Y. Supp. 839; *Sowash* v. *Consolidated Traction Co.* 188 Pa. 618, 41 Atl. 743.

The ordinance requiring the defendant company to pave between the rails of its tracks, and to keep the same in good and complete repair, and in the event of the pavement being disturbed in any way to at once relay that part disturbed, imposed upon the company the duty to keep in repair the pavement between the rails of its tracks: and the failure to do so, by reason of which the plaintiff suffered special injury, constituted actionable negligence.

3 Elliott, Railroads, §§ 1081, 1092, pp. 1621, 1640; *Philadelphia & R. R. Co.* v. *Boyer*, 97 Pa. 91; *Jetter* v. *New York & N. H. R. Co.* 2 Abb. App. Dec. 458; *Beisegel* v. *New York C. R. Co.* 14 Abb. Pr. N. S. 29; *Massoth* v. *Delaware & H. Canal Co.* 64 N. Y. 524; *Baltimore & O. R. Co.* v. *State use of Miller*, 29 Md. 252, 96 Am. Dec. 528; *Chicago, R. I. & P. R. Co.* v. *Reidy*, 66 Ill. 44; *Briggs* v. *New York C. & H. R. R. Co.* 72 N. Y. 26; *Hayes* v. *Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369.

The fact that the part of the street occupied by the tracks has been paved and kept in repair to the satisfaction of the street and water commissioners is no defense to an action for damages caused by a defect in the pavement or track due to defective construction or failure to repair.

Booth, Street Railways, p. 292; *Osgood* v. *Lynn & B. R. Co.* 130 Mass. 492.

It was not necessary that the defendant company should have had notice that the said roadbed was not maintained to the satisfaction of the authorities.

Worster v. *Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 203.

Pitney, J., delivered the opinion of the court:

So far as the opinion of the supreme court bases the affirmance of the judgment of the trial court upon the theory that the plaintiff at the time of her injury was in the exercise of her rights as a passenger in the act of leaving the defendant's car, it cannot be sustained. Whatever inference might have been drawn from the evidence upon that subject is a matter of no consequence, for no verdict has been rendered against the defendant upon the ground of neglect of any duty that it owed to the plaintiff as a passenger. The trial court charged the jury (apparently with the acquiescence of plaintiff's counsel) that the evidence sufficiently showed that the plaintiff had left the car, and, being in safety upon the highway, was thenceforth a traveler upon the highway, and subject to all the duties and obligations imposed upon such travelers, and thereupon proceeded to submit the case to the jury solely upon the question whether the defendant had been guilty of a breach of duty owed by it to the plaintiff as a traveler upon the highway. The verdict and judgment, having gone upon this theory, cannot be sustained upon the theory that the defendant's conductor had negligently misdirected the plaintiff about alighting from the car and reaching the sidewalk, or had negligently stopped the car at an unsafe and improper place. The defect in the pavement, therefore, instead of being a mere circumstance to be viewed with other circumstances as bearing upon the question of negligence in

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stopping the car, or negligence in directing the plaintiff towards her destination, becomes the essential fact upon which alone the negligence of the defendant company is to be predicated. And if the judgment can be sustained, it must be upon the ground that the plaintiff has an action against the defendant for a personal injury occasioned by the nonrepair of the street pavement, while she was a foot passenger upon the street, and irrespective of the consideration that she had ridden upon the defendant's car. The defect in question was a deep hole in the street pavement between the rails of the track, and, according to the plaintiff's evidence, this was the immediate occasion of her injury. There was evidence tending to show that the hole was the result, either of nonrepair, or improper repair, of the pavement, and that it had existed for a sufficiently long time to put the defendant upon notice, if the defendant was bound, in law, to take notice of the condition of the pavement. Of course, if the defendant was under an absolute duty to repair the pavement, it was at the time under a duty to observe its condition. Therefore in all aspects the case was one proper for the jury's consideration, if there existed a legal obligation upon the defendant to repair the pavement. There is nothing in the case to show that the pavement in question had been laid or maintained by the defendant, or that the defect resulted from any act of commission on the defendant's part. Nor is there anything to connect the defect with the defendant's rails or sleepers, or to show that anything done or omitted in the construction, maintenance, or operation of the railway produced the defect. The location of the hole between the rails is a mere circumstance, without causative significance. And the only default attributable to the defendant is the failure to repair.

It is familiar law that a railway company, having the right to lay tracks in a public street, is bound, by the general principles of the common law, and without either a specific statute or ordinance or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair. 2 Thomp. Neg. 2d ed. § 1353. But the question of the liability of such a company for failing to keep the surface of the street in repair is quite a different question. Such a liability does not result from the mere fact that the corporation has been vested with a franchise or license of using the public street. The liability to maintain the pavement as such, if it exists, must either be rested upon some valid statute or ordinance imposing such a duty, or must arise out of the obligations of a contract. It has been repeatedly held that, where some burden is lawfully imposed by a municipality upon a street railway company as a condition of the grant of its franchise, the acceptance of such a condition by the company constitutes a contract between the company and the municipality. *State ex rel. Wilbur* v. *Trenton Pass. R. Co.* 57 N. J. L. 212, 31 Atl. 238; *State, Cape May, D. B. & S. P. R. Co., Prosecutor,* v. *Cape May*, 58 N. J. L. 565, 34 Atl. 397; *Cape May* v. *Cape May Transp. Co.* 64 N. J. L. 80, 44 Atl. 948; *State, Dean, Prosecutor,* v. *Paterson*, 67 N. J. L. 199, 50 Atl. 620. Were an ordinance of such a character invoked in the present case, the question would remain whether the plaintiff, having no privity therein, could sue for a breach of its provisions. In *Appleby* v. *State*, 45 N. J. L. 165, Mr. Justice Depue, speaking for this court, said: "A duty, the breach of which is an actionable wrong, may arise from a contract, or be imposed by positive law, independent of contract. In the first case the party to the contract only can sue. . . . In the other case any person injured may sue, if he be one of the class of persons for whose benefit the duty is imposed." The rule here recognized was enforced by the supreme court in *Marvin Safe Co.* v. *Ward*, 46 N. J. L. 19; *Styles* v. *F. R. Long Co.* 67 N. J. L. 437, 51 Atl. 710. But the present case is devoid of evidence to show that any liability for the repair or maintenance of the street pavement was imposed upon the defendant as a condition of its right to exercise its franchise, or that the defendant, by any contract, has undertaken such a duty. The plaintiff introduced in evidence an ordinance adopted by the board of street and water commissioners of the city of Newark, September 6, 1894, purporting to apply to all street railways, and imposing upon the operating companies the duty of paving, repaving, and repairing the space between the rails. Its terms will be set forth more fully below. Defendant's duty to repair was rested upon that ordinance alone. The trial court, and also the supreme court, treated it as a valid police regulation, imposing an absolute duty upon the defendant for the general benefit of the traveling public, so that an action would lie at the instance of any traveler injured through a neglect of the imposed duty to repair the pavement. The bill of exceptions clearly raises the question whether a duty of repair was lawfully imposed upon the defendant by the ordinance in question, and whether the plaintiff, as a traveler upon the highway, was one of the class for whose benefit that duty was imposed.

It is certainly well settled that a specific duty, the violation of which is actionable, may arise from a valid statute or municipal ordinance, as well as from the general principles of the common law. Familiar examples among our statutes are the so-called law of the road (Gen. Stat. § 91, p. 2823), and the requirement that a railroad locomotive shall sound a bell or whistle on approaching a highway crossing (Gen. Stat. § 29, p. 2645). The books contain many cases arising out of breaches of the latter duty. The duty imposed upon railroad companies "to use all practicable means to prevent the communication of fire from any locomotive engine," and making them liable in damages to the person injured, is an instance. Gen. Stat. §§ 13, 14, p. 2670; *Delaware, L. & W. R. Co.* v. *Salmon*, 39 N. J. L. 299-303, 23

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Am. Rep. 214. So is the duty to provide spark arresters. Gen. Stat. §§ 15, 16, p. 2671; *Wiley* v. *West Jersey R. Co.* 44 N. J. L. 247; *Hoff* v. *West Jersey R. Co.* 45 N. J. L. 201; *West Jersey R. Co.* v. *Abbott*, 60 N. J. L. 150, 37 Atl. 1104. So, doubtless, are such of the provisions of the act relating to factories, etc. (Laws 1885, p. 212; Gen. Stat. p. 2345), as are expressly designed for the personal safety of the operatives. Other instances may be cited. Nor does there seem to be any distinction between a valid statute and a valid ordinance, in respect to the binding force of a duty created thereby. A lawful municipal ordinance is an exercise of the delegated power of legislation, and is the law of the place. When adopted in the exercise of that power which is commonly called the "police power," ordinances frequently prescribe for persons subject thereto a rule of conduct, for the purpose of insuring the safety of others. Familiar instances of municipal ordinances imposing duties, for a breach of which an action may be maintained by any person specially injured, are those regulating the speed of vehicles in streets, those requiring railroad companies to place gates or flagmen at street crossings, those regulating excavations in the streets, the use of explosives, and the like. In *New Jersey Exp. Co.* v. *Nichols*, 32 N. J. L. 166–169, 33 N. J. L. 434–441, 97 Am. Dec. 722, the plaintiff was attempting to pass along a sidewalk in the city of Newark, when he was caught and injured by the wagon of the defendant being backed up to the side of the building adjoining the walk for the purpose of taking in packages from the building. The fact that the wagon was thus backed in violation of a city ordinance was a circumstance considered as material by the supreme court and by this court, upon the question of defendant's negligence. In *New Jersey R. & W. Transp. Co.* v. *West*, 32 N. J. L. 91, 33 N. J. L. 430, the plaintiff was watching a railroad train approaching a street crossing from one direction at a rate exceeding that limited by the city ordinance, and was struck by a train coming from the opposite direction at a less speed. The ordinance required no flagman at this crossing, and the defendant company relied upon the ordinance, and claimed to have complied with it. This court treated the fact that the fast train was exceeding the limit fixed by the city ordinance as a circumstance tending to show negligence on the part of the defendant, and to rebut the allegation that there was contributory negligence on the part of the plaintiff.

In some jurisdictions, contention has arisen as to whether the violation of a statute or ordinance intended to regulate the conduct of the individual constitutes negligence *per se*, or conclusive evidence of negligence, or whether, on the other hand, such violation is only prima facie evidence of negligence. Abundant citation of authorities will be found in 21 Am. & Eng. Enc. Law, 2d ed. title *Negligence*, pp. 460, 478, 483; Thomp. Neg. 2d ed. §§ 10, 773, 1094, 1196, 1226, 1394, 1396, 1528, 1538, 1554, 1900, 1905, 2103. Perhaps the doubts have arisen from confusing the action for violation of a specially imposed duty with the action for violation of the common-law duty of exercising care under given circumstances. It would seem that a correct definition of "actionable negligence" must include the notion that a legal duty has been violated. Whether the duty arose from the common law, or from a valid statute or municipal ordinance, would seem immaterial. See Thomp. Neg. 2d ed. §§ 1–12. Assuming the party injured in a given case to be one of a class for whose benefit a duty has been by statute or ordinance imposed upon the opposite party, and assuming that the evidence shows an actual breach of that duty, it would seem the sole remaining inquiries should be whether the violation of the imposed duty was the proximate cause of the injury, and, if so, whether any faulty conduct of the injured party was a contributing cause. This view of the matter would give to the party aggrieved by a violation of a duty that had been imposed for his benefit the right to maintain an action for an injury thereby sustained, irrespective of the question whether the conduct complained of could be properly termed negligent, in the general sense. This is the case with those statutory actions that stand quite apart from negligent conduct,—such, for instance, as the action for damages for excessive distress under the statute of Marlbridge (52 Hen. III.), embodied in our act concerning distresses as § 1 (Gen. Stat. p. 1207), and the special action for a mere irregularity in the proceedings consequent upon a lawful distress for rent, which action was conferred by the statute (11 Geo. II. chap. 19, § 19), whose provisions are found in § 12 of our act concerning distresses.

Without pursuing the subject further, we assume, for the purposes of the following discussion, that there is no distinction between a common-law duty and one imposed by statute or ordinance, with respect to entitling a party injured to his damages, and no distinction between a valid statute and a valid ordinance, with respect to its effect in imposing a duty for violation of which an action will lie.

But the action for breach of a duty, however the duty be created, is only for the benefit of the party aggrieved. We are at once confronted with the inquiry, To whom is the duty owing? For whose benefit was it created? Hence arises a rational distinction that seems to have been recognized from the earliest times. Thus, in Comyns' Digest, *Action upon statute* (F), it is laid down that, "in every case where the statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute," etc. See also Cooley, Torts, pp. 650–658. A leading English case is *Couch* v. *Steel* (1854) 3 El. & Bl. 402, 23 L. J. Q. B. N. S. 121. There was a statute which enacted that every ship on a foreign voyage should be supplied with certain medicines, and the action was brought against a ship owner by a seaman, alleging a breach of this duty, and consequent loss of health to the

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plaintiff. Lord Campbell, Ch. J., said: "The enactment provides a benefit for the seaman; . . . and thereby the plaintiff, being a seaman on board, was deprived of that benefit, and his health was injured." Accordingly the action was sustained. This decision was not distinctly overruled, but the generality of Lord Campbell's reasoning was criticised, by the court of appeal, in *Atkinson* v. *Newcastle & G. Waterworks Co.* (1877) L. R. 2 Exch. Div. 441, 46 L. J. Exch. N. S. 775. The water company failed in its statutory duty to maintain fire plugs, with pipes filled with water at a certain pressure. The court held that a property owner whose buildings had been burned in consequence of the water company failing in this duty had no action against the company. These cases are cited by Mr. Justice Dixon in *Weller* v. *McCormick*, 52 N. J. L. 472, 8 L. R. A. 798, 19 Atl. 1101, as authority for the discriminating statement of the rule to which he there gives expression, *viz.*: "For it is a general principle that where there rests upon any person a public duty, either arising at common law or created by statute, and that duty is due to the public, considered as composed of individuals, and for their protection, each person specially injured by breach of the obligation is entitled to a private action to recover compensation for his damage." And the same distinction is recognized in the language already quoted from *Appleby* v. *State*, 45 N. J. L. 165. The decision in *Sonn* v. *Erie R. Co.* 66 N. J. L. 428, 49 Atl. 458, affirmed in this court for the reasons given in the court below (67 N. J. L. 350, 51 Atl. 1109), recognizes this distinction. There the railroad company was required by the charter under which its road was constructed and operated (P. L. 1867, § 9, p. 306) "to construct and keep in repair good and sufficient bridges over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle across the said railway shall not be impeded thereby." Here was a positive, unconditional duty imposed for the express benefit of the traveling public; and although the same section provided that, if the company neglected to perform the duty, the public officers having charge of the repairs or maintenance of the road, and having unsuccessfully warned the company, might proceed to do the work, and recover the cost from the company, it was held by the supreme court that the plaintiff was one of the class of persons for whose benefit the duty was imposed, and might sustain an action for damages arising from its breach. In the argument of the case in this court, the construction adopted by the supreme court was not, in this respect, questioned.

In examining a municipal ordinance in the effort to determine its scope and purview, an important and sometimes controlling inquiry is whether it was passed in the exercise of the police powers of the municipality, for the regulation of the conduct of persons within the corporate limits, in order to conserve the safety of persons or property, or whether it is an exercise of the taxing power of some other governmental power. We find running through the adjudicated cases a rule of construction almost universally adopted,—that where the provisions of an ordinance are intended, not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remediable only at the instance of the municipal government, or by enforcement of the penalty prescribed therein, and that there shall be no right of action to an individual citizen especially injured in consequence of such breach. The most conspicuous cases of this sort are those that deny liability to private suit for violation of the duty imposed by ordinance upon abutting property owners to maintain sidewalk pavements, or to clean ice and snow from the walks. *Moore* v. *Gadsen*, 93 N. Y. 12; *Rochester* v. *Campbell*, 123 N. Y. 405, 10 L. R. A. 393, 25 N. E. 937; *Kirby* v. *Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682; *Hartford* v. *Talcott*, 48 Conn. 525. 40 Am. Rep. 189; *Flynn* v. *Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Taylor* v. *Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728. Two reported decisions in our circuit courts indicate the general acceptance of this distinction in this state. *Snowden* v. *Dodd* (Essex circuit, 1885; Depue, J.) 8 N. J. L. J. 296; *Courtney* v. *Central R. Co.* (Union circuit, 1895; Van Syckel, J.) 18 N. J. L. J. 173. That the New York and Massachusetts cases just referred to proceed upon the distinction now asserted, and not in denial of the binding effect of ordinances in general, is evidenced by the fact that in those same states the liability to private suit for violation of ordinances passed in the exercise of the police power is fully recognized. *Knupfle* v. *Knickerbocker Ice Co.* 84 N. Y. 488; *Connolly* v. *Knickerbocker Ice Co.* 114 N. Y. 104, 21 N. E. 101; *McKickard* v. *Flint*, 114 N. Y. 222, 21 N. E. 153; *Wright* v. *Malden & M. R. Co.* 4 Allen, 283; *Salisbury* v. *Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Hall* v. *Ripley*, 119 Mass. 135.

Turning now to the ordinance *sub judice*, upon which alone the defendant's liability is rested, we find it is entitled "An Ordinance Regulating Street Railways and Providing for Paving and Repairing in the Street through Which Street Railways are Built or Operated." It consists of eight sections. Section 1 provides that, when the tracks of any street railway have been or shall be laid in any street in the city which at the time of laying the tracks shall be unpaved, it shall be the duty of the railway company laying the track or operating the railway to pave between the rails of the tracks, and between the tracks, and for the space of 1 foot outside of each outer track, with such pavements and in such manner as the board of street and water commissioners shall deter-

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mine; and said pavements so laid shall by said company or its successors be kept in good and complete repair, to the satisfaction of the board of street and water commissioners, or, if not so kept and maintained, the repairs thereto may be made by the board, and the costs thereof shall be paid on demand by the railway company to the board: Provided, the board shall give at least ten days' notice to the company of its intention to make such repairs. Section 2, that, where the tracks of any street railway company have been or shall be laid in any paved street, it shall be the duty of the company laying the tracks or operating the railway to repave between the rails of the track, and between the tracks, and for the space of 1 foot outside of each outer track, and to such further distance as may be necessary to bring the whole pavement of the street into proper conformity; the pavement to be of the same character and equal in quality to the pavement with which the remaining portion of the street is paved; such pavement to be laid under the direction of the board, and to its satisfaction, and to be thereafter kept in repair by the company or its successors to the satisfaction of the board, or, if not so kept and maintained, the repairs thereto may be made by the board, and the cost thereof shall be paid on demand by the company to the board: Provided, the board shall give at least ten days' notice in writing to the company of its intention to make such repairs. Section 3, that, where the board shall cause any street to be paved or repaired [repaved?], it shall be the duty of the railway company owning or operating a street railway in such street at the same time to pave or repave between its tracks and for the space of 1 foot on the outside of of each outer track, with such pavement and in such manner as the remaining portion of the street is paved or repaved by the board; the pavement to be laid and relaid under the direction of the board, and to its satisfaction; and the pavement so laid to be thereafter kept by the company in repair to the satisfaction of the board, or, if not so kept and maintained, the repairs thereto may be made by the board, and the costs thereof shall be paid on demand by the railway company to the board: Provided, the board shall give at least ten days' notice in writing to the company of its intention to make such repairs. Section 4, that, where the tracks of any street railway company, or any portion thereof, shall be taken up by the company for any reason, or the pavement under the charge of the company shall in any way be disturbed, it shall be the duty of the company to at once relay the pavement so disturbed or taken up, not only to the full width to which it has been so disturbed, but to such further distance as may be necessary to again bring the whole pavement of the street into proper conformity; said work to be done under the direction of the board, and to its satisfaction. Section 5, that it shall be the duty of every street railway company owning or operating a street railway to keep in thorough repair, to the satisfaction of the board, the cross walks crossing the railway, and for 1 foot outside of the outer track of the railway; said cross walks to be in every way equal in quality to the remaining cross walks, and all new cross walks laid by the company to consist of stone not less than 4 feet in width, and reaching between the tracks. Section 6, that no company owning or operating any street railway shall take up any pavement or cross walk, except for the purpose of repair, without the consent of the board or of the superintendent of works, and no street railway shall alter or change the grade of its tracks without the consent of the board. Section 7, that in case any street railway company shall fail to pave any portion of its tracks pursuant to the terms of this ordinance, to the satisfaction of the board, the board, upon ten days' notice to the company, may cause the pavement to be laid or taken up, and the said portion of the street to be paved or repaved to the satisfaction of the board, and the company shall upon demand pay to the board the cost thereof. Section 8, that the board reserves to itself the right to appoint inspectors to supervise any paving or repaving to be done by any street railway company pursuant to the terms of this ordinance, and the cost of such inspectors shall be refunded and paid to the board by the company on demand; and all permits to lay down street railway tracks, or to locate street railways, or to open the streets for the relaying of tracks, shall be expressly subject to all the terms of this ordinance.

Assuming the validity of the ordinance, it seems to us not to admit of the construction that it was designed for the safety of travelers upon the street as a class. On the contrary, the design is to impose upon the street railway company a share of the public burdens of the municipal government. The prime object is the relief of the municipal treasury. The duties imposed are to be performed by the company as one of the municipal agencies, and under the immediate supervision of a municipal board; and the ordinance provides that for any omission by the company to comply with its terms the remedy shall be applied by the board itself in proceeding to do the work and recovering the costs thereof from the company. There is no penalty imposed upon the company. There is nothing to indicate that it is done for the safety or protection of travelers upon the street. There is nothing in the language to indicate that it was the intent of the municipal authority in passing the ordinance that it should give rise to an action against the company by any citizen aggrieved through a breach of its provisions. There is no discretion given to the company as to the mode or style of paving or repairs; on the contrary, it is within the fair intendment of the ordinance that all work which is required to be done by the street railway company shall be done under the immediate direction of the board of street and water commissioners, or its inspectors and supervisors. In the opinion of the supreme court it is said that the ordinance was passed un-

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der due legislative authority for the regulation of all street railways; that it is a police regulation, in which the traveling public are concerned; and that the burden thus laid upon the operating companies is one fairly within proper police regulation, and could constitutionally be imposed as a condition of the exercise of a franchise in a public street, whether under an irrepealable contract or otherwise. This statement, it will be perceived, recognizes the importance of seeking out the source of power as having a bearing alike upon the validity of the ordinance and upon its proper construction if valid. By way of legislative authority, we are referred to Laws 1857, p. 116, and Laws 1891, § 12, p. 262. No other legislation was referred to in the argument before us. The enactment of 1857 is the revised charter of the city of Newark, by which a common council was established, with power to make ordinances to regulate and keep in repair the streets, to license and regulate vehicles and carriages used for the transportation of passengers and merchandise, to grade and pave the sidewalks, etc. The act of 1891 had the effect of establishing a board of street and water commissioners, who became vested with the powers formerly vested in the common council, including the general control over the streets, and with the express power to pass ordinances to regulate and control the use of streets and public places by foot passengers, vehicles, railways, and engines, and to grant franchises and locations to street railway companies for the operation of railways; subject, however, to the limitations contained in the general laws of the state relative thereto. The constitutionality of this statute has been sustained by the supreme court in *Re Haynes*, 54 N. J. L. 6, 22 Atl. 923. The powers to which we are thus referred are properly classed among the police powers of the municipality. The distinction between the police power and the taxing power is entirely clear. The former extends merely to the regulation of those matters that are confided by the legislature to the municipal corporation for that purpose, including the power to exact reasonable fees, not for the purpose of revenue, but only as incidental to the power of regulation. The power of taxation is exerted in order to compel citizens and property owners to contribute to the support of the municipal government. Tiedeman, Mun. Corp. §§ 116, 123, 124, 253; Dill. Mun. Corp. 4th ed. §§ 141, 357–360, 768. The power to regulate the use of the public streets, including limitations upon the speed of travel, the exclusion of vehicles from the sidewalks, the regulation of public conveyances, and the like, are instances of the exercise of the police power. Dill. Mun. Corp. 4th ed. § 393. Nowhere, it is believed, has the distinction between the police power and the taxing power been kept more clearly in view than in New Jersey. Our courts, while giving full scope and reasonable construction to the powers delegated by the legislature to the municipalities, have been careful to check any usurpation of the taxing power attempted under the guise of police regulation. A conspicuous example is to be found in the decision of the supreme court in *State, North Hudson County R. Co., Prosecutors*, v. *Hoboken*, 41 N. J. L. 71. As this decision is cited in the opinion now under review as authority for the proposition that an ordinance requiring a street railway company to pave the street and maintain the pavement is fairly within proper police regulation, and as it has been elsewhere cited to the same effect (Booth, Street Railways, § 243, note; *State, Cape May, D. B. & S. P. R. Co., Prosecutor*, v. *Cape May*, 59 N. J. L. 401, 36 L. R. A. 653, 36 Atl. 698), it deserves more than a passing mention. The report of the case shows that, after the railway company had constructed, under legislative sanction, certain lines of street railway operated with horses, the municipal council adopted certain ordinances, general in their effect, which, among numerous other provisions, required all street railway companies to take out licenses for the running of their cars, and thereupon to pay into the city treasury annual license fees of $15 for each one-horse car and $25 for each two-horse car, at the same time imposing a penalty for each time any car should be run without license. These ordinances were brought under review by writ of certiorari. The report shows that the argument of the counsel of the prosecutor was directed to the validity of those parts of the ordinances that required the taking out of licenses and the payment of license fees. The opinion of the supreme court was delivered by Mr. Justice Depue (afterwards chief justice), who, near the outset of the discussion, used this language: "A municipal corporation, under the ordinary powers of local government, in virtue of its control over its streets, may adopt reasonable regulations for the government of the city, for the preservation and safety of its streets, and for the maintenance of good order. The provisions in these ordinances requiring the tracks to conform to grade, and to be laid under the direction of the street commissioner, for keeping in repair the space within the rails, requiring bells to give warning of the approach of the cars, providing for the removal of snow, and the like, are of the character of regulations which may be adopted, and, if reasonable, are valid. Such regulations do not appreciably interfere with the exercise of its franchise by a corporation having the franchise to use the public streets for its business. They are necessary for the good government of the city, and the legislature is presumed to have intended, when it authorized the use of the public streets for such purposes, that its grantee should hold its privileges subject to such regulations as are reasonably necessary for the common use of the streets for the purposes of a street railway and for ordinary travel. But an ordinance requiring a license as the condition under which a railway company shall be permitted to run its cars, and exacting a license fee therefor, is quite a different thing." The learned justice then proceeds to show that

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the function of granting licenses is an incident of the police power of regulation; that the grant of power to license does not carry by implication the power to charge license fees for revenue; and that the exaction of license fees for revenue purposes is clearly an exercise of the taxing power, and cannot be sustained, unless the charter plainly shows an intent to confer that power. And so the ordinances were set aside so far as they affected the prosecutor by imposing license fees. If the language quoted from this opinion were intended to mean that the police power justified the imposition upon street railway companies in general of the duty of repairing the streets and of removing snow therefrom, it would be quite incongruous with the point actually decided, and to which much stress of argument was devoted. What the learned justice said, however, was merely that "the provisions in these ordinances" (meaning the ordinances before the court), so far as they applied to certain things that he mentioned, were "of the character" (that is, within the category) of regulations that, if reasonable, would be valid. He did not say that the regulations in question were either reasonable or valid. He did not undertake to say specifically what they were. They do not appear in the report of the case, because they were not the subject of attack, or even of discussion. The opinion shows that he referred to them only casually, as instances of the exercise of the power of regulation, so that he might illustrate by antithesis the character of the licensing clauses that were under criticism. If any greater significance was intended to be given to the language quoted, it was manifestly *obiter dictum*.

An examination of the ordinances that the learned justice had before him, which may be found among the files of the supreme court, shows the correctness of what has just been said. The original ordinance was approved June 27, 1861, and contains 10 sections, the first of which enacts, in substance, that when any permission shall hereafter be granted to any person or corporation to lay tracks and run cars over the streets of the city, such person or corporation shall be subject to the following conditions and restrictions: That the tracks shall be laid under the direction of the street commissioner and committee on streets; that the rails shall be laid on the established grades, and shall at all times conform to grades hereafter established; that such person or corporation shall keep in good repair the space between the rails and 2 feet on each side of the outer rails, etc. Section 2 requires all companies to keep bells upon their horses to give warning of their approach, limits the speed to 6 miles an hour, requires the cars to be lighted at night, and further provides that in clearing or removing the snow or ice from the tracks it shall be done so as not to interrupt public travel or interfere with the rights of abutting property owners, and that no salt or other melting substance shall be used for removing the snow. The remaining sections, so far as they apply to companies already existing, are regulative merely, excepting the one that imposed the annual license fee for each car; and this, by its terms, applied, not only to companies thereafter to be authorized to construct tracks, but also to companies already in operation. The amendatory ordinances relate solely to the system of licensing attempted to be established by the ordinance of 1861. It will be seen that there was nothing in the ordinances requiring the repair of the streets by companies already established. The declaration was that companies obtaining permission in the future to lay tracks must take it subject to the condition indicated. These were the days of horse railroads, whose operations had the effect of concentrating the wear and tear upon a limited portion of the street; and the proposition was that as a *quid pro quo* for a local franchise any new horse railroad company should agree, not, indeed, to pave or repave, but to repair, the street. It will also be noticed that nothing in the ordinances required the removal of snow. The requirement was that, if the company desired to remove the snow for its own convenience, it should do so in a manner not to interfere with the rights of others. So much for the *Hoboken Case*. It has been much misunderstood. It is a clear authority against, not in favor of, any construction of the police power that would permit it to be employed for purposes of revenue. That case was followed by the supreme court in *Cape May* v. *Cape May Transp. Co.* 64 N. J. L. 80, 44 Atl. 948, where it was again held that an ordinance imposing license fees for revenue upon a street railway company could not be supported as an exercise of the police power.

In the following cases the supreme court has sustained municipal regulations imposed upon street railways in the exercise of the police power, *viz.*: An ordinance requiring horse railroad companies to have an agent upon each car, in addition to the driver, to assist in the control and care of the car and its passengers, and to prevent accidents and disturbances of the good order and security of the streets (*State, Trenton Horse R. Co., Prosecutors*, v. *Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076); an ordinance prohibiting the placing of salt upon street railway tracks, except on curves leading from one street to another (*State, Consolidated Traction Co., Prosecutor*, v. *Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146); an ordinance limiting the rate of speed of electric cars running in the streets (*State, Cape May, D. B. & S. P. R. Co., Prosecutor*, v. *Cape May*, 59 N. J. L. 393, 36 L. R. A. 656, 36 Atl. 679); an ordinance requiring the use of fenders on the front of electric cars to prevent accidents (*State, Cape May, D. B. & S. P. R. Co., Prosecutor*, v. *Cape May*, 59 N. J. L. 396, 36 L. R. A. 653, 36 Atl. 696); an ordinance requiring electric cars to come to a full stop at each street before crossing it (*State, Cape May, D. B. & S. P. R. Co., Prosecutor*, v. *Cape May*, 59 N. J. L. 404, 36 L. R. A. 657, 36

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Atl. 678); an ordinance having the effect of prohibiting a trolley company already authorized to string electric wires upon poles in the streets, from cutting or trimming any trees in so doing, without first obtaining permission from the governing body (*State, Consolidated Traction Co., Prosecutor*, v. *East Orange Twp.* 61 N. J. L. 202, 38 Atl. 803). No criticism is now made upon any of these decisions. They give no support to the present ordinance.

This court, as it happens, has not been called upon to deal directly with the question of municipal regulation of street railways. But the power of the municipality to regulate the crossings of streets by steam railroads has been more than once brought here for consideration. In *State, Pennsylvania R. Co., Prosecutor*, v. *Jersey City*, 47 N. J. L. 286, it was held that an ordinance prohibiting the obstruction of a crossing for more than three minutes at a time was within the granted powers of regulation of the streets and of railways; that such regulations must be reasonable; and, the ordinance in question being plainly reasonable in its general application to crossings throughout the city, and open to question in this respect only as to three streets near the terminal of one railroad, this court refused to set aside the ordinance *in toto*, leaving the railroad company to raise the objection of unreasonableness with respect to either of the three crossings in any proceeding that might be taken to enforce the ordinance. In *Morris & E. R. Co.* v. *Orange*, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363, this court held that the police powers of government are sufficient to authorize imposing upon a steam railroad company the duty of protecting the public at grade crossings over city streets by the erection and maintenance of gates and the employment of flagmen; and that, therefore, in proceedings taken by the municipality to ascertain damages allowable for the opening of a street, the railroad company, while entitled to compensation, was not entitled to have the cost of gates and flagmen included in the allowance. In many other cases in the supreme court, the distinction between the police power and the taxing power has been discussed. *Kip* v. *Paterson*, 26 N. J. L. 298; *State, Benson, Prosecutor*, v. *Hoboken*, 33 N. J. L. 280; *State, Delaware, L. & W. R. Co., Prosecutors*, v. *East Orange Twp.* 41 N. J. L. 127; *State, Muhlenbrinck, Prosecutor*, v. *Long Branch*, 42 N. J. L. 364, 36 Am. Rep. 518; *State, Clark, Prosecutor*, v. *New Brunswick*, 43 N. J. L. 175; *State, Morgan, Prosecutor*, v. *Orange*, 50 N. J. L. 389, 13 Atl. 240; *Mulcahy* v. *Newark*, 57 N. J. L. 513, 31 Atl. 226; *Cape May* v. *Cape May Transp. Co.* 64 N. J. L. 80, 44 Atl. 948. And two cases in this court may be mentioned: *Haynes* v. *Cape May*, 52 N. J. L. 180, 19 Atl. 176; *Johnson* v. *Asbury Park*, 60 N. J. L. 427–430, 39 Atl. 693. It is needless to say that this extended reference to familiar decisions has been made, not for the purpose of showing the existence of a distinction that is so universally recognized, but for the purpose of showing how rational is the distinction, and how easy of application, and in order to demonstrate how impossible it is that a power conferred by the legislature for the purpose of regulating the streets of a city, and the use of the streets by traction companies and others, can, by any defensible interpretation, be so stretched as to cover an ordinance of the character of that now before us. The traction company is in the enjoyment of a public franchise granted by the legislature. It has a use of the streets differing only in kind from that of other citizens using them, and has no interest in the soil. It is under a general obligation to keep its rails in repair so they shall not become an obstruction to travel. It is also bound by any contract it may lawfully have made with the municipality in consideration of the grant of its local privileges. But entirely independent of any such consideration, and irrespective of any disturbance of the street surface in the operation of the railway, this ordinance attempts to impose upon every traction company the duty to pave a considerable portion of every street over which it passes, although it may bring no additional wear and tear upon the pavement, and the further duty to keep such pavement, when laid, at all times in repair. To call this "regulation," or an exercise of the police power, is a misuse of terms. It is taxation pure and simple. It calls upon the company to perform a function not essentially different in character, although vastly more onerous, than the once familiar operation known as "working-out" the township road taxes by the labor of the inhabitants. Gen. Stat. p. 2817, §§ 51 *et seq.* A power that will not support the imposition of license fees fixed on a revenue basis will certainly not support an ordinance of this character. We therefore hold that the ordinance is not supportable as an exercise of the police power, and, since no other legislative authority exists for its enactment, it imposed no duty upon the defendant company to repair the pavement between its rails, or to repave that portion of the street.

We have not forgotten the "Act to Provide for the Incorporation of Street Railway Companies and to Regulate the Same," approved April 6, 1886 (Laws 1886, p. 185; Gen. Stat. p. 3216). Section 18 is as follows: "That every street railway company incorporated under this act shall keep in repair, to the satisfaction of the local authorities, the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks, and, if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair 18 inches on each side of the portion occupied by its tracks: Provided, that nothing in this section shall be deemed to affect or repeal existing provisions of any municipal charter or any ordinance or regulation heretofore passed and adopted." There is nothing in this case to show when, or under what legislative authority, the defendant company was incorporated. Nor was this statute invoked in the argument of

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the learned counsel for the plaintiff in this court. We cannot assume that the defendant was incorporated under that act, in view of the existence of other legislation to which its origin may as naturally be attributed. We are therefore relieved from considering whether § 18 of this act creates a liability in favor of any member of the traveling public who may sustain damage through the nonrepair of the street.

The judgment should be reversed, and a *venire de novo* awarded.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE of West Virginia
v.
D. J. EDWARDS, *Plff. in Err.*

(51 W. Va. 220.)

***1. Where a person, by means of some fraud or trick, procures the delivery of money** or goods to him by the owner, with the intent to steal the same, it amounts to a taking of the property, within the definition of larceny, unless the delivery of the possession is made for the purpose of passing the title to the property as well as its possession; and, if possession be acquired by such means and with such intent, and the goods or money are afterwards converted by the taker to his own use, the offense is larceny.

2. Where both possession and title are obtained by false pretenses, with intent to defraud, the offense is obtaining money by false pretenses, in which case the statute declares that the offender shall be deemed guilty of larceny.

3. When possession is obtained by means of fraud, trick, or device, so as to make the taking felonious, and the taker converts the property to his own use, the offense is common-law larceny, and a conviction may be had upon a common-law indictment for larceny.

4. In such case the indictment need not specify the means by which the larceny was effected.

5. Whether the possession was so obtained with intent to steal is a question for the jury.

6. The instruments, devices, or tokens used in the commission of a crime are competent and legitimate evidence in the trial of the accused, and the taking of them from his person by an officer who has arrested him upon a charge of his having committed

*Headnotes by POFFENBARGER, J.

NOTE.—*Admissibility in evidence against accused of documents or other things taken from him.*

I. *Introductory*, 465.
II. *Constitutional restrictions.*
a. *General statement—application*, 465.
b. *Unreasonable searches and seizures*, 466.
c. *Compelling evidence against self*, 468.
III. *Effect of illegal or improper seizure*, 470.
IV. *Rule as to articles unlawfully possessed, or in which the public has an interest*, 472.
V. *To what proceedings foregoing rules apply*, 473.
VI. *Conclusion*, 474.

I. *Introductory.*

In the formative days of English law, public opinion revolted against the inquisitorial and manifestly unjust methods of Star-Chamber administrative justice, which placed every man's life and property at the mercy of irresponsible officials and maliciously disposed neighbors.

In obedience to the demand for reform, and without statutory enactment or actual decision on the point, the English courts of the seventeenth century practically adopted the maxim *Nemo tenetur seipsum accusare*,—a maxim which is embodied in the statement of Lord Mansfield in Roe *ex dem.* Haldane v. Harvey, 4 Burr. 2489, that in a criminal or penal case the defendant is never forced to produce any evidence, though he should hold it in his hands, in court.

This maxim, "which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." Brown, J., in Brown v. Walker, 161 U. S. 597, 40 L. ed. 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The 4th Amendment to the United States Constitution prohibits unreasonable searches and seizures.

The 5th Amendment to the United States Constitution provides that no one shall be compelled, in a criminal case, to be a witness against himself; and the same provisions, or provisions to similar effect, are found in nearly every American Bill of Rights. See the discussion of this subject in division I., a, of the *note* to Levy v. San Francisco City & County Super. Ct. (Cal.) 29 L. R. A. 811.

But the omission of such provisions is not construed as a revocation of so well-recognized an incident of English-American law.

And so, although the Constitution of Iowa does not contain the usual provision against compelling one accused of crime to give self-incriminating evidence, the supreme court of that state has held that the principle itself is too fundamental to have been purposely omitted from the charter of liberties of the people; and that, in the absence of a specific provision relative thereto, the same result will be reached under the general guaranty of due process of law. State v. Height (Iowa) 91 N. W. 935.

As to *Constitutional protection against being forced to furnish evidence to be used against one's self in a civil case*, see *note* to Levy v. San Francisco City & County Super. Ct. (Cal.) 29 L. R. A. 811.

II. *Constitutional restrictions.*

a. *General statement—application.*

Besides the application of the general constitutional guaranty of due process of law, shown in State v. Height (Iowa) 91 N. W. 933, *supra*, I., the 4th Amendment of the Constitution of the United States, declaring that the right of

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the crime is not an illegal seizure; nor is the search of his person for such instruments an unreasonable search, within the meaning of the constitutional provision against unreasonable search.

(March 22, 1902.)

ERROR to the Circuit Court for Harrison County to review a judgment convicting defendant of grand larceny. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Melvin G. Sperry** and **John R. Swiger,** for plaintiff in error:

Money loaned for the purpose of gaming, with knowledge that it is to be used for such purpose, or money advanced for illegal uses or purposes, cannot be recovered in an action at law.

8 Am. & Eng. Enc. Law, p. 1015.

Inasmuch as the prosecuting witness had so parted with his property as not to possess such an interest therein as would support an action at law, he had not such an interest as is the subject of conversion.

Stolen goods may be taken from a prisoner and used as evidence against him, because he has no right to their possession. Weapons, implements, or money may be lawfully taken on a search, because they would aid him in effecting an escape from custody. Counterfeit money may be so seized and used, because its possession is in itself a crime. But things that do not fall within one of these classes cannot be lawfully taken from the possession of a person in custody.

Pickett v. *State*, 99 Ga. 12, 25 S. E. 608; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Messrs. **Romeo H. Freer,** Attorney General, and **Alexander Dulin,** for defendant in error:

The intent with which the crime is com-

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the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and the 5th Amendment thereof, providing that no person shall be compelled in any criminal case to be a witness against himself, and similar provisions of the Constitutions of the several states, apply on the question of the admissibility in evidence against an accused person of documents or other things taken from him; and where a seizure of papers is unreasonable and contrary to the spirit of such amendments, they cannot be used in evidence. United States v. Wong Quong Wong, 94 Fed. 832.

The constitutional safeguards against unreasonable searches and seizures, and compelling a defendant in criminal proceedings to give evidence against himself, would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use. *Ibid.*

And aliens are included within the constitutional protection against unreasonable search and seizure, and against compelling one accused of crime to give evidence against himself, and are entitled to the benefit of constitutional guaranties affecting liberty and property, as well as citizens; so that, in proceedings for the deportation of a Chinese person, private letters written by him, and taken from him by unlawful seizure, are not admissible in evidence against him. *Ibid.*

And a witness, as well as the defendant, is protected by constitutional amendments from being compelled to give evidence that tends to criminate him or subject his property to forfeiture by being made to produce documents or books. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

b. *Unreasonable searches and seizures.*

In Stockwell v. United States, 3 Cliff. 284, Fed. Cas. No. 13,466, it was held that account books, letters, and other documents seized by a marshal on a search warrant, under § 2 of the act of Congress of March 2, 1867, issued pursuant to 14 U. S. Stat. at L. 547, chap. 188, § 2, giving power to the district judge to issue such warrant whenever it shall be made to appear by complaint or affidavit, to his satisfaction, that any fraud on the revenue has been committed by any person interested or engaged in the importation or entry of merchandise at any port within the district, and brought before the district judge and placed in the custody of the district attorney, are not inadmissible in evidence in an action by the United States to recover duties and penalties for alleged illegal importation, as in contravention of constitutional provisions forbidding unreasonable search and seizure.

And precisely the same ruling was made in United States v. Hughes, 12 Blatchf. 553, Fed. Cas. No. 15,417, following Stockwell v. United States, 3 Cliff. 284, Fed. Cas. No. 13,466, *supra.*

And the same was held in *Re* Platt, 7 Ben. 261, Fed. Cas. No. 11,212, on the question of the right to require the production of such papers; and it was also held that such a requirement does not contravene the constitutional provision against taking property without due process of law. But the question of admissibility in evidence of the papers required to be produced was not involved.

And the right to require the production of books and papers in proceedings for forfeiture for the violation of revenue laws was upheld in United States v. Mason, 6 Biss. 350, Fed. Cas. No. 15,735; United States v. Three Tons of Coal, 6 Biss. 379, Fed. Cas. No. 16,515; and United States v. Distillery No. 28, 6 Biss. 483, Fed. Cas. No. 14,966.

In Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, however, Stockwell v. United States, 3 Cliff. 284, Fed. Cas. No. 13,466, *supra,* was criticized and in effect overruled, the court saying that the learned justice in that case seemed to think that no greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation, than to one authorizing a search for imported goods, but that this consideration failed to meet the most serious objections to the validity of the law in question; and *Re* Platt, 7 Ben. 261, Fed. Cas. No. 11,212; United States v. Hughes, 12 Blatchf. 553; Fed. Cas. No. 15,417; United States v. Mason, 6 Biss. 350, Fed. Cas. No. 15,735; United States v. Three Tons of Coal, 6 Biss. 379, Fed. Cas. No. 16,515; and United States v. Distillery No. 28, 6 Biss. 483, Fed. Cas. No. 14,966, which followed Stockwell v. United States, 3 Cliff. 284, Fed. Cas. No. 13,466, *supra,* as a precedent, were also in effect overruled.

And the general rule would now seem to be that documents or books obtained from the owner in a manner contrary to the spirit of the constitutional provision against unreasonable search and seizure cannot be used in evidence in

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mitted may appear from the circumstances connected with the commission of the same.

Mason v. *State*, 32 Ark. 238; *Hart* v. *State*, 57 Ind. 102; *Elswick* v. *Com.* 13 Bush, 155.

Among the circumstances to be considered are the "concealment" and "openness" exhibited by the parties in consummating their scheme.

2 Bishop, Crim. Proc. § 754, note 4.

The conduct, acts, and representations of the defendant toward Mr. Dennison being *mali in se*, anything he should secure from said Dennison by reason of the game played with him would be larceny.

2 Bishop, Crim. Law, §§ 810, 813.

An indictment for simple larceny can be maintained upon evidence tending to prove that the crime was committed by deceit and false representations.

State v. *Halida*, 28 W. Va. 499; *Anable* v. *Com.* 24 Gratt. 563; *Leftwich* v. *Com.* 20 Gratt. 716; *Dowdy* v. *Com.* 9 Gratt. 727, 60 Am. Dec. 314.

The conduct, acts, false representations, and assurances made by the defendant to Dennison are proper evidence in this case, under the doctrine of *res gestæ*.

Wharton, Crim. Ev. § 266; 2 Bishop, Crim. Proc. § 746; *Com.* v. *Hurd*, 123 Mass. 438.

The crime of larceny was committed.

State v. *Chambers*, 22 W. Va. 779, 46 Am. Rep. 550.

Poffenbarger, J., delivered the opinion of the court:

Although involving an old and well-settled principle of criminal law, this case is the first of the kind to come to this court, and seems to be rather novel, because the courts are not often called upon to pass upon cases involving the question presented here. It is a conviction of the crime of

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a criminal prosecution, or a proceeding to establish a forfeiture against him. United States v. Wong Quong Wong, 94 Fed. 832; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

And that a search and seizure, the object of which is to give the papers seized in evidence against the owner, thus compelling him to be a witness against himself in contravention of the 5th Amendment of the Constitution, is unreasonable, within the prohibition of the 4th Amendment thereof. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

And that actual entry upon premises, and search for and seizure of papers, are not required to constitute an unreasonable search and seizure within the meaning of the 4th Amendment; and compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the amendment, and to make their nonproduction a confession of the allegations which it is claimed they will prove is equivalent to a compulsory production. *Ibid.*

Within this rule, letters written in Chinese and handed by the appellant in an appeal from orders of deportation to an employee of the government, who passed them to customs officials, who kept and opened them, are inadmissible in evidence in such proceeding, as having been procured in contravention of the constitutional provision against unreasonable search and seizure. United States v. Wong Quong Wong, 94 Fed. 832.

And the act of Congress of June 22, 1874, to amend the customs-revenue laws, authorizing Federal courts in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, in default of which the allegations of the government attorney are to be taken as confessed, contravenes the 4th Amendment of the Constitution of the United States prohibiting unreasonable searches and seizures as applied to suits for penalties or to establish a forfeiture of the party's goods; and an invoice produced pursuant thereto, in a proceeding *in rem* to establish a forfeiture of goods alleged to have been fraudulently imported without paying duties, cannot be inspected by the government attorney and admitted in evidence therein. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

59 L. R. A.

Search and seizure of a man's private papers to be used in evidence for the purpose of convicting him of a crime or requiring a penalty, or of forfeiting his property, is totally different from the search and seizure of stolen goods, dutiable articles on which the duties have not been paid, and the like, which rightfully belong to the custody of the law. *Ibid.*

Constitutional provision against unreasonable searches and seizures of a man's papers and possessions, however, does not prohibit all such searches and seizures, but such, only, as are unreasonable, and the foundation of which is not previously supported by oath or affirmation. Com. v. Dana, 2 Met. 329.

And the production of papers or other articles in evidence in a criminal prosecution is not a violation of the constitutional right of the accused to be secure in his papers and effects against unreasonable search and seizure, where they were taken under a search warrant such as is required by law, which was issued upon probable cause, and supported by affidavit, and particularly described the place to be searched and the things to be seized. Langdon v. People, 133 Ill. 382, 24 N. E. 874.

And constitutional restrictions against unreasonable searches and seizures were intended to place a salutary restriction upon the powers of government, and to operate upon legislative bodies so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful, and upon executives so that no law violative of the constitutional inhibition should ever be enforced, and upon the judiciary so as to render it the duty of courts to denounce as unlawful every such search and seizure, whether confessedly without color of authority or justified under the guise of legislative sanction, and do not apply to misconduct of private persons acting upon their individual responsibility and of their own volition, so as to render inadmissible in evidence papers or other things procured by such a search and seizure. Williams v. State, 100 Ga. 511, 39 L. R. A. 269, 28 S. E. 624.

Thus, property obtained by a private detective by an unauthorized search of defendant's rooms is not inadmissible in a criminal prosecution against the defendant when pertinent, on the ground that it was obtained by unreasonable search and seizure. Gindrat v. People, 138 Ill. 103, 27 N. E. 1085.

And the constitutional restriction against unreasonable searches or seizures does not render

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grand larceny where the prosecutor has been deprived of his money by a trick and conspiracy. E. L. Dennison, a farmer, residing in Harrison county at a point about 12 miles from Clarksburg, was the victim. On a certain Thursday, while away from home, he was followed up by the defendant, D. J. Edwards, who represented himself to be one of a wealthy firm of bankers and coal operators of Fairmont, named Watson, and said he wanted to buy the prosecutor's land, a tract of about 400 acres, for the purpose of developing it as oil land, that being a section of the state in which there was considerable activity in oil production at that time. He made an appointment with Dennison to see him at his (Dennison's) home on the following Monday, promising to bring with him some other parties. On the day agreed upon he came, but there was nobody with him. He explained this by saying that the party whom he had expected to bring was a woman, and that she was sick. He said he would bring her over in a few days, that whatever he might do would be all right, but that he did not want to trade until she came. He then invited Dennison to get in his buggy and drive down the road with him and show him the land. After they had gone some distance they met a large man, who, as they were driving past, inquired the distance to Clarksburg, and began a conversation. Edwards immediately stopped the buggy, and the large man represented that he lived in Alabama, and had a sister living, as he supposed, at some place near Clarksburg, for whom he was hunting, claiming that she had been disinherited by her father; that her father had since died; and that he had

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inadmissible in evidence, in a prosecution for carrying concealed weapons, the discovery of a weapon concealed upon the person of the defendant, the search for which was unauthorized and illegal. Shields v. State, 104 Ala. 35, 16 So. 85.

And searching the office of a person accused of crime, with the consent and aid of his servant and agent, who was in possession, in order to obtain evidence against the accused, is not a violation of the constitutional provision against unreasonable searches; and the taking away of an article found there with the consent of such agent is not a seizure, within the meaning of that provision, which will render such article inadmissible in evidence against him. State v. Griswold, 67 Conn. 290, 33 L. R. A. 227, 34 Atl. 1046.

So, in State v. Nordstrom, 7 Wash. 506, 35 Pac. 382, it is held that papers and things taken from the accused in the course of the usual search upon defendant's arrival at jail, no force having been used to get possession of them, are admissible in evidence against him without violating the constitutional protection against unreasonable searches and seizures, or compulsory self-crimination.

See also Langdon v. People, 133 Ill. 382, 24 N. E. 874, and State v. O'Connor, 5 Kan. App. 394, 43 Pac. 859, — *infra*, IV.

c. *Compelling evidence against self.*

The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, prohibited by the 5th Amendment to the Constitution, and is equally within the prohibition of that amendment in the prosecution of crime, or in proceeding for a penalty or forfeiture. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; State v. Davis, 108 Mo. 666, 18 S. W. 894.

Thus, letters written in Chinese, handed by appellant, in an appeal from orders for deportation, to an employee of the government, who passed them to customs officials, who kept and opened them, are inadmissible in evidence in such proceeding against the appellant, under the provision of the 5th Amendment to the Constitution of the United States, providing that no person shall be compelled in any criminal case to be a witness against himself. United States v. Wong Quong Wong, 94 Fed. 832.

And the act of Congress of June 22, 1874, to amend the customs-revenue laws, authorizing Federal courts in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, in default of which the allegations of the government attorney are to be taken as confessed, violates the 5th Amendment of the Constitution of the United States, providing that no person in any criminal action shall be compelled to be a witness against himself, as applied to suits for penalties or to establish a forfeiture of the party's goods; and an invoice thus obtained in proceedings *in rem* to establish a forfeiture of goods alleged to have been fraudulently imported without paying duties cannot be inspected by the government attorney, or admitted in evidence therein. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Constitutional provisions, whether national or state, prohibiting the enforced production by parties to a criminal case of evidence against themselves, however, are merely limitations upon the power of the government, and have no reference whatever to, or bearing upon, the unauthorized acts of individuals, so as to render inadmissible, in a prosecution for the larceny of a diamond ring by substituting an imitation diamond in its place, cheap imitation diamonds obtained by a private detective by an unauthorized search of the defendant's rooms, the admission thereof being a violation of no constitutional right. Gindrat v. People, 138 Ill. 103, 27 N. E. 1085.

In the above case, Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, *supra*, was distinguished upon the ground that in that case the erroneous order compelled the accused to produce evidence against himself, and was therefore held to be tantamount to an unreasonable search and seizure, while here the question of illegality was raised collaterally; and the courts exercised no compulsion whatever to procure evidence from the defendant, and neither made orders, nor issued processes, authorizing, or purporting to authorize, a search of premises or a seizure of property or papers, but simply admitted evidence which was offered, without stopping to inquire whether possession of it had been obtained lawfully or unlawfully.

And the use of an envelope containing no writing, but pictures, as evidence against a person accused of crime, in order merely to show that his conduct in respect to such articles was incriminating, is not a violation of a constitutional guaranty that no person shall be compelled, in a criminal case, to give evidence against himself, although the envelope and inclosures were taken from his prem-

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come into possession of a large amount of money, and was seeking her, with the view of dividing with her. He represented that a man whom he had met in Harrison county had won $500 from him in a game which they had played, and then, coming up to the buggy, produced the cards, and began to show Dennison and Edwards the three-card monte game by which he had lost the $500. After manipulating the cards a while, he proposed to bet on them. Dennison was reluctant, but was encouraged by Edwards. The big man pulled a red handkerchief out of his pocket, apparently full of money, from which he took two $5 bills, handing one to Edwards and the other to Dennison. After some shuffling of the cards, and Edwards and Dennison had each turned a blank, the man from Alabama proposed to play with them for $2,000, and took out a roll which had the appearance of money, and had marked on it "Two Thousand Dollars," and placed it in the hands of Dennison. Edwards took it out of his hands, and placed it in the inside pocket of Dennison's vest. Then the man from Alabama said all he asked of them was that they get the money, to which Dennison replied that he had no money there, and they suggested that he had money at Clarksburg in the bank, and he replied that he did have some there. Then Edwards opened a satchel containing a little tin box, and said to the man from Alabama that they would put the money into that box and lock it up and give him the key, and they would go to Clarksburg to get their money. Dennison said he would have to go home first, and they drove back to his house, where they ate dinner, and then drove to Clarksburg. They were to raise

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ises by a trespasser. State v. Griswold, 67 Conn. 290, 33 L. R. A. 227, 34 Atl. 1046.

In the above case, Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, *supra*, was distinguished upon the ground that in that case defendant was required to produce his books, invoices, and papers, which were to be made evidence against him, while in the present case the thing used in evidence was a simple piece of personal property, having of its own no voice or meaning so far as guilt or innocence was concerned, and giving no evidence, the evidence in the case arising from the conduct of the defendant with reference to it.

And where an officer, having a warrant for the arrest of a person, meets with resistance in his attempt to execute it, whereupon, with the assistance of another officer, he disarms the person sought to be arrested, and finds a pistol concealed in his hip pocket, the proof thus obtained is not objectionable, in a prosecution against him for carrying concealed weapons, as being in violation of the constitutional prohibition against compelling the accused to furnish evidence against himself, since he was required to produce nothing and testify to nothing, and no presumption was indulged against him as a penalty for his failure to comply with any requirement. Chastang v. State, 83 Ala. 29, 3 So. 304. The court was of the opinion, however, that if the statute had provided that, under an indictment for carrying concealed weapons, the defendant might be required to produce the alleged weapon, and, on failure to comply, the presumption would be indulged that he had such a weapon concealed about his person, then he would be required to furnish evidence against himself under the rule laid down in Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, *supra*.

And evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions obtained under duress, or that it is evidence which defendant has been compelled to furnish against himself, though the warrant was illegally issued. State v. Flynn, 36 N. H. 64.

And, while no person can be compelled to give evidence against himself, illegal circulars and tickets may be used as evidence of guilt, although illegally obtained from defendant, since they speak for themselves, and are not evidence given by the accused. State v. Kaub, 15 Mo. App. 433.

Nor is one accused of unlawfully possessing lottery tickets with the intent to sell them compelled to furnish evidence against himself within a constitutional exemption from self-incrimination, by the admission in evidence against him of lottery tickets and lottery paraphernalia, including books relating to his transactions, which were taken from his possession at the time of his arrest under a search warrant. Com. v. Dana, 2 Met. 329.

And allowing witnesses on the part of the state to exhibit to the jury certain drills and punches found by them in the house of the defendant, in a prosecution for burglary, is not a violation of the prohibition against compelling a person in a criminal prosecution to give evidence against himself, where it is shown that a safe in the house burglarized was opened by means of similar instruments in connection with an explosive substance, the evidence being proper as tending to connect the defendant with the offense. Starchman v. State, 62 Ark. 538, 36 S. W. 940.

And letters taken from one of the unlocked drawers of a dresser which had been moved by the owner, with its contents, to the home of his wife's parents, about two weeks after her death, with the direction to the mother-in-law to give it to his child, and a bond in the house of defendant's father-in-law not under lock, none of which were taken surreptitiously, are not inadmissible in evidence in a prosecution against him for the murder of his wife, for the purpose of serving as a standard of comparison in determining the genuineness of his signature to a confession, on the ground that he was thus compelled to give evidence against himself. State v. Van Tassel, 103 Iowa, 6, 72 N. W. 497.

And evidence contained in books and papers seized on a warrant issued under § 2 of the act of Congress of March 2, 1867, is not inadmissible in an action for a forfeiture for violation of the customs-revenue laws as having been obtained from the party within the meaning of U. S. Rev. Stat. § 860 (U. S. Comp. Stat. 1901, p. 661), providing that no discovery or evidence obtained, by means of any judicial proceeding, from any party or witness, shall be given in evidence, or in any manner used, against such party or witness, or his property or estate, in any court of the United States for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness. United States v. Hughes, 12 Blatchf. 553, Fed. Cas. No. 15,417.

See also State v. Nordstrom, 7 Wash. 506, 35 Pac. 382, *supra*, II. b; Evans v. State, 106 Ga. 519, 32 S. E. 659, and State v. O'Connor, 8 Kan. App. 594, 43 Pac. 859. *infra*, IV.

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$2,000 between them, and Edwards insisted that Dennison should borrow some money and make his share $800, while he, Edwards, undertook to furnish the balance, representing that he could get all the money he wanted from the woman of whom he had spoken. Dennison declined to borrow any money, but agreed to put in what he had in the bank, $300. Edwards agreeing to raise the balance, $1,700. Dennison went to the bank, and got his money, while Edwards pretended to go and get the $1,700. They then went back and met the stranger on the road. After they had met him, Edwards pulled out what appeared to be a bunch of money, and said, "Here is my money, Mr. Dennison; where is yours?" Then Dennison took out his $300, and Edwards took it and said, "Now here is my pile, and here is Mr. Dennison's; are you satisfied?" After a pretense of quibbling over the matter, he unlocked the tin box, and took out the bundle that had been left in it, and then deposited it and Edwards' bundle and Dennison's money in the box, and the three went on in the buggy. After going about two miles Dennison suggested that they return to the unfortunate Alabaman part of his money, to which Edwards at first objected, but afterwards assented, and the box was opened, and one of the bunches handed to the stranger. Dennison's story is not very clear, but the substance of it seems to be that there was a pretense that he and Edwards had won the $2,000 from the stranger, but he required them, as a condition precedent to final payment of it, that they produce an equal amount, and that it was for that purpose that they had gone to Clarksburg. He says

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III. *Effect of illegal or improper seizure.*

Though papers and other objects of evidence may have been illegally taken from the possession of the defendant in a criminal prosecution, or otherwise unlawfully obtained, this is no valid objection to their admissibility therein against him if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully; and it will not form an issue to determine that question. Gindrat v. People, 138 Ill. 103, 27 N. E. 1085; Trask v. People, 151 Ill. 523, 38 N. E. 248; Siebert v. People, 143 Ill. 571, 32 N. E. 431; Com. v. Dana, 2 Met. 329; State v. Kaub, 15 Mo. App. 433; Stockwell v. United States, 3 Cliff. 284, Fed. Cas. No. 13,466.

The fact that articles were taken from the possession of a person accused of crime by a trespass furnishes no valid objection to their admissibility in evidence against him. State v. Griswold, 67 Conn. 290, 33 L. R. A. 227, 34 Atl. 1046.

However unfair or illegal may be the methods by which evidence was obtained in a criminal action, if relevant, it is admissible, if accused is not compelled to do any act which criminates himself, or a confession or admission is not extorted from him. Shields v. State, 104 Ala. 35, 16 So. 85.

If articles introduced in evidence in a criminal prosecution were taken by the officers offering them without authority, they may be forced to respond in damages; but the fact cannot be considered as furnishing a reason for excluding the evidence. Starchman v. State, 62 Ark. 538, 36 S. W. 940; Williams v. State, 100 Ga. 511, 39 L. R. A. 269, 28 S. E. 624; Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910; State v. Kaub, 15 Mo. App. 433.

In Starchman v. State, 62 Ark. 538, 36 S. W. 940, *supra*, Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, *supra*, II. c, was distinguished upon the ground that there the defendant was compelled to produce his private papers to be read in evidence against him, while here no private papers of the defendant were introduced, and he was not compelled to produce the instruments offered in evidence, but they were found by the officers while searching for stolen property.

Thus, the fact that articles were procured by a search of rooms of the defendant for which there was no legal justification does not prevent the state from using such articles in evidence in a criminal prosecution against him. Gindrat v. People, 138 Ill. 103, 27 N. E. 1085.

And the fact that a search warrant was illegally issued does not render evidence obtained thereby inadmissible in a criminal prosecution against the person from whom it was taken. State v. Flynn, 36 N. H. 64.

And, the state is not deprived of the right to employ evidence of the discovery of a pistol concealed upon the person of the defendant in a prosecution for carrying concealed weapons by the fact that it was discovered by means of a search which was without legal justification, and a trespass, and an indictable offense. Shields v. State, 104 Ala. 35, 16 So. 85.

Nor are papers found in a room occupied by a person under indictment for forgery, while out on bail, in his absence, which the officer took into his possession, though unlawfully obtained, thereby rendered inadmissible in evidence against him. Trask v. People, 151 Ill. 523, 38 N. E. 248.

And papers taken without authority from the room of a person accused of murder are not rendered inadmissible in evidence against him on his trial therefor by such illegal taking. State v. Atkinson, 40 S. C. 363, 18 S. E. 1021.

In the above case, Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, *supra*, II. c, was distinguished on the ground that in that case the defendant was required to produce his books and papers in court to be used in evidence against him, which was equivalent to compelling him to testify against himself.

Nor are letters written by the wife of the person killed to the defendant in a prosecution for murder, which were found in the defendant's room by a Pinkerton detective, who obtained them by representing that he was acting as her friend, inadmissible in evidence in the prosecution therefor because of the manner in which they were obtained. Siebert v. People, 143 Ill. 571, 32 N. E. 431.

So, evidence showing that the defendant in a prosecution for keeping open a tippling house on Sunday had upon her person and about her premises liquors and other articles, the possession of which, though not in itself criminal, tended to establish her guilt of the offense charged, is admissible, notwithstanding the fact that the discovery of such articles was made by forcibly entering into her house, and there searching the same and her person, without any warrant or authority of law. Williams v. State, 100 Ga. 511, 39 L. R. A. 269, 28 S. E. 624.

And the act of an officer in seizing from the outside an article resembling a bottle held by defendant's daughter under her dress does not render inadmissible in a prosecution for main-

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that on the way to Clarksburg and back Edwards had repeatedly told him to take care of the money, and that he (Edwards) would take care of the man, meaning that, as the man was anxious to get out of the country where he was losing so much money, he would take him to the train. As they drove along the road it was suggested that Dennison take Edwards' satchel and the money and go on home, while Edwards took the other man to the train, and when they had driven to a certain point the buggy was stopped, and Edwards ordered Dennison and the stranger to get out, and told Dennison to take the satchel, but he did not care to take it, and then Edwards said, "I'll just give you the box," and then the big man walked around and engaged Dennison in conversation, while Edwards got out the box and wrapped it up in a newspaper. He then handed it to Dennison to take home with him, promising, himself, to come back that night, or the next morning at the latest, when they would divide. Then Edwards and the stranger got in the buggy and drove off. Soon afterwards, Dennison, suspecting that he had been defrauded, opened the box, and found that it contained no money, but, as he says, a few old papers. In fact it was a bundle or roll of worthless old state bank notes, which bear some resemblance in appearance to our currency. Dennison then went in hot pursuit of the men, and succeeded in having the defendant arrested before he got away, but the other man escaped. On the person of the defendant was found $110 in good money, consisting of five $20 bills and two $5 bills. In addition to this he had a supply of the worthless bank notes. The money

taining a liquor nuisance, his evidence as to what she held in her hand. Com. v. Welch, 163 Mass. 372, 40 N. E. 103.

And upon the trial of one accused of selling liquors containing an unlawful amount of alcohol, the admissibility in evidence of an analysis of samples taken from defendant's premises is unaffected by any question as to whether or not the samples were secured lawfully. Com. v. Brelsford, 161 Mass. 61, 36 N. E. 677.

And the fact that an officer was guilty of misconduct in his mode of serving a warrant, in breaking open a safe on the refusal of the defendant to give up the key, though it might, perhaps, render him liable to an action or indictment, does not render the fact that intoxicating liquors were found in the safe incompetent evidence, in a prosecution for illegally maintaining a tenement for the sale of intoxicating liquors. Com. v. Welsh, 110 Mass. 359.

And lottery tickets taken at the time of arrest from one accused of maintaining a lottery are admissible in evidence against him, although taken in the course of an illegal search of his office. State v. Pomeroy, 130 Mo. 489, 32 S. W. 1002.

Nor are criminatory articles and letters found by an officer in the possession of the defendant inadmissible in a prosecution for an attempt to cause an abortion because the officer who found them had no warrant to search for them, his only authority being under a warrant to search her husband's premises for intoxicating liquor. Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910.

So, though a search warrant issued pursuant to 14 U. S. Stat. at L. 547, chap. 188, § 2, was illegal, books, letters, and documents obtained thereby are properly admitted in evidence in a proceeding by the United States against the person from whom they were obtained to recover penalties for alleged illegal importation, where they were pertinent to the issue, and were offered in evidence in the same condition in which they were taken from the possession of the defendant. Stockwell v. United States, 3 Cliff. 284, Fed. Cas. No. 13,466.

And papers taken by a marshal under a search warrant, and placed in the hands of a district judge, may, under the act of Congress declaring that papers so seized shall be subject to the order of said judge, be put by him into the possession of the district attorney, to be used as evidence against the person from whom they were taken, in a proceeding by the United States for alleged illegal importation. *Ibid.*

And account books, letters, and documents taken from the custody of the defendant on a search warrant issued under 14 U. S. Stat. at L. 547, chap. 188, § 2, providing therefor when it shall appear by complaint and affidavit, to the satisfaction of the district judge, that a fraud on the revenue has been committed, are not subject to objection as evidence in an action by the United States for duties and penalties for alleged illegal importation, on the ground that they were obtained by force of a search warrant not accompanied by the complaint or affidavit, where it appears by the warrant that it was shown by complaint and affidavit, to the satisfaction of the judge, that the alleged frauds had been committed. *Ibid.*

Nor are they subject to objection on the ground that the warrant did not allege that the district judge became satisfied by complaint and affidavit that the alleged frauds had been committed, where no exception was taken to the rule of the trial court admitting such books and documents. *Ibid.*

But see, as to the above case, the consideration given it in II. b, *supra*.

So, in Jordan v. Lewis, 14 East, 305, note (said to be a better report than that in 2 Strange, 1122), the plaintiff presented in evidence a copy of the indictment upon which he sued, and its admissibility was objected to because the copy had been furnished [illegible] the order of the court. The court of King's bench held that the paper was admissible, for, being a copy of the indictment, the court could not refuse to receive it in evidence, nor could it take notice in what manner it was obtained.

And in a case involving similar facts (Legatt v. Tollervey, 14 East, 302) Lord Chief Justice Ellenborough announced it to be the opinion of the court that, even if it were found that the judge or court had refused to allow the party acquitted of a criminal charge to have a copy of the indictment, in a subsequent action for a malicious prosecution on that charge a copy of the indictment, which the plaintiff is able to prove to be in fact a true copy, is admissible though surreptitiously obtained.

And in Com. v. Smith, 166 Mass. 370, 44 N. E. 503, it was said by Judge Holmes, in giving the decision of the court, that the mode in which an unlawful ticket was obtained from the accused does not make it inadmissible in evidence against one accused of its unlawful possession, even if the right of objecting to it had been reserved in the agreed facts, which was not the case.

And in the anarchists' case.—Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898.—it was objected that a letter taken from the defendant and placed in evidence by the act of the state was not admissible in evidence against him be-

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that Dennison had gotten from the bank was all in $20 bills, and the cashier of the bank testified that the bills found in the defendant's possession looked very much like those which he had given the prosecutor at the bank. The indictment contained three counts. Two of them were in the usual form, and the third contained allegations of false pretense and misrepresentation. On motion to quash the indictment and each count thereof, the court sustained the motion as to the last count, and overruled it as to the others. On the trial the jury found the defendant guilty on the second count of the indictment and acquitted him as to the first count. A motion to set aside the verdict was overruled, and the prisoner was sentenced to three years' confinement in the penitentiary. Several exceptions were taken, and the case has been brought to this court on a writ of error.

Unless there is some error by the admission of improper evidence, or in reference to the instructions, the verdict cannot be disturbed. Where a person, by means of some fraud or trick, and with intent to steal, procures the delivery of money or goods to him by the owner, it amounts to a taking, within the definition of larceny, unless the delivery of the possession is made for the purpose of passing the property or title in the goods as well as the possession. And if possession be acquired by such means, and with such intent, and the goods or money are afterwards converted by the taker to his own use, the offense is larceny; and whether such intent existed at the time of the taking and practice of the fraud is a question for the jury. But this distinction must be borne in mind: If the property is delivered with the intention on the part of its owner of parting with it al-

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cause obtained by unlawful seizure; but the court said that the record was not in such shape as to permit counsel to make the point.

See also Shields v. State, 104 Ala. 35, 16 So. 85, *supra*, II. b; Chastang v. State, 83 Ala. 29, 3 So. 301; State v. Van Tassel, 103 Iowa, 672 N. W. 497; Evans v. State, 106 Ga. 519, 32 S. E. 659, *infra*, IV.

IV. *Rule as to articles unlawfully possessed, or in which the public has an interest.*

Articles which are or may be used in unlawful traffic are admissible in evidence against one in whose possession they are found, however obtained by the state, even if produced by an unauthorized and illegal search. State v. Burroughs, 72 Me. 479; Com. v. Henderson, 140 Mass. 303, 5 N. E. 832.

And in such case the admissibility in evidence against the accused of such articles found upon his premises is unaffected by any inquiry as to whether the proceedings of the officer serving the search warrant were regular and lawful or not. Com. v. Henderson, 140 Mass. 303, 5 N. E. 832.

Thus, in People v. Hess, 85 Mich. 128, 48 N. W. 181, it is held that gaming instruments wherewith an unlawful business is being carried on are admissible in evidence against one accused of their unlawful possession and use; and that it is immaterial that the things in question were seized from the defendant without a warrant when no warrant was necessary,—as when the police found them in a room or rooms to which the public were invited.

And in Com. v. Henderson, 140 Mass. 303, 5 N. E. 832, it was held that liquors seized on the premises of the defendant are admissible in evidence, in a prosecution for unlawfully exposing and keeping for sale intoxicating liquors with intent unlawfully to sell them, whether the proceedings of the officer in serving the search warrant, under which they were taken, were regular and lawful or not.

Likewise, where one stands charged with keeping and maintaining a place where intoxicating liquors are sold, bartered, or given away in violation of law, and evidence discloses sales made by him in a place fitted up for that purpose, and that such place is one where people, generally congregate to drink intoxicating liquors as a beverage, it is competent for the court to permit the state to introduce in evidence prohibited articles which are shown to have been taken from the place charged as being a public nuisance. State v. O'Connor, 3 Kan. App. 594, 43 Pac. 859.

And jugs, bottles, and other paraphernalia, seized by officers at the time of making an arrest for maintaining a common nuisance by maintaining a place for the sale of intoxicating liquors, are not rendered inadmissible in evidence against the accused by the Kansas Bill of Rights, providing that no person shall be a witness against himself, and that the right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate, where the act under which the seizure was made was one directly in the police power of the state, and was not one seeking to take the lawful property of any individual, but simply to gather in those things the possession of which, for prohibited purposes, is itself prohibited. *Ibid.*

In the above case, Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, *supra*, II. b, was distinguished on the ground that in that case private papers were seized, to be used as evidence against the defendant, which were his property and rightfully in his possession, and not in themselves unlawful.

So, articles which constitute a token of, or a device for the commission of, a crime, or in which the government is interested for the purpose of suppressing or preventing crime, are legitimate evidence for the state, and may be taken from the possessor and used for that purpose without reference to the manner of taking. This is the doctrine of STATE v. EDWARDS.

And laws which provide for search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within the category of those prohibiting unreasonable search and seizure. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Langdon v. People, 133 Ill. 382, 24 N. E. 874.

And where a certificate which was the subject of the crime of forgery was concealed in the office of the accused, and a warrant based upon the forged certificate might have been issued to secure the return of a fugitive, the public has an interest in its destruction so that it shall not be used wrongfully to procure action by the executive of a sister state, and it is admissible in evidence in a prosecution for the forgery, though seized and taken from the office of the accused, over his objection that it had been pro-

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together, passing both title and possession, the offense is not larceny, but obtaining property by false pretenses; but if the owner is induced to deliver the possession only, the taker having a preconceived design to convert it to his own use when obtained, it is implied that the taking is against the will of the owner, and the offense is larceny. While the act of taking, in order to constitute larceny, must be a trespass against the owner's possession, actual violence is not necessary, for in these cases the fraud by which possession is acquired takes the place of force. 18 Am. & Eng. Enc. Law, 2d ed. pp. 469, 478; 12 Am. & Eng. Enc. Law, 2d ed. p. 805. These principles are well illustrated in numerous cases, and the application of them runs back to some of the very old English cases. In *Semple's Case*, 1 Leach C. L. 420, it was held that to hire a chaise for any length of time with an intention to convert it wrongfully to the use of the hirer is larceny, and the nondelivery of it to the owner is evidence of such conversion. In *Pear's Case*, 1 Leach C. L. 213, it is held that the obtaining of a horse under the pretense of hiring it for a day is felony, if the jury find the hiring was *animo furandi*. In *Patch's Case*, 1 Leach C. L. 238, it is held that to obtain property from another by the practice of ring dropping is felony, if the jury find it was obtained under a preconceived design to steal it. In *Moore's Case*, 1 Leach C. L. 314, it is held that to aid and assist a person, to the jury unknown, to obtain money by the practice of ring dropping, is felony, if the jury find that the person was confederating with the person unknown to obtain the money by means of the ring. In this case, after the prosecutor and the prisoner's confederate had agreed

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cured by an unreasonable search and seizure. Langdon v. People, 133 Ill. 382, 24 N. E. 874.

And prescriptions of druggists, required by Mo. Rev. Stat. § 4622, are not within that class of private papers shielded from inspection for the purpose of obtaining evidence against the druggist by the constitutional provision that no person shall be compelled to testify against himself in a criminal cause, since the state has a right to control, regulate, or altogether prohibit, the sale of intoxicating liquors, and has the right to impose such conditions upon those whom it may authorize to sell such liquors as it may deem necessary to properly regulate and control their use. State v. Davis, 108 Mo. 666, 18 S. W. 804.

So, in Evans v. State, 106 Ga. 519, 32 S. E. 659, it was held that evidence of guilt found upon a person under legal arrest may be used against him, but that, where a person not in legal custody is compelled to furnish incriminating evidence against himself, the evidence is not admissible; and evidence that a person while not under legal arrest had been compelled to put his hand into his pocket and surrender a pistol, thus declaring that he was violating the law, is not admissible upon a prosecution against him for carrying a concealed weapon.

It is to be observed that many of the cases set forth in II. b, II. c, and III., *supra*, were also cases of the production and offer in evidence of articles which it was unlawful to possess, or which rightfully belonged to the custody of the law. Such cases, however, were placed in the subdivisions above referred to because the question considered in them was not the effect of the fact that the article was unlawfully possessed, or rightfully belonged to the custody of the law, but the effect of the constitutional restrictions as to unreasonable searches and seizures, and compelling one to give evidence against himself, or of the fact that there the taking was wrongful, or unlawful, respectively.

V. *To what proceedings foregoing rules apply.*

In United States v. Mason, 6 Biss. 350, Fed. Cas. No. 15,735; United States v. Three Tons of Coal, 6 Biss. 379, Fed. Cas. No. 16,515; and United States v. Distillery No. 28, 6 Biss. 483, Fed. Cas. No. 14,966,—it was held that proceedings against property for a violation of the revenue laws are not criminal cases within the meaning of the constitutional provisions that no person in criminal cases shall be compelled to give evidence against himself and prohibiting unreasonable searches and seizures; but the question in those cases was as to the right to require the production and examination of certain books belonging to the defendants, and not as to their admissibility in evidence.

And a proceeding in which a person is summoned before the assessor to answer questions with reference to his returns and assessments, provided for by 14 U. S. Stat. at L. p. 101, chap. 184, is held to be a civil, and not a criminal, proceeding in which a compulsory production of his books and papers would violate constitutional provisions against unreasonable searches and seizures and against being compelled in a crminal case to give evidence against oneself. *Re* Strouse, 1 Sawy. 605, Fed. Cas. No. 13,548.

A proceeding to forfeit a person's goods for an offense against the laws, however, though civil in form, and whether *in rem* or *in personam*, is a criminal case within the meaning of the 5th Amendment of the Constitution, declaring that no person shall be compelled in any criminal case to be a witness against himself, so as to render inadmissible in evidence books and papers which a person is compelled to produce. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

And the rule of decision in the above case, to the effect that a requirement for the production of private books, invoices, and papers or that the opposing allegations respecting them shall be taken as confessed is unconstitutional as applied to suits for penalties or to establish a forfeiture, is equally applicable to the case of a compulsory production of the private books and papers of a party in proceedings other than judicial, as before a legislative commission of inquiry, since it is the forcible entry into, and the compulsory exposure of, one's private affairs and papers without judicial process, or not in the course of judicial proceedings, which are contrary to the principles of free government. *Re* Pacific R. Commission, 32 Fed. 242.

And under a constitutional provision that in all criminal prosecutions the accused shall not be compelled to give evidence against himself, a criminal cause is as much a criminal prosecution when before a grand jury as when before a court. *Ex parte* Wilson, 39 Tex. Crim. Rep. 630, 47 S. W. 1000.

So, the Missouri statute providing that the secretary of state shall address to every corporation doing business in the state a letter of inquiry as to whether it has merged all or any part of its business or interest in or with any "trust," to which reply must be made un-

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to divide the value of the ring between them, the prosecutor gave him 20 guineas and 4 doubloons on the faith of the ring, which he held as a pledge, with the understanding that the stranger should return them the next morning and take the ring and give the prosecutor 100 guineas for his share of the ring. The reporter says: All the judges agreed that, in considering the nature of larceny, it was necessary to attend to the distinction between the parting with the possession and the parting with the property only; that in the first case it is felony, and in the last case it is not. Upon the circumstances of the present case, two of the judges were of opinion that the doubloons were to be considered as money, and that the whole was a loan on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced on it, and therefore that the possession, as well as the property, was parted with; but nine of the judges were clearly of opinion that it was felony, for they thought the 20 guineas and the 4 doubloons were only deposited in the nature of a pledge till the half of the supposed value of the ring was paid to the prosecutor, and therefore he had parted with the property only, and not with the possession. *Loomis* v. *People*, 67 N. Y. 322, 23 Am. Rep. 123, was a case very similar to this one. Olason, the prosecutor, was decoyed into a saloon by Lewis, a confederate of the prisoner, Loomis. Lewis pretended to have a check for $500, on the faith of which he got Olason to loan him $90 in the following manner: Loomis and Lewis threw dice for $5, Loomis losing. Then Lewis agreed to divide that with Olason, but he declined to have anything to do with it. Then Loomis put up what was called $100, and Lewis, having only $10, applied to Olason for $90 more, saying, "I am sure to beat him again, and you can have your money back. If I do lose, I have got the check for $500, and we will go to the bank and get the check cashed, and you can have the money." Olason let him have the money, the dice were thrown, and Loomis won. Olason wanted his money back, but Lewis asked him to let him have $100 more, which he refused. Then Lewis put up the pretended $500 check against the $100 put up by

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der oath, the corporation and its managers being made liable to a forfeiture of goods, and the officers to imprisonment, should the evidence thus forced from them disclose a breach of law on the part of the corporation; and, furthermore, a failure to reply to such inquiry would sanction the immediate revocation of the corporate charter,—violates the constitutional provision that no person shall be compelled to testify against himself in a criminal cause. State *ex rel.* Atty. Gen. v. Simmons Hardware Co. 109 Mo. 127, 15 L. R. A. 678, 18 S. W. 1126.

VI. *Conclusion.*

The common-law maxim *Nemo tenetur seipsum accusare* is usually found in American law in a constitutional provision that no one shall be compelled to testify against himself in a criminal cause. This protection extends to all causes of a criminal nature wherein the rights of life, liberty, or property of any man, be he alien or citizen, are in peril. But, while it is agreed that the constitutional provision is a limitation upon all governmental activity, many of the cases hold that an accused person is not thereby protected against the admission in evidence against him of papers or things which have been obtained from him in modes and by means which are not justified by the rules of fair dealing.

The cases show the general rule to be that private papers and things are generally held admissible in evidence against the one unjustly or unwittingly deprived of their possession, if they are not taken or their production required by the government itself; in such case the agent is responsible as an individual for his conduct, but the courts will avail themselves of the fruits of his work if relevant and competent.

And the line of distinction between the things which may be produced and put in evidence and those the production of which would contravene constitutional principles seems to lie between articles which have no voice and cannot speak for themselves, and which furnish evidence only because of their character as tokens of a crime, and of their connection with the subject-matter, on the one hand, and articles in the nature of letters and papers which speak their own language and for themselves, and which frequently constitute admissions, and which are required by law to be produced for use against their owner, on the other hand.

There seems to be no question but that papers and things are admissible in evidence against an accused person from whom they were obtained by lawful search and seizure, as in STATE v. EDWARDS. And it appears that papers of a public nature, or in which the public has an interest, and things which are unlawfully the subject of private property, are always admissible in evidence against an accused person.

We have made no effort to collate and digest the hundreds of cases wherein stolen property, instruments of burglary, larceny, homicide, and other crimes, or other things taken from an accused person, were admitted *sub silentio* in evidence against him. Such things are admissible in evidence if a part of the *corpus delicti*, unless by their admission an accused person is compelled to testify against himself,—which can only be the case where the papers or things are admitted over his objection; for then only can an accused person avail himself of the constitutional protection against being compelled to testify against himself.

As said by Barclay, J., in State *ex rel.* Atty. Gen. v. Simmons Hardware Co. 109 Mo. 127, 15 L. R. A. 678, 18 S. W. 1126, a case of the requirement that an officer of a corporation furnish certain information, "the constitutional provision before us [against compulsory self-crimination] is, no doubt, quite inconvenient in some instances, as a barrier to investigation of criminal conduct, but its larger value in expressing and enforcing a principle of individual right is thought to more than counterbalance such inconvenience." It is "one of the most important of the rules of procedure that express the fundamental difference between the criminal practice prevailing in continental Europe and that of countries which trace their laws, as we do, to the English source. In the former, the accused is required to submit to a rigid official examination touching the charge against him. In the latter, such an examination is positively forbidden."

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Loomis, and Loomis won that, whereupon Lewis declared he was worth nothing, and the two confederates went away with Olason's money. This was held to be sufficient to constitute larceny. Miller, J., delivering the opinion of the court, says: "There is, to be sure, a narrow margin between a case of larceny and one where the property has been obtained by false pretenses. The distinction is a very nice one, but still very important. The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offense. In the former case, where by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established; while in the latter, where title, as well as possession, is absolutely parted with, the crime is false pretenses." *Miller v. Com.*, 78 Ky. 15, 39 Am. Rep. 194, is very similar to the *Loomis Case*. There, the prosecutor, being intoxicated, was lured into a room where a game of faro was being operated by the conspirators. The game was called a "brace" game, and was so conducted that the conspirators always won, and it was impossible for others to win. Here, the prosecutor gave the defendant's confederate $10 at three different times to bet on the game, and each time it was lost. On this state of facts, Cofer, J., said: "When the money was given to Smith to bet, it ought not to be assumed that the prosecutor meant more than that it should be hazarded on the game, and to part with his property if he lost. But if, by concert between Smith and Miller, they knew, before the cards were dealt, that it would be lost, they are guilty precisely as if by concert between them Smith had obtained the money to bet, and immediately, without going through the mere form of betting, had divided it between them." *People v. Rae*, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1, is another case which, although materially different from this one in its facts, embodies the same principle; and it was there held that "when, by means of fraud, conspiracy, or artifice, possession of property is obtained with felonious intent, and the title still remains in the owner, the crime is larceny; but if the title as well as the possession is parted with, the crime is that of obtaining property by false pretenses."

Applying these principles to the case under consideration, it was clearly right to submit to the jury the determination of the question whether the prisoner did all the acts which induced the prosecutor to part with the possession of his money, with a preconceived purpose and design to take his money and convert it to his own use. The evidence in the case shows that the $300 was not to be used in any game thereafter to be played, but was simply to be produced and shown with the pretended $1,700 of the prisoner's money, as a condition precedent to the relinquishment to them by the prisoner's confederate of the $2,000 which, it was pretended, they had already won from the stranger; and the prosecutor's money was delivered to the prisoner for a special and very limited purpose, namely, to put it with the $1,700 in the box to make a total of $2,000, which, with the money won from the confederate, made in all $4,000, composed of what they had risked and won, and which the prosecutor and prisoner were to divide. Such being the facts, there was nothing more than a bailment of the prosecutor's money, and he had no intention of parting with anything but its mere possession, for a very special purpose, to be executed in his presence, and the money to be returned to him and to remain in his possession until the prisoner should return for the purpose of making the division. In the execution of this purpose, for which the money was put in the hands of the conspirators, they fraudulently, and by means of a trick and device, abstracted it from the box and carried it away. "Where money is placed by the owner in the hands of another person to be applied to a special purpose, such as the payment of the owner's debts, and such person appropriates the money so committed to him, it is larceny, though the relation of master and servant did not exist; but it is not larceny if the money was to have been kept for the owner, or used for him, by way of investment or otherwise." 18 Am. & Eng. Enc. Law, 2d ed. p. 476. If the jury had found from the evidence, or if it clearly appeared to the court from the evidence, that the prosecutor intended to part with the title as well as the possession of his money, there could be no conviction of the crime of larceny, but there might be a conviction of the crime to obtain money by false pretenses. But it cannot be inferred from anything in the evidence in this case that the prosecutor intended to part with anything but the possession of his money for a very limited time and a very special purpose. It was represented to him that he had already won the money, and that the delivery of the possession of his money was for the mere purpose of showing that he had it, after which it was to be returned, with all the other pretended money, to him, to be by him held until it should be divided. It was for the jury to say whether it was with a design and intention on the part of the prisoner and his associate to steal the prosecutor's money that they approached him as they did and pretended to play a game in which they represented that he had won, and thereby induced him to thus part with the possession of his money. On the trial the jury did so find, and the verdict cannot be disturbed on the ground that it is contrary to the law and the evidence.

The prisoner asked the court to instruct the jury that if they believed from the evidence that the prosecutor willingly and voluntarily parted with his property by placing it in the hands of the prisoner, to be used for an illegal and illegitimate purpose, and the prisoner afterwards converted the property to his own use, there could be no conviction of larceny. The court refused to

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give the instruction, and it is argued that this was error. If the prosecutor had bet his $300 on the game, and had lost it, he could have recovered it in a civil action, under § 2 of chapter 97 of the Code. There is no evidence that he loaned or advanced the prisoner the money to be bet or wagered in a game, so as to bring it within the meaning of §1 of said chapter. Assuming that there is evidence that this money was to be used in a game to be played after it was delivered, it was to be used as the money of the prosecutor, and not as money loaned to the prisoner. But there is no such evidence. The evidence only tends to show that the pretended game had already been played, and that it was in fact a mere trick and device in the scheme to get the possession of the prosecutor's money. Hence, the statute against gaming has no application here. And there is nothing in the case from which it appears that the prosecutor's title to his money was forfeited, so as to relieve the prisoner from the charge of the larceny thereof, even if such forfeiture, when it does exist, would have that effect. So the instruction was properly refused.

Another objection is that it was error to permit the state to introduce testimony tending to show that the defendant obtained the money by means of false representations, trickery, and fraud, for the reason that the indictment does not specify the means by which the larceny was effected. There is nothing in this. It has been held repeatedly in Virginia that a conviction of larceny for obtaining money under false pretenses may be sustained upon a common-law indictment for larceny. *Dowdy* v. *Com.*, 9 Gratt. 727, 60 Am. Dec. 314; *Leftwich* v. *Com.* 20 Gratt. 716; *Price* v. *Com.* 21 Gratt. 846; *Anable* v. *Com.* 24 Gratt. 563; *Fay* v. *Com.* 28 Gratt. 912. 2 Bishop, Crim. Proc. § 185, says of this Virginia doctrine that it would be contrary to principles generally maintained. But it is certainly sufficient where the case is one of pure common-law larceny, as this one is.

The attorney for plaintiff in error devotes a great deal of his brief to his objection to the admission of the worthless state bank notes as evidence in the case, on the ground that these papers, having been taken from the person of the defendant by the officer who arrested him, were illegally seized. One complete answer to this is that, if it was an illegal seizure, that is no objection to the use of the papers as evidence, they being proper evidence in the case in other respects; for the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would it form a collateral issue to determine that question. *Com.* v. *Dana*, 2 Met. 329, 337; *Legatt* v. *Tollervey*, 14 East, 302; *Jordan* v. *Lewis*, 14 East, 305, note. But the seizure was not illegal, for the reason that these papers were instruments or tokens used by the defendant in the perpetration of the crime with which he is charged, and with which he stood charged at the time they were taken from his person. There is such a thing as unreasonable search, which the law will not permit; but where a man stands charged with crime, and an instrument or device is found upon his person or in his possession which was a part of the means by which he accomplished the crime, those instruments, devices, or tokens are legitimate evidence for the state, and may be taken from him and used for that purpose. If it were otherwise, the pistol with which a murderer shoots down his victim, or the dagger with which he stabs him, inseparably connected with the *corpus delicti*, and, therefore, competent and legitimate evidence, could not be taken from the pocket of the murderer and used as evidence against him, for the reason that they belong to him and are found upon his person. It is well settled that a person in custody on a criminal charge may be subjected to a personal search and examination against his will, in order to discover upon him evidence of his criminality. *Pickett* v. *State*, 59 Am. St. Rep. 228, note (99 Ga. 12, 25 S. E. 608), citing *Rusher* v. *State*, 94 Ga. 363, 21 S. E. 593; *Ex parte Hurn*, 92 Ala. 102, 13 L. R. A. 120, 9 So. 515; *Closson* v. *Morrison*, 47 N. H. 482, 93 Am. Dec. 459. In *Shields* v. *State*, 104 Ala. 35, 16 So. 85, a pistol found concealed upon the defendant's person by an officer, prior to his arrest, by making forcible search of his person, was held admissible against the defendant, although the search was unauthorized and unlawful. Take the case of a burglar who is charged with the crime. Is it possible that the officer arresting him upon a warrant for his arrest cannot take from his person the kit of tools with which he effected the burglary? Certainly he may. What are these old papers except the instruments as effectually used in closing the eyes of Dennison to the larceny of his money which the defendant was perpetrating under the deception practised by their use as a burglar uses his jimmy to break open a safe? The case of *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, is not in point. There, the unlawful seizure discussed is of private papers, such as books, correspondence, bills, invoices, and other papers relating to goods which it was claimed had been imported in violation of the revenue laws. Neither the papers in question, nor the case, was at all similar to this one. The case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, in which Lord Camden delivered the opinion which, Mr. Justice Bradley says, is considered one of the landmarks of English liberty, a permanent monument to the British Constitution, and a monument of English freedom, was an action of trespass for entering the plaintiff's dwelling and breaking open his desks, boxes, etc., and searching and examining his papers. That was not a case in which instruments for the perpetration of crime were taken from the person of a man actually charged with the very crime in which the instruments were used. What has been said on this subject disposes of the objection to the admission of the testi-

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mony of witnesses Boggess, Harrison, Fleming, and Dennison concerning these old papers.

Instruction No. 2, given for the state, is complained of. It was, substantially, that there might be larceny even though the possession of the property stolen was willingly relinquished by its owner, and that if the jury believed from the evidence, beyond a reasonable doubt, that the defendant obtained the possession of Dennison's money by means of false representations, with felonious intent at the time of stealing it, and, after obtaining its possession, he feloniously converted the same to his own use without the consent of Dennison, they should find the defendant guilty. This is a correct enunciation of the law, as has been shown, and the instruction was properly given. Instruction No. 2, asked for by the defendant, was refused, and it is claimed that the court erred therein. It was to the effect that, to constitute the crime of larceny, there must be a taking and carrying away by a trespass of the personal property, etc., without any explanation of the meaning of the word "trespass," or what amounts to trespass in such case. From what has been said on this subject, it is manifest that the instruction would have been misleading. It was, therefore, properly refused. Instruction No. 5, asked for by the defendant, was also refused, and the action of the court in reference to it is complained of. It was, in substance, that there could be no conviction for larceny upon evidence of obtaining money under false representations if the jury believe Dennison had willingly parted with his money. There was no evidence to warrant the instruction upon the law of obtaining money under false pretenses. There was nothing in the evidence from which it might be inferred that Dennison had parted with anything more than the possession of his money, and that, as has been shown, he might do willingly, and yet the defendant could, nevertheless, be convicted of larceny. The evidence only imported a common-law larceny.

The judgment is free from error, and must be affirmed.

NORTH CAROLINA SUPREME COURT.

Price LEFLER *et al.*
v.
WESTERN UNION TELEGRAPH COMPANY, *Appt.*

(131 N. C. 355.)

1. **Delivery of a telegram directed to a person in care of a railroad company** at a certain place, to the ticket agent of the company there, after making extensive search for the sendee, relieves the telegraph company from further liability.
2. **Information as to the contents of a telegram** need not be given to the sendee's agent when delivery is made to him.

(November 25, 1902.)

APPEAL by defendant from a judgment of the Superior Court for Rowan County in plaintiffs' favor in an action brought to recover damages for failure to deliver a telegram promptly. *Reversed.*

The facts are stated in the opinion.

Messrs. **C. H. Armfield** and **W. D. Turner**, for appellant:

Where the facts are admitted, and one inference only can be drawn from these facts by a reasonable man, then, whether or not they constitute negligence is a question of law for the court; but, where different conclusions may be drawn from the same facts by different men, then the question is for the jury.

Tillett v. *Norfolk & W. R. Co.* 118 N. C. 1031, 24 S. E. 111; 2 Thomp. Neg. § 11, p. 1236.

A delivery to the Southern Railway Company, in whose care the message had been sent, was a compliance by the defendant with its contract.

Western U. Teleg. Co. v. *Young*, 77 Tex. 245, 13 S. W. 985; *Western U. Teleg. Co.* v. *Elliott*, 7 Tex. Civ. App. 482, 27 S. W. 219; *Western U. Teleg. Co.* v. *Newhouse*, 6 Ind. App. 422, 33 N. E. 800; *Western U. Teleg. Co.* v. *Terrell*, 10 Tex. Civ. App. 60, 30 S. W. 70; *Western U. Teleg. Co.* v. *Mitchell*, 91 Tex. 454, 40 L. R. A. 209, 44 S. W. 274; *Western U. Teleg. Co.* v. *Mosely* (Tex. Civ. App.) 67 S. W. 1059.

Messrs. **F. H. Busbee** and **George M. Fearons** also for appellant.

Messrs. **Overman & Gregory** and **Long & Nicholson** for appellees.

Furches, Ch. J., delivered the opinion of the court:

Action for damages for negligence in delivering a message received at Mooresville, Iredell county, to be delivered at Salisbury, Rowan county. The message was as follows:

To Price Lefler,
Care So. Railway Co., Salisbury, N. C.:
Mother dying. Come at once.
D. M. Howard.

NOTE.—As to sufficiency of delivery to captain of steamboat of message to passenger, see, in this series, Davies v. Eastern S. B. Co. (Me.) 53 L. R. A. 239.

As to sufficiency of delivery to clerk of hotel where addressee boards, see Western U. Teleg. Co. v. Cobb (Tex.) 58 L. R. A. 698.

As to duty of telegraph company to find person addressed generally, see Western U. Teleg. Co. v. Houghton (Tex.) 15 L. R. A. 129, and *note*.

As to sufficiency of delivery to wife of addressee when he is absent, see Western U. Teleg. Co. v. Mitchell (Tex.) 40 L. R. A. 209.

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This message was received by defendant company at 8:20 at Mooresville, and received at Charlotte at 10:55, and at Salisbury at 11:15. The evidence tended to show that the agent at Mooresville endeavored to send the message to Charlotte at once, but the agent at Charlotte did not answer his calls, and he could not do so sooner than he did. Upon the message reaching Salisbury, it was at once delivered to Leroy Shuping, a messenger boy sixteen years old, and who had lived at Salisbury all his life. He did not know Price Lefler, nor did he know where he lived, nor whether in Salisbury or not; and it would seem, from the evidence, that he made extensive search and inquiry for Lefler, the sendee, but was unable to find him. And this being so, at 11:15 o'clock he delivered the message to Johnson, the ticket agent of the Southern Railway at Salisbury. This delivery to Johnson was in time for the plaintiffs to have gone to Mrs. Howard's before her funeral, if the delivery had been made to Price Lefler in person.

The discussion of this case has assumed a wide range, as the discussion of such cases usually does. But not to consider what is not necessary for a decision of the case, the discussion is very much limited. The message was delivered to Johnson in proper time, and eliminates the discussion of any negligence there may have been in sending the message, as no negligence can avail the plaintiffs that did not cause the injury. It also eliminates a discussion as to whether the messenger boy, Shuping, used due diligence in trying to find Price Lefler or not, who was not in town at that time. The court properly instructed the jury that Johnson was a proper agent of the Southern Railway Company, to whom a delivery of the message might be made, and a delivery to him was a delivery to the Southern Railway Company, and, as the message was directed to Price Lefler in care of the Southern Railway Company, the said company was made his agent, and a delivery to the agent discharged the defendant from further liability on account of the message. *Western U. Telcg. Co.* v. *Houghton*, 82 Tex. 561, 15 L. R. A. 129, 17 S. W. 846; *Western U. Telcg. Co.* v. *Young*, 77 Tex. 245, 13 S. W. 985. These cases were cited by the plaintiffs for the purpose of showing that, although the telegram was sent in care of the Southern Railway Company, it was still the duty of the defendant to make diligent inquiry for Price Lefler, which the plaintiffs allege was not done. But upon examination of the cases it will be seen that this is only necessary when the party in whose care the message is sent cannot be found. When he is found, and delivery made to him, the defendant has nothing further to do with the telegram. In this case the messenger boy, Shuping, made extensive inquiry for Price Lefler before he delivered the message to the Southern Railway Company. This he need not have done, but might have delivered it to the Southern Railway Company at once. As the said company became the agents of the plaintiffs, a delivery to it was a delivery to the plaintiffs. *Houghton's Case*, 82 Tex. 561, 15 L. R. A. 129, 17 S. W. 846. And we cannot see, outside of the statute, how the defendant incurred any liability for not informing the plaintiffs' agent what was in the telegram. The plaintiffs were then in possession of the message, and it could speak for itself. If the defendant's messenger could have found Price Lefler and delivered the message to him, that would have been a compliance with its contract, and a discharge from any further liability. But it seems that a delivery to the wife of Price Lefler might not have been a sufficient delivery. It would not have been a literal compliance with the contract; but it would at least be a presumptive delivery, and a question for the jury, and, unless some reason was shown why it was not or should not be, it would be held sufficient. Gray, Communication by Telegraph, § 23.

While the court charged the jury correctly that a delivery to the Southern Railway Company was a compliance with the contract, and a delivery to Johnson was a delivery to said company, it erroneously charged the jury that if they found from the evidence that a prudent man would have informed Johnson, when the message was delivered to him, that "it was a very important message," then it was the duty of the defendant to have done so, "and, if it did not, it was guilty of negligence." This was excepted to, and was error. It was no part of the defendant's duty to inform the plaintiffs or their agent what the telegram contained, and it had no right to inform any one else.

For this error there must be a new trial.

Douglas, J., concurs in the result.

NEW YORK COURT OF APPEALS.

Abigail M. ROBERSON, by Margaret E. Bell, Guardian *ad Litem*, *Respt.*,
v.
ROCHESTER FOLDING BOX COMPANY *et al.*, *Appts.*

(171 N. Y. 538.)

1. The unauthorized publication of one's likeness by another person for advertising purposes will not support an action for injunction or for damages on the theory that it is an invasion of a "right of privacy."

2. Allegations that the publication of one's likeness by another person for advertising purposes exposes him to disgrace, ridicule, or obloquy are necessary to a com-

NOTE.—This is a case of extraordinary interest and importance. But it is greatly to be regretted that its determination has been made to depend almost entirely on the question of a

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plaint setting forth such publication as a libel.

(Gray, Bartlett, and Haight, JJ., dissent.)

(June 27, 1902.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Monroe County in plaintiff's favor in an action brought to enjoin the alleged wrongful publication of plaintiff's portrait, and to recover damages alleged to have been caused thereby. *Reversed.*

The facts are stated in the opinions.

Mr. **Elbridge L. Adams,** for appellants:

The complaint does not state a cause of action for libel.

White v. *Nicholls,* 3 How. 266, 11 L. ed. 591.

The publication of a woman's photograph, unaccompanied by any defamatory words or signs, is no more libelous than the publication of a verbal picture of her, minutely describing her beauty, her habits, and her costume. Both would be very offensive to a modest woman, but neither would give her a cause of action for defamation of her character.

Townshend, Slander & Libel, pp. 2, 3, 118; Holt, Libel, p. 244; 1 Hilliard, Torts, chap. 7, § 13; *White* v. *Nicholls,* 3 How. 266, 11 L. ed. 591; *Root* v. *King,* 7 Cow. 613; *People* v. *Croswell,* 3 Johns. Cas. 354.

The complaint states no cause of action known to the common law, either at law or in equity.

Selden's Table Talk, title, *Equity;* Pom. Eq. Jur. §§ 43, 57, 424; Story, Eq. Jur. §§ 14, 18, 20; Eaton, Eq. Jur. § 13; *Cowper* v. *Cowper,* 2 P. Wms. 720; *Manning* v. *Manning,* 1 Johns. Ch. 530; *Rees* v. *Watertown,* 19 Wall. 107, 22 L. ed. 72; Bl. Com. 443; *Day* v. *Brownrigg,* L. R. 10 Ch. Div. 294; *Ajello* v. *Worsley* [1898], 1 Ch. 274; *Donovan* v. *Finn,* Hopk. Ch. 59, 14 Am. Dec. 531; *Greene* v. *Keene,* 14 R. I. 388, 51 Am. Rep. 400; Snell, Eq. p. 17; *Johnson* v. *Crook,* L. R. 12 Ch. Div. 639.

The "right of privacy" is not a legal, actionable right.

3 Northwestern Law Review, p. 1; *Dockrell* v. *Dougall,* 78 L. T. N. S. 840; *Atkinson* v. *John E. Doherty & Co.* 121 Mich. 372, 46 L. R. A. 219, 80 N. W. 285; *Corliss* v. *E. W. Walker Co.* 31 L. R. A. 283, 64 Fed. 280; *Murray* v. *Gast Lithographic & Engraving Co.* 8 Misc. 36, 28 N. Y. Supp. 271; Salkowski, Roman Law, p. 608.

An injunction cannot be granted in this case, for equity deals only with matters of contract or property, and does not exercise jurisdiction in matters of morals or conduct.

Kerr, Inj. p. 1; High, Inj. § 1012; Eden, Inj. pp. 295, 296; *Woolsey* v. *Judd,* 11 How. Pr. 54.

Equity will not enjoin the publication of a libel.

Brandreth v. *Lance,* 8 Paige, 24, 34 Am. Dec. 368; *New York Juvenile Guardian Soc.* v. *Roosevelt,* 7 Daly, 188; *Mauger* v. *Dick,* 55 How. Pr. 132; *Boston Diatite Co.* v. *Florence Mfg. Co.* 114 Mass. 69, 19 Am. Dec. 310; *Francis* v. *Flinn,* 118 U. S. 385, 30 L. ed. 165, 6 Sup. Ct. Rep. 1148; *Raymond* v. *Russell,* 143 Mass. 295, 58 Am. Rep. 137, 9 N. E. 544; *Whitehead* v. *Kitson,* 119 Mass. 484; 8 How. St. Tr. 198; *Perceval* v. *Phipps,* 2 Ves. & B. 19.

The plaintiff cannot have damages, for the law takes no cognizance of mere injury to feelings.

Hobbs v. *London & S. W. R. Co.* L. R. 10 Q. B. 111; *Mitchell* v. *Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354, 4 Misc. 575, 25 N. Y. Supp. 744; *Chapman* v. *Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430, 15 S. E. 901.

Mr. **Milton E. Gibbs,** for respondent:

Defendant's use of plaintiff's portrait for advertising purposes, without her consent, constitutes an unwarrantable invasion of her "right of privacy," for which an action lies.

Schuyler v. *Curtis,* 27 Abb. N. C. 387, 15 N. Y. Supp. 787, 64 Hun, 594, 19 N. Y. Supp. 264, 30 Abb. N. C. 376, 24 N. Y. Supp. 509, 147 N. Y. 434, 31 L. R. A. 286, 42 N. E. 22; *Marks* v. *Jaffa,* 6 Misc. 290, 26 N. Y. Supp. 908; *Manola* v. *Stevens* (N. Y.) 4 Harvard Law Rev. 193; *Pollard* v. *Photographic Co.* L. R. 40 Ch. Div. 345; *Corliss* v. *E. W. Walker Co.* 31 L. R. A. 283, 57 Fed. 434, 64 Fed. 280; *Pierce* v. *Swan Point Cemetery,* 10 R. I. 227, 14 Am. Rep. 667.

It is not necessary that a property right should exist in order to call into action a court of equity.

Pierce v. *Swan Point Cemetery,* 10 R. I. 227, 14 Am. Rep. 667; *Snyder* v. *Snyder,* 60 How. Pr. 368; *Woolsey* v. *Judd,* 4 Duer, 379; *Pollard* v. *Photographic Co.* L. R. 40 Ch. Div. 345; 1 Story, Eq. Jur. §§ 49, 50; *Prince Albert* v. *Strange,* 1 Macn. & G. 25.

Every person has a property right in his own photograph, and until that right is surrendered he is its exclusive owner, and also of the additional right to make and circulate all copies of that photograph.

Pollard v. *Photographic Co.* L. R. 40 Ch. Div. 345; *Tuck* v. *Priester,* L. R. 19 Q. B.

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right of privacy. It would have been far more satisfactory if the case had been so presented and decided as to give full consideration to the question of the right of a person to be protected against the essentially defamatory use of his or her portrait in such manner as to cause disgrace or discredit, and the question of the property right of a person in the use of his or her own portrait, which will be protected against the unauthorized use of it by other persons for advertising purposes. The former of these questions was not considered because of the lack of an allegation as to the defamatory tendency of the publication. The latter is not at all discussed in the majority opinion.

On the question of the right of privacy generally, see, in this series, Corliss v. E. W. Walker Co. (C. C. D. Mass.) 31 L. R. A. 283, and *note;* Schuyler v. Curtis (N. Y.) 31 L. R. A. 286; and Atkinson v. John E. Doherty & Co. (Mich.) 46 L. R. A. 219.

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Div. 629; 8 Am. L. Reg. N. S. 1; *Prince Albert* v. *Strange*, 1 Macn. & G. 25; 12 Wash. L. Rep. 353; *Corliss* v. *E. W. Walker Co.* 31 L. R. A. 283, 57 Fed. 434, 64 Fed. 280; *Wynehamer* v. *People*, 13 N. Y. 433.

The fact that this case may be new in instance is not a sufficient reason for turning the plaintiff out of court.

Piper v. *Hoard*, 107 N. Y. 73, 13 N. E. 626; *Kujek* v. *Goldman*, 150 N. Y. 176, 34 L. R. A. 156, 44 N. E. 773; *Sorensen* v. *Balaban*, 11 App. Div. 164, 42 N. Y. Supp. 654; *Hoefler* v. *Hoefler*, 12 App. Div. 84, 42 N. Y. Supp. 1035.

The lithographic portraits of plaintiff were her property, and she has a right to an accounting of sales and uses of the same by the defendants.

7 Am. & Eng. Enc. Law, 2d ed. pp. 584–588; *Hier* v. *Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Piper* v. *Hoard*, 107 N. Y. 73, 13 N. E. 626; *Jewelers' Mercantile Agency* v. *Jewelers' Weekly Pub. Co.* 155 N. Y. 241, 41 L. R. A. 846, 49 N. E. 872.

The plaintiff is entitled to damages for her mental distress and annoyance, besides the recovery of the profits made by the use of her picture.

Moyer v. *Gordon*, 113 Ind. 282, 14 N. E. 476; 8 Am. & Eng. Enc. Law, pp. 659, 669–672; Sedgw. Damages, p. 35; *Byrne* v. *Gardner*, 33 La. Ann. 6; *Hamilton* v. *Third Ave. R. Co.* 53 N. Y. 28; *Prince* v. *Ridge*, 32 Misc. 666, 66 N. Y. Supp. 454; *Lewis* v. *Hoover*, 3 Blackf. 407; *Newell* v. *Whitcher*, 53 Vt. 589, 38 Am. Rep. 703; *Leach* v. *Leach*, 11 Tex. Civ. App. 699, 33 S. W. 703; *Barbee* v. *Reese*, 60 Miss. 906; *Williams* v. *Underhill*, 63 App. Div. 223, 71 N. Y. Supp. 291; *Preiser* v. *Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890; *Moore* v. *Rugg*, 44 Minn. 28, 9 L. R. A. 58, 46 N. W. 141.

Parker, Ch. J., delivered the opinion of the court:

The appellate division has certified that the following questions of law have arisen in this case, and ought to be reviewed by this court: (1) Does the complaint herein state a cause of action at law against the defendants, or either of them? (2) Does the complaint herein state a cause of action in equity against the defendants, or either of them? These questions are presented by a demurrer to the complaint, which is put upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

As a demurrer admits, not only those facts which are expressly alleged in the complaint, but everything which can be implied by fair and reasonable intendment from its allegations (*Marie* v. *Garrison*, 83 N. Y. 14, 23), we are to inquire whether the complaint, regarded from the standpoint of this rule, can be said to show any right to relief either in law or in equity. The complaint alleges that the Franklin Mills Company, one of the defendants, was engaged in a general milling business and in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold, and circulated about 25,000 lithographic prints, photographs, and likenesses of plaintiff, made in a manner particularly set up in the complaint; that upon the paper upon which the likenesses were printed and above the portrait there were printed, in large, plain letters, the words, "Flour of the Family," and below the portrait, in large capital letters, "Franklin Mills Flour," and in the lower right-hand corner, in smaller capital letters, "Rochester Folding Box Co., Rochester, N. Y.;" that upon the same sheet were other advertisements of the flour of the Franklin Mills Company; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons, and other public places: that they have been recognized by friends of the plaintiff and other people, with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement, and her good name has been attacked, causing her great distress and suffering, both in body and mind; that she was made sick, and suffered a severe nervous shock, was confined to her bed, and compelled to employ a physician, because of these facts; that defendants had continued to print, make, use, sell, and circulate the said lithographs, and that by reason of the foregoing facts plaintiff had suffered damages in the sum of $15,000. The complaint prays that defendants be enjoined from making, printing, publishing, circulating, or using in any manner any likenesses of plaintiff in any form whatever; for further relief (which it is not necessary to consider here); and for damages.

It will be observed that there is no complaint made that plaintiff was libeled by this publication of her portrait. The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize. Indeed, her grievance is that a good portrait of her, and therefore one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture, without her consent, for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes; but, as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and, as an incident thereto, to reimburse her for the damages to her feelings which the complaint fixes at the sum of $15,000. There is no precedent for such an action to be found in the decisions of this court. Indeed, the learned judge who wrote the very able and interest-

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ing opinion in the appellate division said, while upon the threshold of the discussion of the question: "It may be said, in the first place, that the theory upon which this action is predicated is new, at least in instance, if not in principle, and that few precedents can be found to sustain the claim made by the plaintiff, if, indeed, it can be said that there are any authoritative cases establishing her right to recover in this action." Nevertheless that court reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "right of privacy;" in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent, or any other of the great commentators upon the law; nor, so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness, and no inconsiderable ability, in the Harvard Law Review (vol. 4, p. 193) in an article entitled "The Right to Privacy." The so-called "right of privacy" is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspapers rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other, for the principle which a court of equity is asked to assert in support of a recovery in this action is that the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a portrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances. If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations, or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right, and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are required to decide cases upon principle, and so are necessarily embarrassed by precedents created by an extreme, and therefore unjustifiable, application of an old principle. The court below properly said that, "while it may be true that the fact that no precedent can be found to sustain an action in any given case is cogent evidence that a principle does not exist upon which the right may be based, it is not the rule that the want of a precedent is a sufficient reason for turning the plaintiff out of court," provided (I think should be added) there can be found a clear and unequivocal principle of the common law, which either directly or mediately governs it, or which, by analogy of parity of reasoning, ought to govern it. It is undoubtedly true that in the early days of chancery jurisdiction in England the chancellors were accustomed to deliver their judgments without regard to principles or precedents, and in that way the process of building up the system of equity went on, the chancellor disregarding absolutely many established principles of the common law. "In no other way," says Pomeroy, "could the system of equity jurisprudence have been commenced and continued so as to arrive at its present proportions." Pom. Eq. Jur. § 48. In their work the chancellors were guided, not only by what they regarded as the eternal principles of absolute right, but also by their individual consciences; but after a time, when "the period of infancy was passed, and an orderly system of equitable principles, doctrines, and rules began to be developed out of the increasing mass of precedents, this theory of a personal conscience was abandoned; and 'the conscience,' which is an element of the equitable jurisdiction, came to be regarded, and has so continued to the present day, as

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a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles, and limited by established doctrines to which the court appeals, and by which it tests the conduct and rights of suitors,— a juridical, and not a personal, conscience." Pom. Eq. Jur. § 57.

The importance of observing the spirit of this rule cannot be overestimated; for, while justice in a given case may be worked out by a decision of the court according to the notions of right which govern the individual judge or body of judges comprising the court, the mischief which will finally result may be almost incalculable under our system, which makes a decision in one case a precedent for decisions in all future cases which are akin to it in the essential facts. So, in a case like the one before us, which is concededly new to this court; it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity, assuming — what I shall attempt to show in a moment — that the right of privacy, as a legal doctrine enforceable in equity, has not, down to this time, been established by decisions. The history of the phrase "right of privacy" in this country seems to have begun in 1890, in a clever article in the Harvard Law Review,— already referred to,— in which a number of English cases were analyzed, and, reasoning by analogy, the conclusion was reached that, notwithstanding the unanimity of the courts in resting their decisions upon property rights in cases where publication is prevented by injunction, in reality such prevention was due to the necessity of affording protection to thoughts and sentiments expressed through the medium of writing, printing, and the arts, which is like the right not to be assaulted or beaten; in other words, that the principle actually involved, though not always appreciated, was that of an inviolate personality, not that of private property. This article brought forth a reply from the Northwestern Law Review (vol. 3, p. 1) urging that equity has no concern with the feelings of an individual, or with considerations of moral fitness, except as the inconvenience or discomfort which the person may suffer is connected with the possession or enjoyment of property, and that the English authorities cited are consistent with such view. Those authorities are now to be examined, in order that we may see whether they were intended to and did mark a departure from the established rule which had been enforced for generations; or, on the other hand, are entirely consistent with it.

The first case is *Prince Albert* v. *Strange*, 1 Macn. & G. 25, 2 De G. & S. 652. The Queen and the Prince, having made etchings and drawings for their own amusement, decided to have copies struck off from the etched plates for presentation to friends and for their own use. The workman employed, however, printed some copies on his own account, which afterwards came into the hands of Strange, who purposed exhibiting them, and published a descriptive catalogue. Prince Albert applied for an injunction as to both exhibition and catalogue, and the vice chancellor granted it, restraining defendant from publishing, "at least by printing or writing, though not by copy or resemblance," a description of the etchings. An examination of the opinion of the vice chancellor discloses that he found two reasons for granting the injunction, namely, that the property rights of Prince Albert had been infringed, and that there was a breach of trust by the workman in retaining some impressions for himself. The opinion contained no hint whatever of a right of privacy separate and distinct from the right of property.

Pollard v. *Photographic Co.* L. R. 40 Ch. Div. 345, is certainly not an authority for granting an injunction on the ground of threatened injury to the feelings, although it is true, as stated in the opinion of the appellate division, that the court did say in the course of the discussion that the right to grant an injunction does not depend upon the existence of property; but the decision was, in fact, placed upon the ground that there was a breach of an implied contract. The facts, briefly stated, were that a photographer had been applied to by a woman to take her photograph, she ordering a certain number of copies, as is usual in such cases. The photographer made copies for himself, and undertook to exhibit them, and also sold copies to a stationer, who used them as Christmas cards. Their action was restrained by the court on the ground that there was an implied contract not to use the negative for any other purpose than to supply the sitter with copies of it for a price. During the argument of plaintiff's counsel the court asked this question: "Do you dispute that, if the negative likeness were taken on the sly, the person who took it might exhibit copies?" Counsel replied: "In that case there would be no consideration to support a contract."

In *Gee* v. *Pritchard*, 2 Swanst. 402, B attempted to print a private letter written him by A, and he was restrained on the ground that the property of that private letter remained in A, B having it only for the qualified purpose for which it was sent to him; the basis of the decision, therefore, being the idea of plaintiff's property in the thing published as being the product of his mind, written by him, and put into the hands of B for a limited purpose only. The same judge — Lord Eldon — also granted the injunction in *Abernethy* v. *Hutchinson*, 3 L. J. Ch. 209, restraining the publication in the Lancet of lectures delivered at a hospital by the plaintiff. The court expressed a doubt in that case whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground that it was a breach of confidence on the part of a pupil who was admitted to hear the lectures to publish them.

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inasmuch as they were delivered for the information of the pupils, and not for sale and profit by them.

Mayall v. *Higbey*, 1 Hurlst. & C. 148, was also a case where an injunction was granted and nominal damages awarded on the ground that plaintiff had a property right in certain photographic negatives which he had loaned to a person, who subsequently became insolvent, and whose assignee, without right, sold them to defendant, who printed copies from them, which he published and sold.

In *Queensberry* v. *Shebbeare*, 2 Eden, 329, the Earl of Clarendon delivered to one Gwynne an original manuscript of his father's "Lord Clarendon's History." Gwynne's administrator afterwards sold it to Shebbeare, and the court, upon the application of the personal representatives of Lord Clarendon, restrained its publication on the ground that they had a property right in the manuscript which it was not intended that Gwynne should have the benefit of by multiplying the number of copies in print for profit.

In not one of these cases, therefore, was it the basis of the decision that the defendant could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust, or that plaintiff had a property right in the subject of litigation which the court could protect.

A more recent English case, decided in 1898, is more nearly in point, and negatives the contention that plaintiff may restrain an unauthorized publication which is offensive to him,—namely, *Dockrell* v. *Dougall*, 78 L. T. N. S. 840. In that case defendant, the owner of a medicine called "Sallyco," published the following substantially true, but unauthorized, statement about plaintiff: "Dr. Morgan Dockrell, physician to St. John's Hospital, London, . . . is prescribing Sallyco as an habitual drink. Dr. Dockrell says 'nothing has done his gout so much good.'" In the course of the opinion the court said, in effect, that plaintiff claimed to be entitled to an injunction restraining defendant from using plaintiff's name in his advertisements on the ground that an injunction should be granted in every such case where it can be shown that the use of the plaintiff's name is unauthorized, and is calculated to injure him in his profession; and, after saying that he did not think that this was right, he stated the proper rule to be that, "in order that an injunction may issue to restrain a defendant from using a plaintiff's name, the use of it must be such as to injure the plaintiff's reputation or property."

None of the other English cases brought to our attention are claimed to have a direct bearing upon this question, and it seems to us very clear that they do not in any wise support the position of plaintiff.

The case that seems to have been more relied upon than any other by the learned appellate division in reaching the conclusion that the complaint in this case states a cause of action is *Schuyler* v. *Curtis*, 147 N. Y. 434, 31 L. R. A. 286, 42 N. E. 22. In that case certain persons attempted to erect a statue or bust of a woman no longer living, and one of her relatives commenced an action in equity to restrain such erection, alleging that his feelings and the feelings of other relatives of deceased would be injured thereby. At special term an injunction was granted on that ground. 27 Abb. N. C. 387, 15 N. Y. Supp. 787. The general term affirmed the decision. 64 Hun, 594, 19 N. Y. Supp. 264. This court reversed the judgment, Judge Peckham writing, and, so far as the decision is concerned, therefore, it is not authority for the existence of a right of privacy which entitles a party to restrain another from doing an act which, though not actionable at common law, occasions plaintiff mental distress. In the course of the argument, however, expressions were used which it is now claimed indicate that the court recognized the existence of such a right. A sufficient answer to that contention is to be found in the opinion written on the motion for reargument in *Colonial City Traction Co.* v. *Kingston City R. Co.* 154 N. Y. 493, 48 N. E. 900, in which it was said: "It was not our intention to decide any case but the one before us. . . . If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the *dicta* of the writer of the opinion, and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant; and when it wanders from the point at issue it no longer has force as an official utterance." The question up for decision in the *Schuyler Case* was whether the relatives could restrain the threatened action of defendants, and not whether Mrs. Schuyler could have restrained it had she been living. The latter question not being before the court, it was not called upon to decide it, and, as we read the opinion, there is no expression in it which indicates an intention, either to decide it, or to seriously consider it; but, rather, it proceeds upon the assumption that, if such a right did exist in Mrs. Schuyler, her relatives did not succeed to it upon her death; all of which will sufficiently appear from the following extracts from the opinion: "This action is of a nature somewhat unusual, and dependent for its support upon an application of certain principles which are themselves not very clearly defined, or their boundaries very well recognized or plainly laid down. Briefly described, the action is founded upon an alleged violation of what is termed the right of privacy." "It is not necessary, however, in the view which we take of this case, to lay down precise and accurate rules which shall apply to all cases touching upon this alleged right." "For the purposes we have in view, it is unnecessary to wholly deny the existence of the right of privacy

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to which the plaintiff appeals as the foundation of his cause of action." "While not assuming to decide what this right of privacy is in all cases, we are quite clear that such right would not be violated by the proposed action of the defendants."

There are two other cases in this state bearing upon this question: *Marks* v. *Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908, decided at special term, and *Murray* v. *Gast Lithographic & Engraving Co.* 8 Misc. 36, 28 N. Y. Supp. 271, decided at an equity term of the court of common pleas at New York. In the first case the relief prayed for was granted upon the authority of the decision of the general term in the *Schuyler Case* which was subsequently reversed in this court. In the *Murray Case*, in a well-reasoned opinion by Judge Bischoff, it is held that a parent cannot maintain an action to enjoin an unauthorized publication of the portrait of an infant child, and for damages for injuries to his sensibilities, caused by the invasion of his child's privacy, because "the law takes no cognizance of a sentimental injury, independent of a wrong to person or property." In the course of his opinion he quotes from the opinion of Lumpkin, J., in *Chapman* v. *Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430, 15 S. E. 901, as follows: "The law protects the person and the purse. The person includes the reputation. . . . The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain, without disturbance, any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries."

Outside of this jurisdiction the question seems to have been presented in two other cases in this country: *Corliss* v. *E. W. Walker Co.* 31 L. R. A. 283, 57 Fed. 434, 64 Fed. 280, and *Atkinson* v. *John E. Doherty & Co.* 121 Mich. 372, 46 L. R. A. 219, 80 N. W. 285. The *Corliss Case* was an action in equity to restrain the publication of the biography and picture of Mr. Corliss. It was based upon an alleged invasion of the right of privacy. The court denied the injunction as to the publication of the biography, but granted it as to the use of certain plates from which the defendant was to make a picture of Mr. Corliss, upon the ground that they had been obtained upon conditions which defendant had not complied with. In the course of the opinion the court said: "Under our laws one can speak and publish what he desires, provided he commit no offense against public morals or private reputation. . . . There is another objection which meets us at the threshold of this case. The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. *Re Sawyer*, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482; Kerr, Inj. 2d ed. p. 1. It follows from this principle that a court of equity has no power to restrain a libelous publication." Both the opinion and the decision necessarily negative the existence of an actionable right of privacy; but subsequently, upon a motion to dissolve the injunction, which was granted upon the ground that Mr. Corliss was a public character, and hence the publishers were entitled to use his picture, the learned court expressed the opinion that a private individual has the right to be protected from the publication of his portrait in any form. Now, while this suggestion was *obiter*, it merits discussion, and an examination of that which it promulgates as doctrine discloses what we deem a fatal objection to the establishment of a rule of privacy. The learned judge says: "I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property, as well as a personal, right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's book by a clerk. . . . But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portrait of himself, but, where an individual becomes a public character, the case is different. A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public." This distinction between public and private characters cannot possibly be drawn. On what principle does an author or artist forfeit his right of privacy, and a great orator, a great preacher, or a great advocate retain his? Who can draw a line of demarcation between public characters and private

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characters, let that line be as wavering and irregular as you please? In the very case, then, before the judge, what had Mr. Corliss done by which he surrendered his right of privacy? In what respect did he, by his inventions, "ask for and desire public recognition" any more than a banker or merchant who prosecutes his calling? Or is the right of privacy the possession of mediocrity alone, which a person forfeits by giving rein to his ability, spurs to his industry, or grandeur to his character? A lady may pass her life in domestic privacy, when, by some act of heroism or self-sacrifice, her name and fame fill the public ear. Is she to forfeit by her good deed the right of privacy she previously possessed? These considerations suggest the answer we would make to the position of the learned judge, and at the same time serve to make more clear what we have elsewhere attempted to point out, namely, the absolute impossibility of dealing with this subject save by legislative enactment, by which may be drawn arbitrary distinctions which no court should promulgate as a part of general jurisprudence.

Atkinson v. *John E. Doherty & Co.* was a suit in equity, brought by the widow of Col. John Atkinson, a well-known lawyer in Detroit, to enjoin the defendant, a cigar manufacturer, from using the name and portrait of Col. Atkinson upon boxes of cigars manufactured by defendant. The suit was dismissed by the circuit court, and its decree was unanimously affirmed by the supreme court. The case quite closely resembles the *Schuyler Case*, which was brought to the attention of that court, and in the course of the opinion the contention that the *Schuyler Case* intimated the existence of a right of privacy was met as follows: "We think it should not be considered as containing a *dictum*, even, in support of the doctrine contended for." The method adopted by the court in the *Atkinson Case* in treating the question was different from that employed by this court in the *Schuyler Case*, however, for the opinion proceeds to a review of the authorities upon which the right of privacy is said to rest, reaching the conclusion that all of the authorities which are entitled to respect are based upon property or contract rights, and hence "that Colonel Atkinson would himself be remediless were he alive, and the same is true of his friends who survive." The opinion concludes as follows: "This 'law of privacy' seems to have obtained a foothold at one time in the history of our jurisprudence;—not by that name, it is true, but in effect. It is evidenced by the old maxim, 'The greater the truth the greater the libel,' and the result has been the emphatic expression of public disapproval by the emancipation of the press and the establishment of freedom of speech, and the abolition in most of the states of the maxim quoted by constitutional provisions. The limitation upon the exercise of these rights being the law of slander and libel, whereby the publication of an untruth that can be presumed or shown to the satisfaction, not of the plaintiff, but of others (*i. e.*, an impartial jury), to be injurious, not alone to the feelings, but to the reputation, is actionable. Should it be thought that it is a hard rule that is applied in this case, it is only necessary to call attention to the fact that a ready remedy is to be found in legislation. We are not satisfied, however, that the rule is a hard one, and think that the concensus of opinion must be that the complainant contends for a much harder one. The law does not remedy all evils; it cannot, in the nature of things; and deliberation may well be used in considering the propriety of an innovation such as this case suggests. We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that it is one of the ills that under the law cannot be redressed."

An examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place in our jurisprudence; and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided. I do not say that, even under the existing law, in every case of the character of the one before us, or, indeed, in this case, a party whose likeness is circulated against his will is without remedy. By § 245 of the Penal Code any malicious publication by picture, effigy, or sign, which exposes a person to contempt, ridicule, or obloquy, is a libel, and it would constitute such at common law. "Malicious," in this definition, means simply "intentional and wilful." There are many articles, especially of medicine, whose character is such that using the picture of a person, particularly that of a woman, in connection with the advertisement of those articles, might justly be found by a jury to cast ridicule or obloquy on the person whose picture was thus published. The manner or posture in which the person is portrayed might readily have a like effect. In such cases both a civil action and a criminal prosecution could be maintained. But there is no allegation in the complaint before us that this was the tendency of the publication complained of, and the absence of such an allegation is fatal to the maintenance of the action, treating it as one of libel. This case differs from an action brought for libelous words. In such case the alleged libel is stated in the complaint, and, if the words are libelous *per se*, it is unnecessary to charge that their effect exposes the plaintiff to disgrace, ridicule, or obloquy. The law attributes to them that result. But where the libel is a picture, which does not appear in the record, to make it libelous there must be a proper allegation as to its character.

The judgment of the Appellate Division and of the Special Term should be reversed, and questions certified answered in the neg-

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ative, without costs, and with leave to the plaintiff to serve an amended complaint within twenty days, also without costs.

O'Brien, Cullen, and **Werner, JJ.,** concur.

Gray, J., dissenting:

The question arises on the defendants' demurrer to the sufficiency of the complaint to state a cause of action. The complaint alleges that, without the knowledge of the plaintiff, the defendants, "knowing that they had no right or authority so to do, had obtained, made, printed, sold, and circulated about 25,000 lithographic prints, photographs, or likenesses of plaintiff, for the purpose of profit and gain to themselves;" that upon the paper upon which the likeness was printed are the words above the portrait, in large, plain letters, "Flour of the Family," and below, in large capital letters, "Franklin Mills Flour," and in the lower right-hand corner, in small capital letters, are the words "Rochester Folding Box Company;" that upon the same paper are the advertisements of the flour of the Franklin Mills Company; that these 25,000 likenesses of the plaintiff, thus ornamented, have been "conspicuously posted and displayed in stores, warehouses, and saloons throughout the United States and other countries, and particularly in the vicinity where the plaintiff resides;" that the result has been to greatly humiliate her, by the scoffs and jeers of persons who have recognized her face upon these advertisements, and her good name has been attacked, and that because of these facts "she was made sick, and suffered a severe nervous shock, was confined to her bed, and was compelled to employ a physician." The plaintiff further alleges that the defendants "are now wrongfully printing, making, using, selling, and circulating these lithographs," and that by reason of these facts she has suffered damages in the sum of $15,000. The relief demanded is that the defendants be enjoined from making, printing, publishing, obtaining, or using in any manner any likeness of the plaintiff in any form whatever. The facts contained within these allegations must be regarded as admitted, under the defendant's demurrer; as must all other facts which can be implied by reasonable and fair intendment. *Marie* v. *Garrison*, 83 N. Y. 14. These defendants stand before the court, admitting that they have made, published, and circulated, without the knowledge or the authority of the plaintiff, 25,000 lithographic portraits of her, for the purpose of profit and gain to themselves: that these portraits have been conspicuously posted in stores, warehouses, and saloons in the vicinity of the plaintiff's residence, and throughout the United States, as advertisements of their goods; that the effect has been to humiliate her, and to render her ill; and yet claiming that she makes out no cause of action. They say that no law on the statute books gives her a right of action, and that her right to privacy is not an actionable right at law or in equity.

Our consideration of the question thus presented has not been foreclosed by the decision in *Schuyler* v. *Curtis*, 147 N. Y. 434, 31 L. R. A. 286, 42 N. E. 22. In that case it appeared that the defendants were intending to make, and to exhibit at the Columbian Exposition of 1893, a statue of Mrs. Schuyler, formerly Miss Mary M. Hamilton, and conspicuous in her lifetime for her philanthropic work, to typify "Woman as the Philanthropist," and, as a companion piece, a statue of Miss Susan B. Anthony, to typify the "Representative Reformer." The plaintiff, in behalf of himself, as the nephew of Mrs. Schuyler, and of other immediate relatives, sought by the action to restrain them from carrying out their intentions as to the statue of Mrs. Schuyler, upon the grounds, in substance, that they were proceeding without his consent (whose relationship was conceded to be such as to warrant such an action, if it were maintainable at all), or that of the other immediate members of the family; that their proceeding was disagreeable to him, because it would have been disagreeable and obnoxious to his aunt, if living, and that it was annoying to have Mrs. Schuyler's memory associated with principles which Miss Susan B. Anthony typified, and of which Mrs. Schuyler did not approve. His right to maintain the action was denied, and the denial was expressly placed upon the ground that he, as a relative, did not represent any right of privacy which Mrs. Schuyler possessed in her lifetime, and that, whatever her right had been in that respect, it died with her. The existence of the individual's right to be protected against the invasion of his privacy, if not actually affirmed in the opinion, was, very certainly, far from being denied. "It may be admitted." Judge Peckham observed, when delivering the opinion of the court, "that courts have power, in some cases, to enjoin the doing of an act, where the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no property, as that term is usually used, is involved in the subject." That the individual has a right to privacy, which he can enforce, and which equity will protect against the invasion of, is a proposition which is not opposed by any decision in this court, and which, in my opinion, is within the field of accepted legal principles. It is within the very case supposed by Judge Peckham in *Schuyler* v. *Curtis*. In the present case, we may not say that the plaintiff's complaint is fanciful, or that her alleged injury is purely a sentimental one. Her objection to the defendants' acts is not one born of caprice; nor is it based upon the defendants' act being merely "distasteful" to her. We are bound to assume, and I find no difficulty in doing so, that the conspicuous display of her likeness in various public places has so humiliated her by the notoriety and by the public comments it has

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provoked as to cause her distress and suffering in body and mind, and to confine her to her bed with illness.

If it were necessary, to be entitled to equitable relief, that the plaintiff's sufferings by reason of the defendants' acts should be serious, and appreciable by a pecuniary standard, clearly, we might well say, under the allegations of the complaint, that they were of such degree of gravity. However, I am not of the opinion that the gravity of the injury need be such as to be capable of being estimated by such a standard. If the right of privacy exists, and this complaint makes out a case of its substantial violation, I think that the award of equitable relief by way of an injunction preventing the continuance of its invasion by the defendants will not depend upon the complainants' ability to prove substantial pecuniary damages; and, if the court finds the defendants' act to be without justification, and for selfish gain and purposes, and to be of such a character as is reasonably calculated to wound the feelings and to subject the plaintiff to the ridicule or to the contempt of others, that her right to the preventive relief of equity will follow, without considering how far her sufferings may be measurable by a pecuniary standard. The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. Cooley, Torts, p. 29. The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection. *Niagara Falls International Bridge Co.* v. *Great Western R. Co.* 39 Barb. 212; *Sherman* v. *Skuse*, 166 N. Y. 352, 59 N. E. 990; *Hamilton* v. *Whitridge*, 11 Md. 145, 69 Am. Dec. 184. In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mold of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence if equity were powerless to extend the application of the principles of common law or of natural justice in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social or commercial conditions. Sir Henry Maine, in his work on Ancient Law, has observed of equity that it is an agency "by which law is brought into harmony with society," and that it is one of the factors which operate in judicial evolution. It succeeds legal fictions, or those judicial assumptions through which a rule of law is modified in its operation, and it precedes legislation. See Maine, Ancient Law, pp. 22–28. Equity has neither fixed boundaries nor logical subdivisions, and its origin, both in Rome and in England, was that there was a wrong for which there was no remedy at law. See 1 Story, Eq. Jur. §§ 49, 50. It supplements the deficiencies of the common law by applying, where otherwise there would result a wrong, those principles of natural justice which are analogous to settled principles of the common law. See 1 Story, Eq. Jur. § 671, note. Lord Chancellor Cottenham observed in *Wallworth* v. *Holt*, 4 Myl. & C. 619: "I think it the duty of this court [meaning equity] to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy. . . . If, therefore, it were necessary to go much further than it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this court to those who can not obtain it elsewhere, I should not shrink from the responsibility of doing so." As I have suggested, that the exercise of this peculiar preventive power of a court of equity is not found in some precisely analogous case furnishes no valid objection at all to the assumption of jurisdiction if the particular circumstances of the case show the performance, or the threatened performance, of an act by a defendant, which is wrongful, because constituting an invasion, in some novel form, of a right to something which is, or should be conceded to be, the plaintiff's and as to which the law provides no adequate remedy. It would be a justifiable exercise of power whether the principle of interference be rested upon analogy to some established common-law principle, or whether it is one of natural justice. In an article in the Harvard Law Review of December 15, 1890 [Vol. 4, p. 193], which contains an impressive argument upon the subject of the "right of privacy," it was well said by the authors: "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. . . . The right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the

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term 'property' has grown to comprise every form of possession,—intangible as well as tangible." Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form *in invitum* their owner. While, so far forth as it merely does that although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property; and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares; and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases, or some declaration by the great commentators upon the law of a common-law principle which would precisely apply to and govern the action, without taking into consideration that in the existing state of society new conditions affecting the relations of persons demand the broader extension of those legal principles which underlie the immunity of one's person from attack. I think that such a view is unduly restricted, too, by a search for some property which has been invaded by the defendants' acts. Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and so it is called forth for the protection of the right to that which is one's exclusive possession as a property right. It seems to me that the principle which is applicable is analogous to that upon which courts of equity have interfered to protect the right of privacy in cases of private writings, or of other unpublished products of the mind. The writer or the lecturer has been protected in his right to a literary property in a letter or a lecture, against its unauthorized publication, because it is property, to which the right of privacy attaches. *Woolsey* v. *Judd*, 4 Duer, 399; *Gee* v. *Pritchard*, 2 Swanst. 402; *Abernethy* v. *Hutchinson*, 3 L. J. Ch. 209; *Folsom* v. *Marsh*, 2 Story, 100, Fed. Cas. No. 4,901. I think that this plaintiff has the same property in the right to be protected against the use of her face for defendants' commercial purposes as she would have if they were publishing her literary compositions. The right would be conceded if she had sat for her photograph; but if her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason. Judge Colt, of the United States court, in *Corliss* v. *E. W. Walker Co.* 31 L. R. A. 263, 64 Fed. 280–285,—a case involving the same question of an invasion of the right of privacy, with respect to the publication of a printed likeness of Mr. Corliss,—expressed the opinion that, "independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property, as well as a personal, right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk." The case itself is not in point in its facts, because the complainant was the widow of Mr. Corliss, and thus it came within the limitations of *Schuyler* v. *Curtis*.

The right to grant the injunction does not depend upon the existence of property which one has in some contractual form. It depends upon the existence of property in any right which belongs to a person. In *Pollard* v. *Photograph Co.* L. R. 40 Ch. Div. 345, it was held that the right to grant an injunction against selling copies of plaintiff's photographs did not depend upon the existence of property; and that "it is quite clear that, independently of any question as to the right at law, the court of chancery always had an original and independent jurisdiction to prevent what that court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence, as was pointed out by Lord Cottenham in *Prince Albert* v. *Strange*, 1 Macn. & G. 25." In *Prince Albert* v. *Strange*, [2 DeG. & S. 695], Lord Chancellor Cottenham sustained the issuance of an injunction upon the ground that the right of privacy had been invaded by the publication and sale of etchings made by Prince Albert and Queen Victoria. Upon the original hearing Vice Chancellor Knight-Bruce, in granting the injunction, observed that, "upon the principle . . . of protecting property, it is that the common law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed

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to writing, and desired by the author to remain not generally known." It would be, in my opinion, an extraordinary view, which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet would deny the same protection to a person whose portrait was unauthorizedly obtained and made use of for commercial purposes. The injury to the plaintiff is irreparable, because she cannot be wholly compensated in damages for the various consequences entailed by defendants' acts. The only complete relief is an injunction restraining their continuance. Whether, as incidental to that equitable relief, she should be able to recover only nominal damages, is not material, for the issuance of the injunction does not, in such a case, depend upon the amount of the damages in dollars and cents.

A careful consideration of the question presented upon this appeal leads me to the conclusion that the judgment appealed from should be affirmed.

Bartlett and **Haight**, JJ., concur with **Gray**, J.

Re Application of STILLWATER & MECHANICVILLE STREET RAILWAY COMPANY, for Appointment of Commissioners, *Appt.*,
To Unite its Tracks with the BOSTON & MAINE RAILROAD, *Respt.*

(171 N. Y. 589.)

Electric railway companies are entitled to track connections with intersecting steam roads, where the incorporation of both classes of roads is provided for by the same statute, the various provisions of which, including those for track connections, refer "to every railroad corporation," thereby including every railroad incorporated under the provisions of the act.

(June 27, 1902.)

APPEAL by petitioner from an order of the Appellate Division of the Supreme Court, Third Department, reversing an order of a Special Term for Saratoga County directing the connection of petitioner's tracks with those of the Boston & Maine Railroad. *Reversed.*

The facts are stated in the opinion.

Mr. **David B. Hill,** with *Mr.* **Thomas O'Connor,** for appellant:

The power to compel the intersection and connection of two railroads is not confined exclusively to steam railroads. The right of street railways to organize under the act of 1850 is the most striking recognition of the applicability of the law to every kind of railroad.

Re Washington Street Asylum & P. R. Co. 115 N. Y. 442, 22 N. E. 356.

It has been held in many cases that the provisions of § 12 apply to the crossing or intersection of steam railroads by electric and street railway companies.

Port Richmond & P. P. Electric R. Co. v. *Staten Island Rapid Transit R. Co.* 71 Hun, 179, 24 N. Y. Supp. 566; *Buffalo, B. & L. R. Co.* v. *New York, L. E. & W. R. Co.* 72 Hun, 583, 25 N. Y. Supp. 265; *Connolly* v. *New York C. & H. R. R. Co.* 35 App. Div. 610, 55 N. Y. Supp. 118; *Geneva & W. R. Co.* v. *New York C. & H. R. R. Co.* 90 Hun, 9, 35 N. Y. Supp. 339; *New York, L. & W. R. Co.* v. *Erie R. Co.* 31 App. Div. 378, 52 N. Y. Supp. 318; *Kunz* v. *Brooklyn Heights R. Co.* 25 Misc. 334, 54 N. Y. Supp. 187; *Hudson* v. *Lynn & B. R. Co.* 178 Mass. 64, 59 N. E. 647.

All the essential attributes of a steam road are possessed by a street road within the meaning of the term "railroad corporation."

Central Nat. Bank v. *Worcester Horse R. Co.* 13 Allen, 106; *Hestonville, M. & F. Pass. R. Co.* v. *Philadelphia,* 89 Pa. 210; *Pennsylvania R. Co.* v. *Pittsburgh,* 104 Pa. 522; *Birmingham Mineral R. Co.* v. *Jacobs,* 92 Ala. 200, 12 L. R. A. 830, 9 So. 320; *Katzenberger* v. *Lavo,* 90 Tenn. 235, 13 L. R. A. 185, 16 S. W. 611; *Williams* v. *City Electric Street R. Co.* 41 Fed. 556; *Clinton* v. *Clinton & L. Horse R. Co.* 37 Iowa, 61.

The right of the appellant's road to connect with respondent's road cannot be defeated upon the ground of any alleged inconvenience to the latter road.

Buffalo, B. & L. R. Co. v. *New York, L. E. & W. R. Co.* 72 Hun, 585, 25 N. Y. Supp. 265; *Geneva & W. R. Co.* v. *New York C. & H. R. R. Co.* 90 Hun, 10, 35 N. Y. Supp. 339; *People ex rel. Kimball* v. *Boston & A. R. Co.* 70 N. Y. 569; *Louisville & N. R. Co.* v. *Bowling Green R. Co.* 23 Ky. L. Rep. 273, 63 S. W. 4; *Beekman* v. *Brooklyn & B. B. R. Co.* 89 Hun, 14, 35 N. Y. Supp. 84; *Gallagher* v. *Keating,* 27 Misc. 138, 58 N. Y. Supp. 366.

Mr. **T. F. Hamilton,** for respondent:

The connection sought, and which is required by the order appealed from, is not between two contiguous or intersecting tracks.

Re Central R. Co. 1 Thomp. & C. 419.

The roads of the petitioner and the appellant are not similar in character; nor is the petitioner's road a new one.

Section 12 of the railroad law, under which this application was made, does not justify the maintenance of this proceeding.

Holmes v. *Carley,* 31 N. Y. 289; *Hudson Iron Co.* v. *Alger,* 54 N. Y. 173; *Re O'Neil,* 91 N. Y. 516; *People ex rel. Wood* v. *Lacombe,* 99 N. Y. 43, 1 N. E. 599; *Innes* v. *Purcell,* 2 Thomp. & C. 538.

Mr. **Lewis E. Carr** also for respondent.

NOTE.—As to right to compel railroad to make connections with other road, see, in this series, Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C. D. Ky.) 2 L. R. A. 289; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C. N. D. Ohio) 19 L. R. A. 395; and Jacobson v. Wisconsin, M. & P. R. Co. (Minn.) 40 L. R. A. 389.

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Haight, J., delivered the opinion of the court:

This proceeding was instituted by the Stillwater & Mechanicville Street Railway Company to obtain an order permitting it to unite and connect the tracks of its railroad with those of the Boston & Maine Railroad Company in order to facilitate the free interchanging of cars between the two roads.

The Stillwater & Mechanicville Street Railway Company was organized under the general railroad law of this state, with the right to transport both passengers and freight, and is operated as an electric railroad by the trolley system. The Boston & Maine Railroad is a foreign corporation, organized under the laws of Massachusetts, and is operating a steam railroad. It is contended upon its behalf that the statute does not authorize the court to compel a connection of the tracks of the two roads. The question, therefore, raised for our review is as to the proper construction of the statute.

The railroad law of 1890 (chap. 565, § 12) provides as follows: "Every railroad corporation, whose road is or shall be intersected by any new railroad, shall unite with the corporation owning such new railroad in forming the necessary intersections and connections, and grant the requisite facilities therefor; and if the two corporations cannot agree upon the amount of compensation to be made therefor or upon the line or lines, grade or grades, points or manner of such intersections and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor, to be appointed by the court, as is provided in the condemnation law; and such commissioners may determine whether the crossing or crossings of any railroad before constructed shall be beneath, at, or above the existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing or otherwise. All railroad corporations whose roads are or shall hereafter be so crossed, intersected, or joined, shall receive from each other and forward to their destination all goods, merchandise, and other property intended for points on their respective roads, with the same despatch as, and at a rate of freight, not exceeding the local tariff rate charged for similar goods, merchandise, and other property, received at and forwarded from the same point for individuals and other corporations." It will be observed that this statute contains two provisions, one for the crossing of the tracks of another railroad at, above, or beneath grade; and the other provides for the intersection of the tracks of such railroads, and upon the making of such connections the roads shall receive from each other and forward to their destination all goods, merchandise, and other property intended for points on their respective lines.

The court below seems to have been of the opinion that this statute had reference to steam railroads, and did not pertain to roads operated by electricity. In determining this question it becomes necessary to examine more fully the railroad law for the purpose of ascertaining the legislative intent. By referring to § 2 of the act, we find provisions for the incorporation of railroads, which is to be accomplished by the execution of a certificate by fifteen or more persons which shall contain the name of the corporation, the number of years it is to continue, and the kind of road to be built or operated. The section contains other provisions, among which is subdivision 11 (as amended by Laws 1892, chap. 676), which provides that, "if a street surface railroad, the names and description of the streets, avenues, and highways in which the road is to be constructed." It is thus apparent that the articles of incorporation provided for have reference to all kinds of railroads for public use, including steam railroads, street surface and electric roads. Again, passing to § 4, subdivision 5, of the act, we find that every railroad corporation, in addition to the power given by the general stock corporation law, shall have power "to cross, intersect, join, or unite its railroad with any other railroad before constructed, at any point on its route and upon the ground of such other railroad corporation, with the necessary turnouts, sidings, switches, and other conveniences in furtherance of the objects of its connection."

"Sec. 34. Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport, and discharge such passengers and property at, from, and to, such places, on the due payment of the fare or freight legally authorized therefor.

"Sec. 35. Every railroad corporation whose road, at or near the same place, connects with or is intersected by two or more railroads competing for its business, shall fairly and impartially afford to each of such connecting or intersecting roads equal terms of accommodation, privileges, and facilities in the transportation of cars, passengers, baggage, and freight over and upon its roads, and over and upon their roads, and equal facilities in the interchange and use of passenger, baggage, freight, and other cars required to accommodate the business of each road, and in furnishing passage tickets to passengers who may desire to make a continuous trip over any part of its roads and either of such connecting roads. The board of railroad commissioners may, upon application of the corporation owning or operating either of the connecting or intersecting roads, and upon fourteen days' notice to the

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corporation owning or operating the other road, prescribe such regulations as will secure, in their judgment, the enjoyment of equal privileges, accommodations, and facilities to such connecting or intersecting roads as may be required to accommodate the business of each road, and the terms and conditions upon which the same shall be afforded to each road. The decision of the commissioners shall be binding on the parties for two years, and the supreme court shall have power to compel the performance thereof by attachment, mandamus, or otherwise."

It will be observed that each of these provisions of the statute, to which reference has been made, expressly refers to every railroad corporation, and thereby includes every railroad incorporated under the provisions of § 2 of the act.

The contention is now made that to compel a track connection with steam railroads by electric or street surface railroads for the interchanging of traffic would be a burden and a hardship to steam railroads that was not contemplated when the statute was passed; that to permit connections with steam railroads by the large number of electric railroads which have been or are being, constructed, would result in confusion to the steam railroads, and make their operation difficult. The learned appellate division appears to have been impressed with this argument, for it states in its opinion that the proceeding and purpose are new, and obviously open a field of inquiry of the greatest importance, not alone to railroad corporations, but to the general public, which has an interest in the streets and highways of towns, villages, and cities of the state; that, if the street surface railways are to be recognized as an integral part of the great system of steam railroads, the purpose should be made clear by the legislature. We readily concede that the legislative intent should clearly appear, but we are not much impressed with the contention that burden and hardship will result to the steam railroads, or that confusion will follow in their operation. The provisions of the statute authorizing the courts to compel connections or intersections of tracks between railroads, to our minds, was intended to promote the public interests independent of that of the railroad companies. Travelers and the shippers of merchandise and freight have the right to make use of all of the facilities provided for in the articles of incorporation, and the provisions of the statute pertaining thereto, in the conduct of their business. This, we think, is made clear by the provisions of the statute, which requires that all railroad corporations whose roads are, or shall be, intersected shall receive from each other and forward to their destination all goods, merchandise, and other property intended for points on their respective roads, with the same despatch and at the rate of freight not exceeding the local tariff rate, etc. Bearing this purpose in mind, we pass to a consideration of the meaning of the law. As we have seen, by the statute authorizing the incorporation of railroads, the legislature contemplated making provisions for all kinds of railroads, street surface as well as steam railroads. By § 4, subdivision 7, all roads organized under the provisions of the act were empowered "to take and convey persons and property on its railroad by the power or force of steam, or animals, or by any mechanical power." It is true that the statute contains numerous provisions which apply alone to steam railroads, and other provisions which apply alone to electric or street surface roads; but in most of these provisions there is specific reference to either steam or street surface roads. The great body of the statute was intended to apply to all railroads incorporated under its provisions, especially so far as those provisions were applicable. The revision of the railroad law of 1850 is of recent date, and after the street surface railroads in our cities and villages had become very numerous. The legislature, in undertaking a revision of the railroad laws, attempted, so far as possible, to establish a complete system, under which all kinds of railroads could be operated, and the public interest subserved. In construing these statutes, it does not become us to shut our eyes to the purposes sought to be accomplished, or the discoveries that have been made, and the improvements accomplished, in the transportations of the country in recent years. The great steam roads have extended across the continent from ocean to ocean, and from the far north down to the tropics. These roads have become great arteries, over which is transported the greater part of the commerce of the continent. It has not been considered profitable or practical for steam roads to be constructed to every village, hamlet, or productive district in the country. This, however, is rapidly being accomplished by the numerous electric roads that are in process of construction, or are contemplated. By their means the farmer, the mill owner, and the merchandise vender in distant places may be able to reach the steam railroads, and through them the great markets of our cities, with their merchandise and products; and in this way one road may become a feeder and distributer of the other.

If one electric road were seeking a connection with another road operated by the same power, it would hardly be claimed that the provisions of § 12 did not apply. It is practically conceded that electric roads may be united with other roads of the same character, and operated by the same power. But the statute has not limited the courts to the requiring of intersections and connections between roads of the same character. Very likely, electric roads tendering cars to steam roads for transportation should only offer those properly equipped with brakes and couplers, so that they may be taken and transported readily and safely. It may be that additional regulations will become necessary in order that equal privileges, accommodations, and facilities may be afforded in connecting and intersecting roads, but all this may be controlled by the board of rail-

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road commissioners, who, under the provisions of § 35, to which we have referred, is given full authority in the premises. It is said that the rights of the public in the streets and highways of our cities, towns, and villages should be protected, and that cars loaded with merchandise and freight should not be permitted to be run over street surface railroads. It may be that additional regulations should be provided, either by statute or by ordinance, limiting the time in which cars of this character should be permitted to run over street surface railroads, especially in cities and large villages; but that the power exists to run such cars is no longer an open question in this court. This question was elaborately considered in the case of *De Grauw* v. *Long Island Electric R. Co.* 43 App. Div. 502, 60 N. Y. Supp. 163, which case was affirmed in this court on the opinion below. 163 N. Y. 597, 57 N. E. 1108.

Again, bearing in mind the legislative purpose, its intent to our minds appears reasonably clear by the provision, "to cross, intersect, join, or unite its railroad with any other railroad." The word "cross" is used in connection with the word "connect," and the legislature could hardly have intended that one word should mean one kind of a railroad, and the other another kind. One of the most important rights which the legislature undertook to provide for and to protect was that of the right of one railroad to cross the tracks of another which had previously been constructed. Were it not for this, one road running north and south through the state could absolutely prevent the constructing of another extending east and west. The legislature was careful to make ample provisions for crossings in the same section in which intersections were provided for, and these provisions with reference to crossings have been held to apply to electric and street surface roads crossing steam roads, or to steam roads crossing electric or street surface roads. *Buffalo, B. & L. R. Co.* v. *New York, L. E. & W. R. Co.* 72 Hun, 583, 25 N. Y. Supp. 265; *Port Richmond & P. P. Electric R. Co.* v. *Staten Island Rapid Transit R. Co.* 71 Hun, 179, 24 N. Y. Supp. 566, Affirmed in 144 N. Y. 445, 39 N. E. 392. It appears to us that the legislature has clearly empowered the court to order connections such as is sought by the petitioner in these proceedings.

The order of the Appellate Division should therefore be reversed, and that of the special term affirmed, with costs.

Parker, Ch. J., and **Gray, O'Brien, Vann, Cullen,** and **Werner**, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

GERMAN INSURANCE COMPANY *et al.*, *Plffs. in Err.*,
v.
Frank J. HEARNE.

(117 Fed. 289.)

1. **A provision of an insurance policy rendering it void** if, without consent of the insurer, mechanics are employed in building, altering, or repairing the premises for more than fifteen days at any one time, is operative regardless of the reasonableness of the repairs.
2. **Rubbing and polishing woodwork,** repairing walls and ceilings, repairing and reburnishing plumbing and gas fittings, and repairing the gutters and spouts are within the provisions of a fire insurance policy making it void in case mechanics are engaged in repairing the building for more than fifteen days at any one time.

(July 11, 1902.)

WRITS of error to the Circuit Court of the United States for the Western District of Pennsylvania to review judgments in favor of plaintiff in actions brought to recover the amount alleged to be due on certain policies of fire insurance. *Reversed.*

The facts are stated in the opinion.

Argued before *Gray*, Circuit Judge, and *Bradford* and *McPherson*, District Judges.

Messrs. **Ernest L. Tustin** and **Walter C. Rodman,** for plaintiffs in error:

If mechanics are employed in building, altering, or repairing the premises for more than fifteen days at any one time, and an agreement or consent is not indorsed on the policy, permitting said work, the contract of insurance is void.

Newport Improvement Co. v. *Home Ins. Co.* 163 N. Y. 237, 57 N. E. 475; *Mack* v. *Rochester German Ins. Co.* 166 N. Y. 560, 13 N. E. 343; *Imperial F. Ins. Co.* v. *Coos County,* 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Ferree* v. *Oxford F. & L. Ins. Annuity & T. Co,* 67 Pa. 373, 5 Am. Rep. 436; *Birmingham F. Ins. Co.* v. *Kroegher,* 83 Pa. 64, 24 Am. Rep. 147; *Girard F. & M. Ins. Co.* v. *Hebard,* 95 Pa. 45; *Heron* v. *Phœnix Mut. F. Ins. Co.* 180 Pa. 257, 36 L. R. A. 517, 36 Atl. 740; *Bemis* v. *Harborcreek Mut. F. Ins. Co.* 200 Pa. 340, 49 Atl. 769.

Mr. **George B. Gordon** also for plaintiffs in error.

Mr. **Willis F. McCook** for defendant in error.

J. B. McPherson, District Judge, delivered the opinion of the court:

Each of these writs of error raises the same question and they may therefore be

NOTE.—For a case in this series holding that painters employed in painting a building are not "mechanics" within the meaning of a clause in an insurance policy rendering the policy void if mechanics be employed in the building, altering or repairing it, for more than fifteen days at a time, see Smith v. German Ins. Co. (Mich.) 30 L. R. A. 369.

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disposed of together. The evidence upon which the question arises was not disputed, and may be summarized as follows:

In December, 1900, Frank J. Hearne, the plaintiff below, bought a large and handsome residence in the city of Pittsburgh. At the time he was living in a hotel in that city, and before he moved into the house that he had purchased, he desired to put it in thorough order, and to make some minor improvements therein. No structural change was contemplated, and none was made. A firm of contractors undertook to do whatever Mr. Hearne directed, and upon February 4, 1901, the work was begun. The kind and quantity of labor and material that was done and used do not seem to have been questioned at the trial. The total amount of the various bills was $2,712.04, and in this sum is included payment for three hundred and fifty-one days of labor. The following quotation from the brief of counsel for the plaintiffs in error is no doubt substantially correct, and will indicate the kind and amount of work and material: "The plasterers' bill for material and one hundred and sixty-four days' labor amounted to $790; the carpenters' bill for material and eighty-five days' labor amounted to $474.79; the plumbing bill for material and twenty-one and a half days' labor amounted to $276.23; the electricians' bill for material and eight days' labor amounted to $45.48; the tinners' bill for material and three days' labor amounted to $37.30; the steam fitters' bill for material and ten days' labor amounted to $98.57; the bricklayers' bill for one day's labor amounted to $5.55; the tile man's bill for material and ten days' labor amounted to $95.50; the weather-strip man's bill for material and seventeen and a half days' labor amounted to $225,—and, in addition to this, there were about thirty days' wages of calciminers, and five painters for a part of a day, which went into the decorators' bill of $500 for materials and labor up to the time of the fire."

Early in the morning of February 28th, a fire broke out, and destroyed the house. It was insured for $50,000 in the companies that are now plaintiffs in error, and suits were brought upon the policies to recover for a total loss. Each policy contains the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time."

No such agreement was otherwise made or waived, and the company defended under this provision, and, among other requests, asked the court to charge the jury as follows:

"(1) Under all the evidence and the pleadings, the verdict should be for the defendant.

"(2) The policy sued on in this case provides that if mechanics be employed in building, altering, or repairing the insured premises for more than fifteen days at any one time, the policy shall be void, unless otherwise provided by agreement indorsed or added to the policy. As it is the undisputed evidence in this case that there was no such agreement indorsed on the policy, and as it is further the undisputed evidence that mechanics were employed in altering or repairing the insured premises for more than fifteen days at one time, at and immediately prior to the fire, the verdict should be in favor of the defendant."

"(6) If the jury find from the evidence that mechanics were employed in altering or repairing the insured premises for more than fifteen successive working days at any time between the date of the policy and the date of the fire, there being no such agreement indorsed on or added to the policy, their verdict shall be in favor of the defendant."

The court refused these points, referring the jury to certain instructions contained in the general charge. The portion of the charge referred to by the learned trial judge is as follows:

"I am asked to charge you, as matter of law, that the work done by the mechanics and other persons employed in this building amounted to such altering or repairing of the building as violated the condition of the contract, and prevents recovery by the plaintiff. I decline so to instruct you under the evidence in the case. That evidence I submit to you, with the following instructions:

"The particular clause here relied on is not to be construed as preventing the owner of the premises insured from renovating the usual and ordinary effects of use and wear, and if the renovation is such as is customary and proper in a house of the kind and quality insured to preserve it, and keep it in fit condition for use, such work is not prohibited by the policy; in other words, the clause in question cannot be supposed to be intended to interdict the insured from the maintenance of his dwelling house in the condition in which it was when the policy was issued, and the preservation of it in such condition.

"If, then, what was done in the plaintiff's dwelling house did not involve any building or rebuilding, or any alteration of any part of the structure or body of the house, and did not go beyond what was incidental to the ordinary repairing necessary for its preservation, there was no violation of that condition of the policy relied upon as avoiding it. It will be for you to determine from the evidence whether what was done in this instance went beyond such ordinary repairs for the preservation of the premises. If you find from the evidence that what was done did go beyond what I have just indicated, that would be a breach of the condition of the policy, and there can be no recovery. But if what was done did not go beyond what was required for the ordinary repair and preservation of the house, the plaintiff may recover. The question of fact, as to the character and extent of the work, is for the jury, under all the evidence."

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The refusal of the points and these instructions are complained of by proper assignments of error, and present the question that is now to be considered.

The foregoing portion of the charge of the learned judge would no doubt have been correct in a suit brought upon an earlier form of the fire policy, which contained the unqualified provision that the contract should be void if mechanics were employed about the house in making alterations or repairs. When this provision made its appearance in policies of fire insurance, and suits were brought that required the courts to determine the scope of this language, serious objections were urged against construing it without qualification, and it was generally —perhaps everywhere—held that a reasonable construction must be put upon the clause,—a construction that would not be repugnant to the nature and purpose of the contract, or inconsistent with the proper protection that the policy was intended to afford. In one of the early cases upon this subject (*James* v. *Lycoming Ins. Co.* 4 Cliff. 272, Fed. Cas. No. 7,182), Mr. Justice Clifford, in the course of an elaborate discussion, stated the reason for such a construction in the following language: "Small repairs, such as taking out a broken slate and putting in a new one, or replacing a broken pane of glass, or stopping a leak in a chandelier or other gas fixture, or mending a leaky cistern, or repairing a defective chimney, stovepipe, or furnace, it is properly conceded, may be made; but the effect of that concession is to admit that the condition in question is subject to a reasonable construction, not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property. Necessary repairs of the house, whether small or great, could not be made by the working of mechanics in the premises without avoiding the policy if it be held that the condition under consideration applies in such cases, as the language of the condition, if taken literally, would forbid everything of the kind; but we are of the opinion that the condition, if construed to exclude all right of making such repairs, would be void, as repugnant to the nature and purpose of the contract as expressed both in the written and printed words of the policy. Stipulations of the kind, however, in a policy of insurance, may be held valid, if, by a reasonable construction, the objection to the literal operation of the instrument may be avoided, even though, if taken literally, they would be invalid. Authorities to support that proposition do not appear to be necessary, as the rule is well established that courts of justice, in the construction of all written instruments, will seek to uphold the instrument, if it can be done by a reasonable construction. *Harper* v. *Albany Mut. Ins. Co.* 17 N. Y. 198.

"Apply that rule to the present case, and it follows, in the opinion of the court, that the condition in question does not prohibit the insured from remedying defects in the premises or machinery insured which arose subsequently to the granting of the policy without his fault, or which were wholly unknown to him at that time, provided such defects were of a character to endanger the safety of the property insured, or to render the same untenantable and unsafe, and unfit to be occupied for the purposes and uses described in the policy, unless it appears that the repairs made were unreasonable, and increased the risk, or that the fire was in some respect attributable to the repairs, or to the work done in making the repairs."

Other courts took the same view, and, so far as we are advised, this construction prevailed with little or no dissent. The following statement concerning the reason for inserting the provision in the policy, and for the restriction placed upon it by the courts, from May, Ins. 4th ed. § 240, is amply supported by the cases quoted in the note:

"Working of Carpenters.—Repairs. Upon the same general principles, when, from the character of the building insured, and the use made of it, it is necessary to have workmen constantly engaged in repairing, in order to keep it in proper condition for the business done therein, the employment of such workmen is not a breach of the condition that 'working of carpenters,' etc., altering or repairing, will vitiate the policy. Such condition has for its object to prohibit such hazardous use as is generally denominated a 'builder's risk,' which arises from placing the building in the possession or under the control of workmen for alteration or repairs, but does not refer to such indispensable repairs as are necessary to the proper conduct of the business to which the building is appropriated."

It will be observed that the learned trial judge construed the clause contained in the policies now being considered as if it were identical with the clause construed by the foregoing cases and it is this construction that is complained of as error. After careful examination, it seems to us that the complaint is well founded. In our opinion, the clause now before the court differs materially from the clause construed in the cases by which the charge of the trial judge was evidently directed, and requires a different construction to be placed upon it. The qualification imposed upon the earlier provision by Mr. Justice Clifford and by other judges resulted in this situation: Since reasonable repair was to be permitted, —such repair as was necessary properly to preserve the building in such condition as the policy found it, or to allow it to be used and enjoyed in a due and customary manner,—it was clear that in nearly every instance the question must be submitted to a jury whether what had been done to the building was reasonably necessary for the purposes mentioned, or whether it had exceeded that limit. As an inevitable consequence, disputes continually arose, and it became plain that the provision forbidding all repairs, thus construed to mean only repairs unreasonable in extent, was of little value in preventing controversies upon this branch of

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the contract. Accordingly, the clause now under consideration was substituted, with the evident purpose of getting rid of a fruitful source of friction and litigation. In effect, the companies said to the insured: In order that there may be no room for question in the future concerning the character and extent of the work that may be done upon the insured premises we agree that you may do whatever you please to the building, whether the change would be accurately described as building, or as altering, or as repairing, without asking our consent, and without being obliged to consider whether or not the risk is thereby increased; and you may do this for fifteen days. But if the work you do is so extensive that it requires more than fifteen days to finish it, then we require you to give us notice, in order that we may take such steps as we may then see fit. We shall then have knowledge of what you are doing, and we can decide whether it may go on, or whether it is so dangerous as to require us to cancel the policy altogether, or to demand that the increase of hazard shall be compensated by an increase of premium.

This we think, is the true meaning of the clause in question. It substitutes the much more certainly applied test of time for the test of reasonableness, and is a change in the contract that seems to us to be commendable, and worthy of support. There can rarely be room for a serious dispute concerning the length of time employed in doing a given work, while it is every day's experience and observation that there are frequently at least two conflicting standards of reasonableness. It seems to us, therefore, that the learned judge fell into error in supposing that the policies in question required him to ask the jury to determine whether the work done by the defendant in error was merely such work as was necessary for the ordinary repair and preservation of the property, or whether it exceeded this limit. To our minds, the meaning of the provision already quoted is plain and clear, as we have endeavored to explain; and it only remains to add that the work done by the mechanics employed for Mr. Hearne was certainly "repairing," even if it were neither "building" nor "altering." The scope of the last two words need not now be determined. The character and extent of the changes are thus described in the brief of the counsel for the defendant in error, who may be trusted not to exaggerate the description: "Not a brick, a stone, or a timber was added to or taken from the building. Neither the roof, walls, floors, partitions, or foundations were altered in any manner or added to. Nothing of the structure or frame of the building was disturbed, excepting that a small end of a board in one floor, provided for that purpose, was lifted by a plumber, to examine a pipe beneath it. The principal work done by the insured was the rubbing and polishing of the hardwood floors, stairway, wainscoting, and woodwork throughout, preparatory to renewing or freshening the finish. Cracks had appeared in a number of the walls and ceilings, which required to be filled up or cut out, and a ceiling was so badly cracked that it was deemed inadvisable to attempt to repair it, and it was replaced. This, of course, required the redecoration of those walls and ceilings, which work was contemplated, and the decorators had come to work with their materials, but had not commenced their work beyond some calcimining in the servants' quarter on the third floor. A bowl in one of the bathrooms was cracked, and replaced by a new one, and the exposed parts of the plumbing were being reburnished and renickeled, so as to freshen it, but no change was made in the plumbing system. The electric and gas chandeliers were tested, insulation renewed where required, and the chandeliers were reburnished, but no change was made in the electric wiring of the house, except to change the position of two small electric light brackets on the wall. The only alteration or addition made to the entire building was so insignificant as to be immaterial, namely, a small chair board, about 8 inches high, was put in the servants' rooms, the board being made and shaped outside of the building, and was simply put in its place in the room. A tinner examined the gutters and spouting of the building, and found leaks in some of the spouting, which was renewed with new spouting."

The charge of the court also contains an excellent summary of the changes, but it need not be quoted. It seems to us impossible to say that "repairing" does not accurately describe work of this character and extent, and, indeed, we do not understand the learned trial judge to differ from us upon this point. He also held that this was "repairing," but believed it might be of such a character as to be permitted by the policy, even after the expiration of fifteen days.

The clause under consideration is of comparatively recent date, and only a few cases have been found in which it has been examined by the courts of last resort. None of them decides the precise point raised by this writ of error, although we think that the reasoning of *Newport Improvement Co.* v. *Home Ins. Co.* 163 N. Y. 237, 57 N. E. 475, justifies us in citing that case as affording support to the conclusion we have reached.

The other question raised by the record need not be considered. For the reasons given, we think the undisputed evidence would have justified the Circuit Court in affirming the first point of the defendants below, by which binding instructions in their favor were asked, and *it is therefore ordered that the judgment in each of these cases be reversed*, without a new venire.

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UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Charles B. MAGUIRE *et al., Plffs. in Err.*,
v.
Michael SHEEHAN.

(117 Fed. 819.)

One cannot escape liability for any part of the loss caused by injuries negligently inflicted by him on another, for the reason that, because of the condition of the injured person, produced by his voluntary use of alcohol, the shock of the injury brought on delirium tremens, which retarded his recovery.

(July 29, 1902.)

ERROR to the Circuit Court of the United States for the District of Rhode Island to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion.

Argued before *Colt* and *Putnam*, Circuit Judges, and *Webb*, District Judge.

Mr. **Walter B. Vincent,** for plaintiffs in error:

To relieve plaintiff of responsibility for the result of his condition absence of fault on his part is necessary.

Lapleine v. *Morgan's L. & T. R. & S. S. Co.* 40 La. Ann. 661, 1 L. R. A. 378, 4 So. 875; *Louisville, N. A. & C. R. Co.* v. *Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Dickson* v. *Hollister*, 123 Pa. 421, 16 Atl. 484; *King* v. *Henkie*, 80 Ala. 505, 60 Am. Rep. 119; *Hanley* v. *North Jersey Street R. Co.* (N. J. L.) 47 Atl. 445.

Plaintiff's failure to make a good recovery did not result directly, either from the original injury, or from the supervening attack of delirium tremens, but from his violent conduct in tearing the bandages from the injured limb.

A negligent person is responsible only for the natural and proximate consequences of his negligence.

Ehrgott v. *New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Baltimore City Pass. R. Co.* v. *Kemp*, 61 Md. 74; *McNamara* v. *Clintonville*, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472; *Stewart* v. *Ripon*, 38 Wis. 584.

Proximate damages are those that are the ordinary and natural result of the negligence, and may therefore be expected.

Haile v. *Texas & P. R. Co.* 23 L. R. A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; *Thompson* v. *Louisville & N. R. Co.* 91 Ala. 496, 11 L. R. A. 146, 8 So. 406; *Indianapolis, B. & W. R. Co.* v. *Birney*, 71 Ill. 391; *Scheffer* v. *Washington City, U. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Streeter* v. *Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 31 N. W. 779; *King* v. *Henkie*, 80 Ala. 505, 60 Am. Rep. 119; *Raymond* v. *Haverhill*, 168 Mass. 382, 47 N. E. 101; *Louisville, N. A. & C. R. Co.* v. *Jones*, 108 Ind. 551, 9 N. E. 476; *Gulf, C. & S. F. R. Co.* v. *Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608; *Terre Haute & I. R. Co.* v. *Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Travelers' Ins. Co.* v. *Melick*, 27 L. R. A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178; *Barry* v. *United States Mut. Acci. Asso.* 23 Fed. 712.

The intervening acts of the plaintiff prevented his recovery, and were due to his alcoholic condition prior to the accident. The proximate cause of these intervening acts was the alcoholic condition, and not the accident.

Barry v. *United States Mut. Acci. Asso.* 23 Fed. 712; *Chicago, St. P. M. & O. R. Co.* v. *Elliott*, 20 L. R. A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949; *Travelers' Ins. Co.* v. *Melick*, 27 L. R. A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178.

Messrs. **Donald G. Perkins** and **J. J. Desmond,** for defendant in error:

The party who commits a trespass or other wrongful act is liable for all the direct injury resulting, although said injury could not have been contemplated as the probable result of the act done.

3 Sutherland, Damages, 2d ed. 1244.

Where a physical injury stimulates a pre-existing tendency to disease, or leads to peculiarly unfortunate results owing to a prior injury or to a delicate state of health, the loss is the direct, though unexpected, consequence of the injury, and the plaintiff may recover compensation for it.

1 Sedgw. Damages, 8th ed. § 112; 2 Wood, Railroads, Minor's ed. pp. 1440–1443; 3 Addison, Torts, 3d ed. 5; *Sullivan* v. *Marin*, 175 Mass. 422, 56 N. E. 600; *Spade* v. *Lynn & B. R. Co.* 172 Mass. 491, 43 L. R. A. 832, 52 N. E. 747; *Littlehale* v. *Dix*, 11 Cush. 364; *Turner* v. *Nassau Electric R. Co.* 41 App. Div. 213, 58 N. Y. Supp. 490; *St. Louis S. W. R. Co.* v. *Ferguson* (Tex. Civ. App.) 64 S. W. 797; *Oliver* v. *LaValle*, 36 Wis. 592; *Stewart* v. *Ripon*, 38 Wis. 584; *Terre Haute & I. R. Co.* v. *Buck*, 96 Ind. 346, 49 Am. Rep. 168; *McNamara* v. *Clintonville*, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472; *Brown* v. *Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 51, 11 N. W. 356,

NOTE.—As to measure of recovery where personal injury is aggravated by existing disease, see cases in *note* to Morgan v. Southern P. Co. (Cal.) 17 L. R. A. 71; also Lapleine v. Morgan's L. & T. R. & S. B. Co. (La.) 1 L. R. A. 378, and Louisville, N. A. & C. R. Co. v. Snider (Ind.) 3 L. R. A. 434.

As to measure of damages for personal injury increased by carelessness or mistake of physician or injured person, see Owens v. Baltimore & O. R. Co. (C. C. S. D. Ohio) 1 L. R. A. 75; Goshen v. England (Ind.) 5 L. R. A. 253; Salladay v. Dodgeville (Wis.) 20 L. R. A. 541; and Selleck v. Janesville (Wis.) 41 L. R. A. 563, 47 L. R. A. 691.

For effect of plaintiff's neglect to obey physician's orders on right to recover damages for malpractice, see DuBois v. Decker (N. Y.) 14 L. R. A. 429.

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911; *Louisville, N. A. & C. R. Co.* v. *Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Jeffersonville, M. & I. R. Co.* v. *Riley*, 33 Ind. 568; *Ohio & M. R. Co.* v. *Hecht*, 115 Ind. 443, 17 N. E. 297; *Baltimore City Pass. R. Co.* v. *Kemp*, 61 Md. 74; *Purcell* v. *St. Paul City R. Co.* 48 Minn. 139, 16 L. R. A. 203, 50 N. W. 1034; *Watson* v. *Rinderknecht*, 82 Minn. 235, 84 N. W. 798; *Louisville & N. R. Co.* v. *Jones*, 83 Ala. 382, 3 So. 902; *Thompson* v. *Louisville & N. R. Co.* 91 Ala. 496, 11 L. R. A. 146, 8 So. 406; *Travelers' Ins. Co.* v. *Melick*, 27 L. R. A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178.

The proximate cause is the efficient cause, —the one that necessarily sets the other cause in operation.

Ætna F. Ins. Co. v. *Boon*, 95 U. S. 117–130, 24 L. ed. 395–398; *Brown* v. *Chicago, M. & St. P. R. Co.* 54 Wis. 360, 41 Am. Rep. 51, 11 N. W. 356, 911; *Louisville, N. A. & C. R. Co.* v. *Falvey*, 104 Ind. 426, 3 N. E. 389, 4 N. E. 908.

Colt, Circuit Judge, delivered the opinion of the court:

The alleged errors of the court below, which relate solely to the question of damages, must be considered in the light of the testimony in the case. It appeared in evidence: (1) That Sheehan, the plaintiff below, prior to his injury was in good health; (2) that the delirium tremens which retarded his recovery was caused by the shock of the injury; (3) that the violent acts which delayed the healing of the wound and the knitting of the bones were committed while in a state of delirium.

This state of facts shows (1) that no question could properly arise respecting what part of the injury might be attributable to a diseased condition at the time of the accident; and (2), as the chain of causation was complete, direct, and immediate, that no question of an independent intervening cause was properly presented in the case.

The charge of the court below on the question of damages was substantially as follows: Damages mean compensation. This includes compensation for loss of time, for loss of future earning capacity, for pain, for suffering, and for all expenses incurred for nursing and in the treatment of the injury.

Upon the question of delirium tremens and the alcoholic habits of the plaintiff, the court said: "It does appear in evidence, however, that, after the man was taken to the hospital, delirium tremens ensued, and that while he was upon his back, and should have remained in one position, in order that his leg might knit, this attack of delirium tremens rendered him practically insane, so that he moved about, tore his bandages, and even got out of bed, and that that delayed the knitting of the wound, and has prevented a recovery as complete as otherwise might have been had; in other words, that the man's previous alcoholic condition affected the injuries which resulted from the accident. Well, gentlemen, this is a pretty delicate matter; and I think it is the policy of the law that such damages as are the natural and probable consequences, and the actual consequence, in each case, are proper subjects for compensation. We find in our community men of various stages of indulgence in alcoholic stimulants, and it would be impracticable for the law to draw any very fine distinctions. You take the case of a cut. Suppose a man in an accident is cut. I believe it is a medical fact that the users of alcohol do not repair their wounds as rapidly as a man who has never put hot and rebellious liquors to his blood, as an old poct puts it. Now, suppose a case where a man of good standing in a community is injured on the highway, and is very badly cut; would it be practicable, gentlemen, for the rules of law to make fine distinctions between a man of that character, a man of perfectly reputable standing, and an alcoholic man,—between a drinker and a non-drinker? . . . In view of these very complicated questions which might arise, it seems to me to be the better policy that you should take the party as he stands, and say what was the injury to him which was due to this accident, as its proximate cause. Now, it is true that a person injured is obliged to use his best efforts to make the injury as little as possible. If a man suffers from a railway collision, he is not relieved from his duty to go about in the business of curing himself. He cannot allow the thing to go on and recklessly increase his injury by not attending to it, in order to get enhanced damages. He is required to use the reasonable exertions of a prudent man, and I suppose that a patient in the condition of this man would be required to use reasonable prudence in taking care of himself; and mere nervousness, mere lack of self-restraint, would not justify conduct such as tearing off bandages or getting out of bed, any more than it would justify a man who had committed an assault upon another to say that his nervous system was so attenuated or impaired by smoking or drinking that he could not resist the taunts of his adversaries. That would be no excuse at all. So, in this case, had the party been a man of sound mind, the doctrine might have been applicable that he is still required to use the conduct of an ordinary and prudent man under such circumstances. The evidence in this case, however, as far as I recollect it, is that this delirium was solely caused by the accident. If that is the case, gentlemen, and the man became an insane person, then the fact that he had, by his conduct in tearing off the bandages and moving about in the bed, retarded his recovery, would be no barrier to the recovery of such damages as he had in fact suffered. . . . I therefore instruct you that you are not entitled to deduct anything from the ordinary damages,—from such damages as you find to have ensued from this accident."

The exception of the defendants was to the whole of this portion of the charge, and not to any particular part. For the rea-

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sons which will appear in the discussion of the substantial question involved in the case, this exception must be overruled.

The defendants further requested the court to charge "that, if the previous condition of the plaintiff was such as to prevent his recovery from the accident, such condition should be taken into account."

In relation to this request, the court said: "You may certainly take into account the man's condition, gentlemen, when you approach the question of damages as affecting his earning capacity; but I think that I have sufficiently instructed you as to its bearing upon this particular question of his conduct in the hospital."

That this request is not a correct statement of the law, and should be overruled, sufficiently appears from what follows in this opinion.

The substantial question the defendants sought to raise was presented by the second request, which was also refused. This request was as follows: "That, if the plaintiff voluntarily put himself in a physical condition where delirium tremens might easily be developed by the shock of an accident, he would be responsible so far as such condition prevented his recovery."

The defendants admit the general rule that, where a personal injury develops a latent disease, the person whose negligence caused the injury is liable to respond in damages for the results of the disease, as well as of the original injury; but they insist that a distinction should be made between different diseases. It is not denied that the rule applies to malaria, scrofula, rheumatism, erysipelas, cancer, and lockjaw, but it is said that it does not apply to ailments which are caused by voluntary and intemperate habits.

We are not aware of any such exception to the general rule. The difficulties of establishing such an exception are apparent, as was aptly illustrated in the charge of the court below. How far a latent disease, called into activity by an injury, is the result of the habits or voluntary acts of the injured, is a matter of speculation, and necessitates the investigation of difficult and occult questions of cause and effect, which lie outside the scope of judicial inquiry. Beyond general expressions in some decisions, which at most are mere *dicta*, there is no authority cited by the defendants which supports their contention. As an almost universal rule, the courts have declined to recognize any such distinction, and it is only necessary to refer to the following cases:

In *Turner* v. *Nassau Electric R. Co.* 41 App. Div. 213, 58 N. Y. Supp. 490, where the plaintiffs intestate died from delirium tremens caused by the shock of the injury, the court said: "If the accident to the deceased had been caused while he was, and by reason of his being, intoxicated, so that his condition might be considered as contributing to the accident, a different question would have arisen; but it requires altogether too great a stretch of moral responsibility, and necessitates the investigation of cause and effect, and would carry us into metaphysical and psychological speculation to an extent outside the possibility of judicial inquiry, to hold that the susceptibility to delirium tremens is different from any other physical condition caused by unwise or improper habits. When disease has supervened from any cause, any aggravation of that condition by the negligence of another is a cause of action for damages, provided such damages are solely set in motion and caused by the injury."

In *Sullivan* v. *Marin*, 175 Mass. 422, 423, 56 N. E. 600, the defendant sought to prove that the plaintiff, prior to the accident, had been addicted to the excessive use of intoxicating liquors. In ruling upon this point, the court said: "If her previous habits had been such as to lessen the probability of her complete recovery, or to prolong or aggravate the suffering caused by her injury, that fact could not be shown in mitigation of damages."

See also *St. Louis S. W. R. Co.* v. *Ferguson* (Tex. Civ. App.) 64 S. W. 797.

The judgment of the Circuit Court is affirmed, with interest, and the costs of appeal are awarded to the defendant in error.

Webb, District Judge, concurred in the conclusion of the court before he resigned.

TENNESSEE SUPREME COURT.

FIRST NATIONAL BANK OF GENEVA, Ohio, *Appt.*,
v.
M. P. SHAW *et al.*

(.....Tenn.....)

1. A note is a contract of the state where it is delivered and payable, although it was signed in another state by a person resident there.

2. A married woman sued in the state of her domicil may avail herself of the protection of its statute allowing her to plead coverture as a defense to her contracts, when sued there on a note delivered and payable in another state where such defense would not be recognized.

(November 20, 1902.)

APPEAL by complainant from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Rhea County in favor of defendants in a suit

NOTE.—For conflict of laws as to contracts of married women, see Union Nat. Bank v. Chapman (N. Y.) 57 L. R. A. 513, and *note*.

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brought to enforce payment of a certain promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. **R. C. M. Cunnyngham** and **Chambliss & Chambliss** for appellant.

Mr. **John C. Locke,** for appellees:

The incapacity of a married woman to contract is so fixed in this state that it may be said to be the settled policy of the state to such an extent that to hold defendants liable would be repugnant to that settled policy.

9 Am. & Eng. Enc. Law, *Husband & Wife,* p. 791.

At common law the married woman had no capacity to contract.

14 Am. & Eng. Enc. Law, p. 601.

The common law has been adopted in this state.

Searcy v. *Vance,* Mart. & Y. 225; *Watson* v. *Church,* 3 Hun, 80; *Robertson* v. *Wilburn,* 1 Lea, 633; *Sexton* v. *Alberti,* 10 Lea, 455; *Warren* v. *Freeman,* 85 Tenn. 513, 3 S. W. 513; *Flanagan* v. *Oliver Finnie Grocery Co.* 98 Tenn. 601, 40 S. W. 1079.

A note of this character, indorsed by a known *feme covert* resident of Tennessee as accommodation security for the maker, is not to be governed in strictness by the law of the place of payment.

Douglas v. *Bank of Commerce,* 97 Tenn. 141, 36 S. W. 874.

This was a separate contract, separate and distinct from the loan contract.

A married woman, from the very fact of coverture, is a standing advertisement to the business world that she has no power over her estate, no authority to carry on business, and, as a result, no power to contract.

Story, Confl. L. 136; Wharton, Confl. L. 98–113.

By the laws of Tennessee the *feme* had no power to contract by the fact of her domicil in Tennessee, where the note was actually signed. These two facts concurring, the law of Tennessee on this subject, the law of her incapacity, is read into the assumed contract, and made a part of the note, at once stamping it as invalid.

Robinson v. *Queen,* 87 Tenn. 447, 3 L. R. A. 214, 11 S. W. 38; *Armstrong* v. *Best,* 112 N. C. 59, 25 L. R. A. 188, 17 S. E. 14.

No principle of private international law places a duty upon our court to enforce a contract or give a remedy to a nonresident which it denies to a resident of our own state.

Ruhe v. *Buck,* 124 Mo. 178, 25 L. R. A. 178, 27 S. W. 412.

McAlister, J., delivered the opinion of the court:

The only question presented for determination upon this record is the liability of the defendant Mrs. Stella V. Harley upon the following note:

$500.00.

Geneva, Ohio, Dec. 3, 1892.

Six months after date, value received, we jointly and severally promise to pay to the First National Bank of Geneva, at their banking house, $500.00 interest 8% after maturity. Interest paid to maturity $17.50.

D. H. Harley,
Stella V. Harley,
M. P. Shaw.

Mrs. Harley, in her answer to the bill, avers that she was a married woman at the time said note was executed, and relies on the plea of coverture. She further avers that she and her husband, D. H. Harley, were residents of and living in the state of Tennessee at the time said note was executed, and have since continuously lived in this state, and she denies that the note was an Ohio contract.

The facts found by the court of chancery appeals are, *viz.:* First. The note sued on is a renewal note. The original note was made June 6, 1891. It was renewed December 5, 1891; renewed again January 4, 1892; and again December 3, 1892; the note last renewed or made being the one in suit. Second. Previous to the execution of the first note, and since 1889, Mrs. Harley was a married woman, living with her husband continuously in Tennessee. She owned no property in the state of Ohio. Third. The weight of the proof is, and we so find as a fact, that she signed all the notes in Tennessee; and it is practically conceded, and, if not conceded, we find the fact to be, that she signed the note sued on in Tennessee. Fourth. The original note was negotiated in Geneva, Ohio. The note sued on was received by the bank at Geneva, Ohio, through the mail, from Chattanooga, Tennessee. Fifth. It is conceded that, under the statute law of Ohio, married women are liable in that state on their contracts.

It will be perceived that the legal question presented is whether a married woman, domiciled with her husband in Tennessee, is liable on a note signed by her in this state, but payable in the state of Ohio. The first question, of course, to be determined, is whether, upon the facts found, this is a Tennessee or an Ohio contract. Says Mr. Tiedeman, in his work on Commercial Paper (§ 506): "It is, however, not the law of the place where the contract was signed or executed, but the law of the place where the contract was consummated, by delivery or otherwise, which governs the construction of the contract" made in one state, to be performed in another. Thus, notes drawn in one state, and delivered and payable in another, for purchases made there, are governed by the law of the latter state, and are considered there made; for by delivery, only, the act of making is fully consummated. So it was said in *Hall* v. *Cordell,* 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 154. But where there is nothing to show "that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance, that

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law must determine the rights of the parties." *Hubble* v. *Morristown Land & Improv. Co.* 95 Tenn. 585, 32 S. W. 965. In 2 Parsons, Contr. 586, it is said: So, if one in New York orders goods from Boston, "either by a carrier whom he pointed out, or in the usual course of trade, this would be a completion, a making of the contract, and it would be a Boston contract, whether he gave no note, or a note payable in Boston, or one without express place of payment." We think it quite plain that the note in suit is an Ohio contract, notwithstanding it was signed by Mrs. Harley in Tennessee, it having been delivered and consummated in Ohio, and is payable in that state, as the place of performance. *Armstrong* v. *Best*, 112 N. C. 59, 25 L. R. A. 188, 17 S. E. 14; *Milliken* v. *Pratt*, 125 Mass. 374, 28 Am. Rep. 241.

The next inquiry is whether the plea of coverture to a note made in Ohio, valid and enforceable against a married woman in that state, is available in a suit on said note in this state, where such a contract is voidable at the election of the married woman. In Story, Confl. L. chap. 4, § 103, it is said: In regard to questions concerning infancy, competency to marry, incapacities incident to coverture, guardianship, and other personal qualities and disabilities, the law of the domicil of birth, or other fixed domicil, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made or the act done, or, as he elsewhere sums it up, "although foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract, yet the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern." Story, Confl. L. §§ 103, 241. Chancellor Kent, while at one time inclined to the doctrine of the civilians, afterwards approved the doctrine which has just been quoted from Mr. Story. 2 Kent, Com. 233, note, 458, 459, and note. The same doctrine was announced by this court in *Pearl* v. *Hansborough*, 9 Humph. 426, in an opinion by Judge Turley. Applying this rule, it was held in *Milliken* v. *Pratt*, 125 Mass. 374, 28 Am. Rep. 241 (Mr. Justice Gray delivering the opinion of the court), that a contract of guaranty, signed by a married woman domiciled with her husband in Massachusetts, and sent by mail to Maine, where it was accepted and acted on, was a contract made in the state of Maine, and, when sued on in the state of Massachusetts, would be determined by the law of Maine. In that case it appeared that by the statutes of Maine in force at the date of the contract of guaranty, the contracts of a married woman were valid and enforceable as if made by a *feme sole*, while the law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband. But it further appeared that since the making of the contract sued on, and before the bringing of the action, the law of Massachusetts had been changed so as to enable married women to make such contracts. The court of Massachusetts therefore permitted a recovery against a married woman on the contract of guaranty made in Maine. See also *Bell* v. *Packard*, 69 Me. 105, 31 Am. Rep. 251. But in Tennessee the contracts of a married woman are voidable, and will not be enforced against her when there is a plea of coverture. It would be a strange anomaly to hold that such a contract made by a married woman in Tennessee would not be enforced by our courts, while the same contract, if made in another state, would be valid and enforceable. As stated by Mr. Justice Gray in *Milliken* v. *Pratt*, 125 Mass. 374, 28 Am. Rep. 241: "As the law of another state can neither operate nor be executed in this state by its own force, but only by the comity of this state, its operation and enforcement here may be restricted by positive prohibition of statute. . . . It is possible, also, that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state for the protection of its own citizens that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." While it is true, as contended by counsel in his very able argument, that the tendency of legislation in Tennessee is to enlarge the contractual power of married women, yet such power is very limited and circumscribed, and the settled policy of this state is to declare nugatory contracts made by her whenever her plea of coverture is interposed. In *Bank of Columbia* v. *Walker*, 14 Lea, 299, it was held that the *lex loci contractus* would govern when not repugnant to the *lex fori*. The court stated the rule to be: "Whether we consider the subject [matter] under the name of comity and its rules, or under that of real and personal statutes and its rules, either or both sustain the position that the *lex loci contractus* as to relations and property rights will prevail over the *lex fori*, unless the enforcement of the former will work an injury to the subjects of the latter, or is prohibited by the laws of the latter." It was further said that rights and contracts arising under the laws of a foreign state will not be enforced here, except under the doctrine of the comity of states, and that this doctrine neither requires nor sanctions the enforcement in the courts of this state of statutory rights and contracts arising under the laws of a foreign state which are repugnant to the policy and spirit of our laws.

For the reasons indicated, *the decree of the Court of Chancery Appeals is affirmed.*

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R. R. SWEPSON, *Appt.*,
v.
John L. DAVIS.

(.....Tenn.....)

1. **A suit for partnership accounting,** which results in a judgment in plaintiff's favor for a small balance, will not sustain a simple action for malicious prosecution, in which there is no allegation of successful refutation of false and malicious allegations made for the purpose of securing an enhanced judgment against defendant, although complainant alleged mismanagement of the business and misappropriation of funds, which allegations were not sustained, and did not become the basis of any decree.

2. **Matters which were not passed on in the original suit cannot be considered** by the court upon the trial of an action for malicious prosecution, and the effect which they might have had in the decision of the original suit, if considered, determined.

On Rehearing.

3. **The court will not, in an action for malicious prosecution, look behind the final judgment** in the original suit, and ascertain whether or not, upon the contentions made by the bill as a whole the defendant, against whom the judgment was entered, was in fact the successful party.

(October 11, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Knox County in plaintiff's favor in an action brought to recover damages for alleged malicious prosecution. *Reversed.*

The facts are stated in the opinion.

Messrs. **Pickle & Turner** and **Jerome Templeton,** for appellant:

Although an action for malicious prosecution of a civil suit will lie without an arrest of person or the attachment of property (*Lipscomb* v. *Shafner*, 96 Tenn. 112, 33 S. W. 818; *Kolka* v. *Jones*, 6 N. D. 461, 71 N. W. 558; *McCardle* v. *McGinley*, 86 Ind. 538, 44 Am. Rep. 343), yet the former action must have been instituted maliciously, —that is, brought for some improper motive, and not in good faith.

Morgan v. *Duffy*, 94 Tenn. 688, 30 S. W. 735; *Graham* v. *Fidelity Mut. Life Asso.* 98 Tenn. 60, 37 S. W. 995; 19 Am. & Eng. Enc. Law, 2d ed. p. 673.

It must also have been brought without probable cause.

Turner v. *Turner*, 85 Tenn. 387, 3 S. W. 121; *Greer* v. *Whitfield*, 4 Lea, 89; 19 Am. & Eng. Enc. Law, 2d ed. pp. 655, 656.

Malice may be inferred from a want of probable cause; but the want of probable cause will not be inferred from the most expressed malice.

19 Am. & Eng. Enc. Law, 2d ed. pp. 678, 680; *Stewart* v. *Sonneborn*, 98 U. S. 187, 25 L. ed. 116.

An honest belief in the defendant's guilt will rebut malice.

Stewart v. *Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Greer* v. *Whitfield*, 4 Lea, 89.

An adverse decision in the former suit against the defendant therein is conclusive proof of probable cause for bringing the former action.

19 Am. & Eng. Enc. Law, 2d ed. p. 668; 14 Am. & Eng. Enc. Law, p. 66; *Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Memphis Gayoso Gas Co.* v. *Williamson*, 9 Heisk. 314.

Where the declaration avers the termination of the former suit in favor of the defendant therein, and the record is referred to in such a manner that the allegation becomes a matter of description, any discrepancy between the record offered in evidence and that described in the declaration will constitute a material variance.

13 Enc. Pl. & Pr. p. 452; *McNamee* v. *Minke*, 49 Md. 122.

The judgment in the former suit in favor of the defendant to that suit is the only competent proof of the fact that such suit ended in favor of the plaintiff in the suit for malicious prosecution.

14 Am. & Eng. Enc. Law, p. 59, note 2; *Brewer* v. *Jacobs*, 22 Fed. 217; *Marbourg* v. *Smith*, 11 Kan. 554; *Sloan* v. *McCracken*, 7 Lea, 626; *Pharis* v. *Lambert*, 1 Sneed, 228; *Stewart* v. *Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; 1 Jaggard, Torts, § 198, p. 610; Cooley, Torts, 2d ed. pp. 217–219; Webb's Pollock, Torts, pp. 349, 395, note 3; Addison, Torts, § 874; 1 Hilliard, Torts, § 26, p. 450; *Wilson* v. *Hale*, 178 Mass. 111, 59 N. E. 632; *Rogers* v. *Mullen* (Tex. Civ. App.) 63 S. W. 897; *McKenna* v. *Heinlen*, 128 Cal. 97, 60 Pac. 668; 2 Greenl. Ev. § 452, note 6; *Mitchell* v. *Jenkins*, 5 Barn. & Ad. 588, 594.

The suit for malicious prosecution of a former suit cannot be maintained, although the plaintiff in the former suit did not recover all he sued for.

2 Greenl. Ev. 16th ed. pp. 427, 428, note 4; *Masterson* v. *Brown*, 18 C. C. A. 481, 30 U. S. App. 730, 72 Fed. 136.

The only exception to the rule that the former action must have terminated in favor of the defendant therein before an action for malicious prosecution will lie is where the defendant in the former suit had no opportunity to defend, or where the final judgment in the former suit was procured by the fraud or perjury of the plaintiff therein.

Webb's Pollock, Torts, 395; 1 Jaggard, Torts, p. 611; *Craig* v. *Ginn* (Del.) 45 Atl. 842.

A judgment is conclusive upon every matter actually and necessarily decided in the former suit, though not then directly the point in issue.

NOTE.—For a decision in this series that plaintiff in a suit for malicious prosecution need not always show that judgment in the alleged malicious prosecution was rendered in his favor, see Antcliff v. June (Mich.) 10 L. R. A. 621.

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1 Freeman, Judgm. § 256, p. 457; *Boyd* v. *Robinson*, 9 Pick. 19.

Mr. **L. H. Spillman** also for appellant.

Messrs. **Rogers & Rogers, J. C. J. Williams,** and **D. L. Snodgrass** for appellee.

Wilkes, J., delivered the opinion of the court:

This is a suit for the malicious prosecution of a civil action which was brought in the chancery court of Knox county in 1893, and finally decided April 21, 1900. There were pleas of not guilty and statute of limitations. There was a trial before a jury, and verdict and judgment for $16,500; and defendant appealed, and has assigned various errors, only one or two of which need be noticed, as they are conclusive of the case.

The eleventh assignment of error is that there is no evidence to support the verdict. Under this and other assignments, it is said that the record in the civil suit, which it is claimed was malicious and without probable cause, shows that the final judgment of the court was in favor of the complainant in that suit, and thus affords conclusive proof of probable cause for bringing the suit. In connection with this assignment, may be considered the objections to the action of the court in refusing to give special requests, in substance, that before the plaintiff could maintain his suit for malicious prosecution the former suit upon which it is based must have finally terminated in favor of the plaintiff in the present suit, and that, if the final judgment in the original suit was against the plaintiff in this suit, he could not recover in this action, and this would be true though the complainant in the original suit was not successful in establishing all his allegations and contentions. The contention is also made that the court should have examined the record in the original suit, and told the jury whether it was decided for the plaintiff in the present suit or not, and it was error to leave it to the jury to decide whether plaintiff was or not successful, as they might determine upon a question which was not passed upon in the original suit.

Plaintiff and defendant had been partners in Knoxville for many years, and had built up a large business; Swepson furnishing almost all the capital, and Davis attending to the business, and receiving a salary therefor, besides a share in the business. The bill in the original suit was brought to wind up the partnership, and it was alleged that the stock was sold out on October 1, 1891, and the firm went into liquidation at that time. The allegations of the bill of which complaint is specially made are, in substance, that Davis had drawn out of the firm large sums of money, and invested the same in real estate, until the balance to the debit of his personal account was more than $16,000, and that this debit against him was one of the largest assets of the firm; that he had invested $13,500 or more of the firm's money in real estate at or near Johnson City, and had taken the title in his own name; that he afterwards sold the land to an incorporated company, which he organized for that purpose; that he took of the firm's money $12,512.50, and put it into a tract of land near Lake Ottosee, taking the deed to himself and the complainant jointly; that he withheld the deed to the same from registration for more than three months in order to conceal the transaction from complainant; that complainant, because of defendant's insolvency, chose to ratify the purchase; that Davis took also $4,375 of the firm's money and invested it in a lot in Knoxville, and took deed to himself individually; that defendant's account was overdrawn more than $30,000, instead of $16,000, as admitted by him, and that outside of defendant's indebtedness, and the lands and lot mentioned, there were only a lot of suspended notes and accounts, of which defendant admitted that only about $12,000 were collectible, and that defendant had no property, except a home in Knoxville, worth about $3,000; that he had become insolvent, and was in no business, but was planning a trip to New York or Baltimore to engage in business, and in the meantime was collecting the remaining debts due the firm, and not accounting to complainant for the same. There was a prayer for an account, and decree for whatever might be found due on settlement, for the appointment of a receiver, and for realizing on all the assets of the firm, real and personal, and for general relief. The defendant answered the bill, going into great detail in regard to the business of the partnership; explaining the various transactions complained of; denying all charges of mismanagement and misappropriation on his part, and all allegations that tended to injure his personal or business standing; and insisting that the firm was not dissolved, but that the charges made against him were calculated to injure him personally and in his business relations. The chancellor heard the case, and decreed that the dissolution of the partnership should be deemed to have been made as of the date the bill was filed, and that it was not necessary to decide whether it was being run under a contract of five or ten years at the time of the dissolution; that the allegations that defendant had drawn out large sums of money and invested them in real estate, concealing the same from complainant, were untrue, but that the partnership funds were used with the full knowledge and consent of the plaintiff; that the lands were partnership assets; that the defendant only used $1,000 of the firm's assets in the purchase of the lot in Knoxville for $4,375, and the remainder was paid for by defendant out of his individual means; that defendant was entitled to $4,000 of Nash notes, but was not entitled to a credit upon his account of $1,575 for salary, as claimed. The case was referred to the master to ascertain the state of accounts between the parties upon a basis laid down,

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and Swepson thereupon appealed to the supreme court. The cause was heard before the court of chancery appeals, and the decree of the chancellor was affirmed, except that Davis was allowed on his assignment an additional credit on salary account of $1,575, which the chancellor had disallowed, and all costs were adjudged against Swepson. 37 S. W. 896. The opinion of that court was made part of the record, and Swepson appealed to the supreme court. This court orally affirmed the decree of the court of chancery appeals, and adopted the decree of that court as its own, and ordered that the decree of the court of chancery appeals, which had made the opinion of that court a part of the record, should be certified to the chancery court, along with the decree of the supreme court, on the remand of the cause. After the remand the cause proceeded to an account and final judgment on 21st April, 1900, for $2,150.66 against Davis the defendant, and in favor of Swepson, the complainant, in that cause. The court of chancery appeals in its opinion says, among other things: "It is sufficient to say that, in our opinion, the main contentions of the complainant in his bill are not sustained by the proof." And again: "We are satisfied that defendant Davis, in all his negotiations and conduct, believed that what is called the 'ten-year contract' was in force; but, looking at the relation of these parties, and what was actually done, we agree with the chancellor that it is of no practical importance, in so far as the equitable rights of these parties are concerned, to determine whether or not said contract was in existence, and actually regarded as an existing contract, defining the rights and duties of the parties, at and before the bill was filed. . . . In view of the filing of this bill, and its charges, no court of equity would continue partnership relations between them." And again: "An examination of this whole record, and all the evidence contained in it, and especially record evidence furnished by complainant, Swepson, himself, leads us irresistibly to the conclusion that this bill and its serious charges were without any rational foundation."

Now, conceding we may look to the opinion of the court of chancery appeals in the original suit, and conceding all that is said by that court in regard to the necessity for the original suit, and conceding, as claimed by counsel for Davis, that many charges and allegations in the bill were unauthorized and unwarranted, and calculated to do Mr. Davis great injustice, and that they did actually so result, the fact appears, nevertheless, that upon the final decree in the original suit it was in favor of Swepson and against Davis for $2,150.66. The question arises, Can a suit for malicious prosecution be sustained upon such record, and in view of the final decree in the original suit? In order to maintain a suit for malicious prosecution, it is necessary to allege and prove that the former or original suit on which it is based has terminated, and that it resulted in favor of the defendant in that suit. *Paris* v. *Lambert*, 1 Sneed, 228; *Sloan* v. *McCracken*, 7 Lea, 626; *Memphis Gayoso Gas Co.* v. *Williamson*, 9 Heisk. 314; *Stewart* v. *Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472. The authorities, English and American, sustaining this proposition, are collated in 19 Am. & Eng. Enc. Law, 2d ed. p. 683; 13 Enc. Pl. & Pr. 446. Jaggard, in his work on Torts, says: "To maintain an action for malicious prosecution, the plaintiff must show that the original proceeding terminated in his favor, if from its nature it was capable of such termination, and such termination must have been final, so that it cannot be renewed. . . . If the original proceeding has not terminated in plaintiff's favor, all questions as to malice, want of proper cause, and the like, are immaterial." 1 Jaggard, Torts, § 198, p. 610, citing a large number of English and American cases. Mr. Cooley, in his work on Torts, in defining the elements necessary to sustain an action of malicious prosecution, says (*181): "There is a concurrence of the following circumstances: (1) A suit or proceeding has been instituted without any probable cause therefor; (2) the motive in instituting it was malicious; (3) the prosecution has terminated in the acquittal or discharge of the accused." Again (*186): "The termination of the proceeding must, in general, be by a final acquittal." In 1 Hilliard, Torts, § 26, p. 472, it is said: "An action for malicious prosecution of a civil suit will not lie until the final termination of the suit, and the complainant must allege a want of probable cause, by averring that the suit was finally determined in favor of the defendant therein." To the same effect and substance is Webb's Pollock, Torts, pp. 394, 395, note 3; Addison, Torts, § 874. In *Sloan* v. *McCracken*, 7 Lea, 627, it is said: "This action is brought to recover damages for the wrongful suing out of the attachment in the original cause. Such an action is the common-law action for the malicious prosecution of a civil suit, and is grounded upon malice and the want of probable cause. *Smith* v. *Eakin*, 2 Sneed, 457, 462. The plaintiff must show that the suit complained of is ended, and ended by a decision in his favor. *Memphis Gayoso Gas Co.* v. *Williamson*, 9 Heisk. 314; *Paris* v. *Lambert*, 1 Sneed, 228. For if the decision were in favor of the plaintiff, the judgment would be conclusive that there was probable cause, unless shown to have been procured by fraud. . . . The plaintiff below in the present suit has failed to show a decision in his favor in any respect in the attachment suit, and his action necessarily fails." In this case there was judgment, also, upon the merits in favor of the plaintiff. In the cases of *Sloan* v. *McCracken*, 7 Lea, 627, and *Memphis Gayoso Gas Co.* v. *Williamson*, 9 Heisk. 314, it was held, in substance, that the judgment of an in-

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ferior tribunal in favor of the original plaintiff is prima facie evidence of probable cause, even though the decision of the court of final resort should reverse the judgment of the court below, and be in favor of the defendant in the original suit.

We have been cited to quite a number of cases by counsel for the plaintiff, but, so far as we have been able to examine them, they are not in conflict with the rule laid down. In the case of *O'Brien* v. *Barry*, 106 Mass. 300, 8 Am. Rep. 329, cited by plaintiff in this suit, it is said: "In an action for malicious prosecution, the plaintiff must show that the prosecution or suit complained of has been terminated by a judgment in his favor." It was held that such suit was premature when brought before the termination of the replevin suit on which it was based, although it was apparent that damage had been done already by seizure of the property in the replevin suit. We have also been specially referred to the case of *Wood* v. *Laycock*, 3 Met. (Ky.) 193, but in that case it is said: "It is a well-established principle that a plaintiff cannot maintain an action for the malicious prosecution of a civil suit until after the legal termination in his favor of the suit complained of, and such termination must appear on the face of the declaration or petition." Citing *Spring* v. *Besore*, 12 B. Mon. 553; *Cole* v. *Hanks*, 3 T. B. Mon. 209; 1 Hilliard, Torts, 495. It is said in that case that an exception exists in cases where there is a statutory provision which declares an interlocutory decree final, but, adds the court, "except in cases of the class mentioned, we are aware of none in which the important prerequisite of the legal termination of the suit complained of can be dispensed with." In the progress of the case there was an order discharging an injunction because improperly sued out, and the court held that the suit for malicious prosecution of the injunction could not be maintained until the former suit was determined on the merits. While the court in that case emphasizes the necessity that the original suit should be terminated, it also emphatically lays down the prerequisite that it must be terminated in favor of the plaintiff in the second suit. The case of *Luby* v. *Bennett*, 111 Wis. 613, 56 L. R. A. 261, 87 N. W. 804, is relied on. In that case the rule is laid down as follows: "A right of action for damages for malicious prosecution does not accrue till the wrongful proceeding has been brought to final determination in favor of the defendant or person accused." Citing a large number of authorities. It was said: "In an action to recover compensation for such a wrong, such final determination must be distinctly alleged in the complaint, and proved upon the trial, the same as any other fact essential to the cause of action, or the pleading will be open to successful challenge for insufficiency. Appellant now invokes that rule, but, as we read the complaint, it seems that it is very clearly alleged that the wrongful prosecution was ended by a judgment in favor of the defendant therein before this action was commenced. The meaning of the language of the pleading, 'It was finally decided and adjudged in said action on the 25th day of September, 1900, that said action was without foundation and was maliciously and unjustly begun, and that this plaintiff was and had not been guilty of any wrong, and awarded this plaintiff judgment therein against the plaintiff therein (the defendant in this action),—' leaves no room for reasonable controversy but that the alleged wrongful prosecution was closed by a judgment in favor of the respondent prior to the commencement of this suit." The case was being heard upon demurrer, and the effect of the holding was that the termination of the suit favorably to the defendant therein had been sufficiently alleged in the complaint, and the demurrer was not, therefore, good. It was held that the pendency of a receivership in the case would not prevent the judgment being final, if the issues material to the question of the bona fides should be tried and closed by final judgment. While the case is not definitely stated, we infer that a final judgment had been rendered for the plaintiff on the merits, and that the result of the receivership would only determine the amount of his recovery.

It is said, however, that the original defendant need not show that he was successful in all his contentions, or even in the final result, if he can show that he was successful, and the original plaintiff failed, in respect to material allegations and charges made in his complaint, and especially if these charges are unwarranted, false, and malicious. To sustain this proposition, we are cited to 2 Greenl. Ev. Redf. ed. § 449, p. 400, as follows: "It is not necessary that the whole proceeding in which the plaintiff was prosecuted by the defendant be entirely groundless. If groundless charges are maliciously and without probable cause coupled with others which are well founded, they are not on that account the less injurious, and therefore constitute a valid cause of action." Mr. Greenleaf, in support of this proposition, cites *Pierce* v. *Thompson*, 6 Pick. 193; *Stone* v. *Crocker*, 24 Pick. 81; *Reed* v. *Taylor*, 4 Taunt. 616; *Buckley* v. *Wood*, 4 Coke, 14b. We have not been furnished with the English cases cited, and have not access to them, but the Massachusetts cases do not sustain the text of Mr. Greenleaf. The case of *Pierce* v. *Thompson*, 6 Pick. 193, is simply to the effect that an agreement to arbitrate is not conclusive of probable cause. In the other cases the original suit was a criminal prosecution in which the defendant had been acquitted. In the case of *Pierce* v. *Thompson*, 6 Pick. 193, there were two original suits said to be malicious; one being that of Thompson as administrator, and the other of Thompson individually as a partner. On the reference, Thompson obtained an award on one of the cases, but failed on the other, the award being in general terms. On the subsequent suit for malicious prosecution,

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Pierce was allowed to separate the two suits, and to show that the award, which was general, was in fact applicable to only one case, and did not apply to the other. His action for malicious prosecution was then sustained as to the case in which the plaintiff had failed, but not as to the other, in which he was successful. In *Masterson* v. *Brown*, 18 C. C. A. 481, 30 U. S. App. 730, 72 Fed. 136, it is held that, if libelous matter is falsely and maliciously incorporated in a suit which is successfully prosecuted, the remedy of the defendant therein is for libel, which he may bring after the termination of the former suit. In this case, which arose in Texas, the actions for malicious prosecution and libel were joined. It was held that the action for malicious prosecution could not be maintained, because the original suit had not been disposed of in favor of the defendant. Pp. 482, 484, 485, 18 C. C. A., pp. 731, 734, 735, 30 U. S. App. and pp. 137, 139, 140, 72 Fed. And it was said the same rule would apply to the suit for libel, founded on allegations made in the course of the judicial proceedings; thus recognizing that the action for malicious prosecution would lie only when judgment had been secured by defendant, but for libel would lie for charges made in the course of the proceeding. In *Mitchell* v. *Jenkins*, 5 Barn. & Ad. 588, 594, cited in 2 Greenl. Ev. 16th ed. 427, 428, note 4, it is said by the judge: "I can conceive a case where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual. . . . That would not be the case where, there being an unsettled account, with items on both sides, one of the parties, believing bona fide that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due." It is proper to remark that in the present case the declaration simply alleges the former suit, and a termination of that suit in favor of the plaintiff, and that the prosecution was malicious and without probable cause. There is no allegation that, notwithstanding the final judgment was against plaintiff, still he had been successful in refuting false and malicious allegations made in the bill for the purpose of securing a greater judgment against him. The plaintiff does not, therefore, present a case where he is suing for malicious charges made and proved untrue, although the final judgment was against him, but he brings the technical action of malicious prosecution, which only lies after final judgment against the plaintiff in the original suit. We know of no authority, and have been cited to none, holding that it is necessary for the plaintiff in his original suit to sustain every allegation or charge made in his bill, or else be liable to a suit for malicious prosecution. If this be the correct doctrine, then in every suit for malicious prosecution there must be a separate investigation and retrial of each separate allegation made in the original suit, without reference to the result of the suit as a whole, and the final decree therein. The only sound and tenable rule in cases of malicious prosecution is that adopted by all the courts, and that is to settle the question whether the original suit was successfully prosecuted or not by the decree therein upon the final adjudication, and not by the separate allegations and charges, and the proof for and against each.

Nor can the court upon the trial of the cause for malicious prosecution look to matters which were not passed on in the original suit, and decide what effect such extraneous matters might have had in the decision of the original suit, if considered. To allow this will permit a review of the original suit upon issues not involved in it, and a retrial of that suit upon different grounds from those upon which it was originally decided. Hence, it was error for the court to submit to the jury the question whether Davis was successful in the original cause, upon the assumption that he had a ten-year, instead of a five-year, contract of partnership. The court said to the jury that "this question was expressly ignored in said original suit, and is a question of fact to be found and determined by you in this case," and told the jury that, if they found this issue in favor of Davis, then Swepson must in the original suit have proved such breaches of trust, misappropriations, and other conduct as would be sufficient to set aside the ten-year contract. This was in effect saying that whether Davis gained or lost the original suit depended, not upon the decree in that suit, not upon the issues considered and determined in that suit, but whether Davis was entitled to the benefit of a ten-year contract,—a question which had not been determined in the original suit, but had been expressly pretermitted and not passed upon. If the original suit ought to have been determined on that question, as it was not so determined there has been no adjudication whatever, and no final judgment in Davis's favor. It was in effect holding that the former suit had never been decided upon the real question involved, but that this undecided question must govern the jury in determining whether Davis won or lost the suit, and whether that suit had been properly brought, with probable cause. The declaration set up the former suit, and is based upon it, and Davis must stand or fall by the result of that suit; and the result of that suit is triable by the record as made, not by matters which were not embraced in it, but expressly reserved and excluded from it. *Brewer* v. *Jacobs*, 22 Fed. 217; 14 Am. & Eng. Enc. Law, p. 59, note 2.

The result is that the court below was in

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error in holding that the suit for malicious prosecution could be based upon an original suit which had been terminated by a judgment final in favor of the plaintiff in that suit. The court was also in error in submitting to the jury the question whether the plaintiff in this suit was successful in the original suit, and especially in telling the jury that it could look to matters not passed upon in that suit, but expressly pretermitted by the decrees in that case. Whether the plaintiff could have maintained an action for libel upon the separate charges made in the bill which were not sustained by proof, as was held in the case of *Masterson* v. *Brown*, 18 C. C. A. 481, 30 U. S. App. 730, 72 Fed. 136, we do not decide, as that question is not involved in this case, by the character of the action brought, nor by the declaration in the case.

For the errors indicated, which are vital, *the judgment of the court below must be reversed*, and the cause remanded for a new trial, and appellee will pay costs of appeal.

A petition for rehearing having been filed, the following response was handed down November 1, 1902:

In this cause a very earnest petition to rehear has been filed. It is insisted that, even if it be conceded that the original suit must have terminated and been decided in favor of the defendant in that suit, before the action of malicious prosecution could be maintained, still the real position of counsel for Davis is that the record of the original case, taken as a whole, does show a termination of the suit in his favor,—in other words, that the court should look behind the final judgment in the original suit, and ascertain whether, upon the contentions made by the bill as a whole, Davis was successful.

It is said that the court did not cite and comment upon 2 Rice, Ev. p. 1062. This was not done because the extract from Rice is a literal copy, in both text and citations, of the extract from 2 Greenl. Ev. p. 249. There is nothing in Rice but what is taken literally and verbatim from Greenleaf, and the latter was commented on at length. The fact that Rice, in his compilation of authorities and cases, has copied from Greenleaf, adds nothing to the value or weight of the authority. Nor does the fact that the text and notes in Greenleaf have remained the same throughout 16 editions add force to it, or prove its correctness, if not supported by the authorities cited or by other authorities. We are again cited to several cases to which our attention was called on the original hearing, and which we could not examine because the books were not accessible. The case of *Brown* v. *McIntyre*, 43 Barb. 344, is cited and again relied on, though not furnished. That case refers also to the case of *Strong* v. *Grannis*, 26 Barb. 122, but we have not access to the last-named case. It is well to remark that these cases are not from courts of last resort. The case of *Brown* v. *McIntyre*, 43 Barb. 344, is digested in 33 Am. Dig. Cent. ed. p. 1796, (*h*), as follows: "A creditor, having brought suit in Canada against his debtor for a lawful claim, had him arrested on a capias issued on an affidavit made by himself, which by the laws of Canada could not be controverted, and in which he fixed the amount of claim at a sum greater than the actual indebtedness, so that the debtor was unable to procure bail, which he might have procured if the creditor had correctly stated the amount of the debt. Held, that the debtor could maintain an action for malicious prosecution." It appears this case was based upon the idea of an abuse of the process of the court in arresting the defendant for an amount for which he could not give bail; and, if so, it would be no authority in this case; nor would it be out of line with the general trend of authority giving a right of action for the malicious abuse of process or false imprisonment, as hereafter stated more fully. The case of *Morton* v. *Young*, 55 Me. 24, is also again called to the attention of the court. It was not commented on in the original opinion, though examined, because it was not believed to bear upon the question now at issue. The case we find reported in 92 Am. Dec. 565. There appears to have been no issue in the case as to how the original suit was decided. The suit was for debt, accompanied by an arrest of defendant. In order to release himself from custody, and acting under duress, the defendant paid part of the demand; and the jury found that it was paid under protest and duress, and with a denial of the justice of the claim. It was insisted the payment was conclusive proof of probable cause for the former suit. The court held not, unless it had been voluntarily made, and the payment did not estop the complaining party from showing the groundlessness and malice of the proceeding. We are furnished with a copy of *Buckley* v. *Wood*, 4 Coke, 14*b*, referred to by Mr. Greenleaf. Counsel says this case is a little misty, and has to be read carefully to be understood, but when understood it means that when a bill was filed, making certain charges, of which a court of equity had cognizance, but which were privileged, and other charges were incorporated of which it did not have cognizance, an action would lie as to the latter, though not as to the former. But it was held in that case that the action was not founded upon the allegations of the bill, but upon the fact that defendant had stated, in the county of Salop, in the hearing of many persons, that the bill was true, but did not say what the allegations of the bill were, so that persons hearing the statement that the bill was true nevertheless did not know that the clauses in the bill were slanderous, and for that cause the judgment holding the defendant liable was reversed. It does not clearly appear what the action brought in this case was. It is stated it was an action on the case, and, from the very nature of the case, must have been an action for slander. The case of *Stone* v. *Crocker*, 24 Pick. 81, is cited, but we do not comment

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upon it, as we cannot see that it in any way sustains counsel for Davis. The case of *Reed* v. *Taylor*, 4 Taunt. 616, is said to be in point. It was a suit for the malicious prosecution of a criminal indictment containing twelve charges of perjury, made in regard to eight several payments and transactions. It was shown that the defendant so indicted was acquitted of all charges. The evidence tended to show that parts of the affidavit as to three of the transactions were untrue and made without probable cause. As to the other transactions, it was shown the charges were true, and there was no probable cause for the assignments of perjury as to these transactions. It was said by Mansfield, Ch. J., that if a man prefer an indictment containing several charges, some of which are grounded on probable cause, and others not, this would support a count for preferring an indictment without probable cause; and Gibbs, J., concurred with him. The case is cited with approval in 4 Phillipps, Ev. 2d ed. p. 257. The case, as we read it, explains the text of Mr. Greenleaf in a manner which puts an application to it entirely different from that insisted on by counsel for Mr. Davis, and simply holds that where a malicious suit is brought, based on several charges or allegations, and it is decided for the defendant, such defendant may, in a subsequent suit for malicious prosecution, show that a portion of the charges and allegations are false, malicious, and made without probable cause, although other charges may be good and based upon probable cause. But it does not hold that the same result would follow if the judgment in the original suit was adverse to the defendant therein. In other words, the plaintiff in the suit for malicious prosecution, when he has judgment in his favor in the original suit, may show that any one or more of the charges made was malicious and without probable cause. In other words, to apply the principle to the present case, if Davis had been successful in the original case, and obtained a judgment in his favor therein, he could sustain his action in this case if he could show that any one of the charges made in the original suit was false and made maliciously and without probable cause, and it would not be required of him to show each and every charge to be false, malicious, and without probable cause. As thus explained and applied, the text of Greenleaf is not in conflict with other holdings of the courts, when he says: "It is not necessary that the whole proceedings be utterly groundless, for, if groundless charges are maliciously and without probable cause coupled with others which are well founded, they are not on that account the less injurious, and therefore constitute a valid cause of action." The difference between that case and the present one is vital, in that there was an acquittal of the defendant of all charges in that case, while here there was judgment against Davis. If in the present case Swepson had failed to recover judgment against Davis, and the latter had then sued for malicious prosecution, he might show that any one of the charges was false, malicious, and without probable cause, even though others may have been sustained, or be shown to be based on probable cause. We cannot see that this case is in point in the present suit. The case of *Mowry* v. *Miller*, 3 Leigh, 561, 24 Am. Dec. 680, is referred to; but the gist of this decision is simply that the party bringing the suit for malicious prosecution for a crime must show an acquittal before action brought, but that the precise date is not material. 4 Phillipps, Ev. 2d ed. p. 261, is cited, where it is said: "Where there have been mutual dealings between the plaintiff and defendant, and items are ascertainable to be due on each side of the account, an arrest for the amount of one side of the account, without deducting what is due on the other, is malicious and without probable cause. And in answer to an action for maliciously arresting the plaintiff without having a cause of action to a bailable amount, it is not sufficient to show that the defendant had a cause of action to the requisite amount, if it be a different cause from that mentioned in the affidavit to hold to bail." Authorities are cited to these two propositions. The text continues, however, as follows: "Though in an action in that particular form it will be sufficient for the defendant to prove a debt to a bailable amount, notwithstanding it is much less than the sum for which the plaintiff was arrested. It is not sufficient proof of a want of probable cause for holding the plaintiff to bail for a particular sum to show that a less sum was paid into court, and taken out by the defendant, who in consequence relinquished his action against the plaintiff." It is apparent that the author, in his text, is speaking of an action for malicious arrest or false imprisonment as contradistinguished from an action for malicious prosecution,—a distinction which the learned author comments on in several pages of the volume, and which is recognized in all the authorities and cases in which the two actions are considered. Several references are made to Newell on Malicious Prosecution, which we have carefully examined and considered. Section 33, p. 52, relates to an action for maliciously suing out an attachment,—a case clearly distinguishable from the present. So § 4, subd. 2 (pp. 328, 329, and notes), relates to malicious arrests or false imprisonments, also different from the case at bar. This difference, as we have already said, is pointed out in Phillipps on Evidence. It is also commented on in Newell on Malicious Prosecution (§ 22, p. 360); also § 4, p. 454; also § 20, p. 359. The difference material to be observed in the present case is that in an action for malicious prosecution it must be alleged and shown that the original suit has been determined and by a judgment in favor of the defendant in that suit (Newell, Malicious Prosecution, § 6, p. 331), while in actions for a malicious abuse

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of process or for false imprisonment it is wholly unnecessary to allege or prove that the prosecution has been determined, or how, as the action depends wholly upon the illegality of the detention and abuse of process. And so in case of a wrongful and malicious attachment the action depends upon the wrongful and malicious seizure of property, without regard to the result of the litigation on the merits. *Sloan* v. *McCracken*, 7 Lea, 626; *Smith* v. *Eakin*, 2 Sneed, 457.

We have given the case the most mature consideration and the closest investigation, not being content to rest upon the authorities furnished us, but seeking all others that would tend to aid us, and we are not able to see any error in our original holding, and the petition to rehear is dismissed.

WASHINGTON SUPREME COURT.

Alberta CLARK, *Appt.*,
v.
NORTHERN PACIFIC RAILWAY COMPANY, *Respt.*

(.....Wash.....)

1. **A father who, after a divorce decree granting him the custody of his child,** returns the child to the mother and disappears, brings her within a statute permitting a mother to maintain suit for the negligent killing of her child in case the father has deserted his family.
2. **A railroad company does not, by permitting a circus to exhibit on its vacant land** adjoining its switch yard, invite citizens to cross the yard to reach the show grounds, so as to be charged with the duty of exercising care to protect them from danger, and rendered liable to one injured by the operation of trains while attempting to cross the yards after having been expressly told to keep out, where the show grounds can be reached without danger by the highway, which is merely a somewhat longer route.

(July 16, 1902.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's child. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Govnor Teats** and **E. W. Taylor,** for appellant:

The interest of the infant is deemed paramount to the claim of both parents.

Mercein v. *People*, 25 Wend. 64, 35 Am. Dec. 662.

There is nothing in the nature of the case, in the relations of a divorced man and woman, father and mother, preventing them from arranging for the care of the children as between themselves.

De Felice, Lectures, Natural Rights, 30.

The natural rights of the mother are the same as those of the father, and can be made to yield only to necessity.

Wand v. *Wand*, 14 Cal. 513; *Osborn* v. *Allen*, 26 N. J. L. 388.

The duties of parents to their children, by the law of nature, rest equally upon both. It is the duty alike of each parent to maintain, protect, and educate their children.

4 Puffendorf, Law of Nature, chap. 11.

A decree of final divorce cannot destroy the relation of parent and child.

The father's departure without providing for the boy was a neglect of duty, an abandonment, a forsaking and adjuration, which will be accounted as renouncing of all claim thereto.

Plaster v. *Plaster*, 47 Ill. 290; *Welch's Appeal*, 43 Conn. 342; *McCarthy* v. *Hinman*, 35 Conn. 538; *Finch* v. *Finch*, 22 Conn. 411; *Conn* v. *Conn*, 57 Ind. 323; *Buckminster* v. *Buckminster*, 38 Vt. 248, 88 Am. Dec. 652; *Cowls* v. *Cowls*, 8 Ill. 435, 44 Am. Dec. 708; Reeve, Dom. Rel. 153, 344; *Leibold* v. *Leibold* (Ind.) 62 N. E. 627; 2 Bishop, Marr. & Div. 522; *Courtright* v. *Courtright*, 40 Mich. 633.

A mother who discharges her parental duty toward her children according to her means, if a widow, is subrogated to all the rights of a father in relation to the minor children.

Ex parte Hewitt, 11 Rich. L. 326; *Matthewson* v. *Perry*, 37 Conn. 435, 9 Am. Rep. 339; *Kerwin* v. *Wright*, 59 Ind. 369; *Hammond* v. *Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Savannah, F. & W. R. Co.* v. *Smith*, 93 Ga. 742, 21 S. E. 157; *Amos* v. *Atlanta R. Co.* 104 Ga. 809, 31 S. E. 43; *Kerr* v. *Pennsylvania R. Co.* 169 Pa. 95, 32 Atl. 97; *Hennessy* v. *Bavarian Brewing Co.* 145 Mo. 104, 41 L. R. A. 385, 46 S. W. 966; *Crockett* v. *St. Louis Transfer Co.* 52 Mo. 457; *Clark* v. *Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Bonnett* v. *Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91; *Jones* v. *Darnall*, 103 Ind. 569, 53 Am. Rep. 545, 2 N. E. 229.

Three years of uninterrupted control of and care for the boy had ripened into a custody that, as against the father and the world, was lawful and exclusive.

Drumb v. *Keen*, 47 Iowa, 435; *Taylor* v.

NOTE.—For negligence in respect to safety of persons at public exhibitions or entertainments, see also, in this series, Hart v. Washington Park Club (Ill.) 29 L. R. A. 492; Lane v. Minnesota State Agrl. Soc. (Minn.) 29 L. R. A. 708; Richmond & M. R. Co. v. Moore (Va.) 37 L. R. A. 258; and Thompson v. Lowell, L. & H. Street R. Co. (Mass.) 40 L. R. A. 345.

As to liability for maintaining upon private premises dangerous attractions for children generally, see Brinkley Car Works Mfg. Co. v. Cooper (Ark.) 57 L. R. A. 725, and *footnote* thereto.

As to liability of railroad company for injuries to children trespassing on turntable, see Edgington v. Burlington, C. R. & N. R. Co. (Iowa) 57 L. R. A. 561.

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Jeter, 33 Ga. 195, 81 Am. Dec. 202; *Clark* v. *Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Bonnett* v. *Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91; *Ackley* v. *Burchard*, 11 Wash. 128, 39 Pac. 372; *Chapsky* v. *Wood*, 26 Kan. 650, 40 Am. Rep. 321; *State ex rel. Jewett* v. *Barrett*, 45 N. H. 15; *Ellis* v. *Jesup*, 11 Bush, 403.

When a minor child is killed, leaving him surviving a mother, but no father, it is not necessary for her, in order to recover substantial damages for his death, to prove pecuniary loss, since she is entitled to his earnings, and therefore pecuniary loss will be presumed.

Bradley v. *Sattler*, 156 Ill. 603, 41 N. E. 171; *Rockford, R. I. & St. L. R. Co.* v. *Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Stafford* v. *Rubens*, 115 Ill. 198, 3 N. E. 568; 1 Jaggard, Torts, p. 451.

It was the duty of the company to be reasonably sure that it was not inviting the public into danger, and to that end it was its duty to exercise ordinary care and prudence, commensurate to the dangers, to render the premises reasonably safe for the people as they went to the circuses, menageries, and shows.

Cooley, Torts, pp. 718, 719; Buswell, Personal Injuries, § 66; Beach, Contrib. Neg. p. 213; 2 Shearm. & Redf. Neg. 5th ed. § 704; *Powers* v. *Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Bennett* v. *Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Atlanta Cotton-Seed Oil-Mills* v. *Coffey*, 80 Ga. 145, 4 S. E. 759; *Hayes* v. *Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Southern Ohio R. Co.* v. *Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269; *Curtis* v. *Kiley*, 153 Mass. 123, 26 N. E. 421; *Tucker* v. *Draper*, 62 Neb. 66, 54 L. R. A. 321, 86 N. W. 917.

It was the company's duty to take proper and reasonable steps to guard against the dangers which boys of the age of Oscar Perry Dix would be liable to meet passing over and upon its tracks and switch yards in going to the circuses and shows which it allowed to be held upon its dangerous premises.

Sioux City & P. R. Co. v. *Stout*, 17 Wall. 657, 21 L. ed. 745; *Kansas C. R. Co.* v. *Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Keffe* v. *Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Ilwaco R. & Nav. Co.* v. *Hedrick*, 1 Wash. 446, 25 Pac. 335; Beach, Contrib. Neg. § 70; *Richmond & M. R. Co.* v. *Moore*, 94 Va. 493, 37 L. R. A. 258, 27 S. E. 70; *Thompson* v. *Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L. R. A. 345, 49 N. E. 913.

Messrs. **B. S. Grosscup, James F. McElroy,** and **A. G. Avery,** for respondent:

To establish her right to sue, the plaintiff must bring herself within the exact terms of the statute.

Noble v. *Seattle*, 19 Wash. 133, 40 L. R. A. 822, 52 Pac. 1013; 1 Rapalje & L. Law Dict. p. 500; *Hedrick* v. *Ilwaco R. & Nav. Co.* 4 Wash. 400, 30 Pac. 714.

The legal right of the mother to the custody and services of this child was destroyed by the divorce, and would so remain as long as the decree was in force and unmodified.

Wilkinson v. *Deming*, 80 Ill. 342, 22 Am. Rep. 192; *Gibson* v. *Gibson*, 18 Wash. 489, 40 L. R. A. 587, 51 Pac. 1041; Tiffany, Personal & Dom. Rel. p. 260.

There was no negligence shown on the part of defendant.

The landowner owes no legal duty to keep his premises in a safe condition for trespassers, and the rule is not greatly different as to mere licensees.

3 Elliott, Railroads, §§ 1228 *et seq.*; Beach, Contrib. Neg. 3d ed. §§ 50, 51; 1 Fetter, Carr. Pass. § 236; *Bennett* v. *Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Richards* v. *Connell*, 45 Neb. 467, 63 N. W. 915.

At the time he was killed, the boy was not at a place where it was necessary to be in order to reach the circus, but was in that place on account of his own trespass. Under the circumstances, no duty as to the condition of the premises was owing him.

2 Shearm. & Redf. Neg. § 704; *Armstrong* v. *Medbury*, 67 Mich. 250, 34 N. W. 566; *Hart* v. *Grennell*, 122 N. Y. 371, 25 N. E. 354; *Heinlein* v. *Boston & P. R. Co.* 147 Mass. 136, 16 N. E. 698; *Matson* v. *Port Townsend Southern R. Co.* 9 Wash. 449, 37 Pac. 705, 707; *Ilwaco R. & Nav. Co.* v. *Hedrick*, 1 Wash. 446, 25 Pac. 335.

It was not the circus which attracted him to the place where he was killed; it was his own wilful and mischievous spirit which led him to steal a ride on the cars.

Barney v. *Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069; *Robinson* v. *Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765, 27 Pac. 689; *Missouri, K. & T. R. Co.* v. *Edwards*, 90 Tex. 65, 32 L. R. A. 825, 36 S. W. 430; *Catlett* v. *St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062.

This boy was old enough to know, and did know, that if he got upon the track in front of an engine he would be killed. He knew that it was dangerous to be in these yards; that engines were constantly passing to and fro, and a pretty sharp lookout had to be kept to avoid getting hurt. In additon to all this, he was warned not to go upon the tracks, and told that he might be killed if he did; and yet, in the next instant, wilfully disregarded the warning, and went into the very midst of the danger, and, without looking, got upon the track in front of a passing engine. He was negligent, and to allow a jury to say that such conduct was an exhibition of ordinary care would be to trifle with justice.

Collins v. *South Boston R. Co.* 142 Mass. 301, 56 Am. Rep. 675, 7 N. E. 856; *Hayes* v. *Norcross*, 162 Mass. 546, 39 N. E. 282; *Merryman* v. *Chicago, R. I. & P. R. Co.* 85 Iowa, 634, 52 N. W. 545; *Herold* v. *Pfister*, 92 Wis. 417, 66 N. W. 355; *Oregon R. & Nav. Co.* v. *Egley*, 2 Wash. 409, 26 Pac. 973.

Where children wilfully make a playground of railway tracks or other exposed premises or property, or jump upon the

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cars in violation of warnings, they become trespassers, and such conduct is negligent *per se*.

Chicago & N. W. R. Co. v. *Smith*, 46 Mich. 504, 41 Am. Rep. 177, 9 N. W. 830; *Moore* v. *Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106.

Hadley, J., delivered the opinion of the court:

Appellant instituted this action against respondent to recover damages on account of the death of her son, which, it is alleged, was caused by the wrongful and negligent act of respondent. At the trial the court granted a motion for nonsuit. The motion was based upon two grounds: First, that appellant had failed to show such title or right as enabled her to maintain the action; and, second, that no negligence of respondent was proved. We will first discuss the branch of the motion relating to appellant's right to maintain the action.

The accident which caused immediate death occurred August 6, 1901. The deceased, Oscar Perry Dix, lacked a little more than one month of being twelve years of age. He was the son of Elihu Dix and the appellant, who were formerly husband and wife. Some time prior to June, 1897, the parents separated; the appellant keeping the two children of the marriage,—the son above named and a daughter. On the 14th of June, 1897, appellant procured a decree of divorce from her said husband, and by the terms of the decree the care and custody of the daughter was awarded to appellant, and that of the son to the husband. After the separation, and before the divorce, the mother mainly supported both the children; the husband having contributed about $20 toward their support. After the divorce the father took the boy and kept him about two weeks, when he brought him back to his mother and told her he could not get along with him, and said if she would keep him he would support him. Soon afterwards the husband gave the mother $10 towards the support of the boy, and has never contributed any sum since. The mother, who afterwards remarried, continued to support the boy for a period of more than three years, and until the time of his death. The location of the father is unknown to her, and she has been unable to discover where he is. Under these circumstances, the respondent contends that appellant cannot maintain this action, for the reason that the father was charged with the lawful care and custody of the boy. 2 Ballinger's Anno. Codes & Statutes, § 4829, provides as follows: "A father, or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward." It will be observed that by the terms of the statute the mother may maintain the action in the event the father has deserted the family. It is contended by respondent that by the divorce the family status was broken, and that there can be no longer a desertion of the family, within the meaning of the statute. The facts as stated, we think, show at least an abandonment of the boy by the father. He not only withheld from the boy his own companionship, but wholly neglected to contribute to his support. It was his primary duty to support his child, independently of that cast upon him by the decree of divorce. The boy being left with his mother, the duty of his support and education was cast upon her. As a natural son, he was, in legal contemplation, a part of his father's family. The family status between mother and child, as constituted by natural relationship, was not broken by the divorce, and their companionship as members of the same household continued, with only an interruption of two weeks. The family status as thus constituted was left by the father without any contribution on his part toward its support. This we believe was not only an abandonment of the child, but also of the family, within the meaning of the statute. By his abandonment the father has forfeited his right to maintain this action, and it belongs to the mother. The first ground stated in the motion for nonsuit should therefore have been denied. Whether the superior court intended to deny the motion on said ground does not appear from the record. It may have been the intention to grant the motion upon the other ground only. We will now consider the second ground of the motion for nonsuit,—that no negligence of respondent was proved. Deceased met his death by being struck by a freight train in the switch yards of respondent in the city of Tacoma. On the day of his death a circus show exhibited in Tacoma, and occupied with its tents grounds belonging to respondent, lying to the north of the system of tracks in the switch yards, and near the east end thereof. The space occupied by the tents and that immediately around them, together with a similar space to the east and west thereof, was unoccupied by tracks. This unoccupied space was to the north and parallel with the system of tracks. Persons being in the switch yards could approach the tents over this space without walking upon or among the tracks. Similar exhibitions had been given upon the same grounds before, and some persons in going thereto entered the switch yards toward the westerly end, and crossed over the tracks towards the show grounds. The yards are principally inclosed by a fence. Parallel with the fence on the south is a street, along which runs a street railway, which extends east almost as far as the switch yards extend. The traveled highway for reaching the show grounds was to go out said street by a street car or otherwise. Just beyond the terminus of the street-car line the street is intersected by a county road running to the northeast around the easterly end of the switch yards, and which passes near the show grounds on the east. It appears that some persons sought to avoid this longer route over the traveled highway by enter-

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ing the switch yards and crossing the tracks, thus approaching the tents from the west or southwest. In the center of the yards were two main tracks, and on the south of these was a lead track for the switches, and connecting with it were 19 switches leading diagonally therefrom. To the north of the main tracks were a number of others running practically parallel therewith. Over this system of tracks respondent daily moved many cars and locomotives. On the morning of the accident the deceased and two other boys about his age were on their way to the show grounds to see the preparations for the parade which was to precede the exhibition. They were hurrying to reach the grounds, and passed into the switch yard at the westerly end thereof. They were met by a switchman, who at first ordered them away, but, upon their urgent request and promise to be careful, he permitted them to pass him. They soon met another switchman, who told them to get out of the way and go around. He also told them not to go that way, as they might get killed. They, however, went aside upon some tracks upon the north side, that were not much used, and where the grass grew. The deceased boy was barefooted, and remarked to the other boys that the cinders hurt his feet. A freight engine with some cars moving easterly toward the show grounds came along on the aforesaid lead track to the south of where the boys were walking. The deceased ran across the intervening tracks and jumped upon one of the moving flat cars. One of the other boys told him not to do it. Just in the rear of the switch train, but upon the main track, came an outgoing freight train, going east. The deceased remained upon the flat car until it was about opposite the show grounds, when he jumped off; and while upon or in the act of crossing the main track toward the show grounds the before-mentioned freight train, being but a short distance away when he entered upon the track, struck him and killed him.

It is not contended by appellant that there was negligence in the operation of the train which caused the death, but she urges that respondent maintained a dangerous place, with danger inherent in the premises and in the operation thereof; that in the midst of this dangerous place respondent permitted the show to exhibit, and that the boys and children were attracted upon and over the premises thereby; that the people and children especially went through these premises upon the invitation and inducement held out by respondent in permitting the show to be held upon its premises; that the deceased was not a trespasser, but an invited visitor; and that the danger was known to respondent and unknown to the boy. The contention, in short, is that respondent's negligence consisted in permitting the show to be located upon these premises without taking proper precaution to protect the deceased boy and others from danger. If the show grounds had not been owned or controlled by respondent, then no liability could have arisen, since it was operating its own property in the customary and lawful way, without negligence. Does the fact that the grounds happened to belong to respondent change its obligation in the premises? There was ample room for the purposes of the show without any interference from the switch grounds. There was a well-traveled public highway leading to the show grounds, without making it necessary to cross the switch yards. It is a matter of common knowledge that such switch grounds cannot be operated without probable danger to casual strangers who may happen upon them, and that the general public are not invited or expected to come upon them. The public could not have expected that respondent would cease operating its trains in order to extend the convenience of a shorter way to the show grounds. In leaving the traveled way to cross these grounds, they were chargeable with knowledge of the attendant danger. The deceased boy knew of the danger. He was an intelligent, active boy, about twelve years of age. He had theretofore spent much time in selling papers, and evidently knew much of the city and its environment. His boy companions testified that they all knew of the danger. They and the deceased knew they were not invited upon the grounds, for the reason that they were twice told by representatives of respondent not to go there, because of the danger. At the encounter with the last switchman he gave peremptory command that they should leave, but they disregarded the command. It would seem that this repeated precaution from respondent was a careful effort to prevent the opportunity for danger, and more could not well have been done, except by resort to forcible expulsion. It is true that, while one is under no obligation to keep his premises in safe condition for the visits of trespassers, yet if "he expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." Cooley, Torts, 2d ed. p. 718. The above is a generally recognized rule, and is fully sustained by authorities cited by appellant. If the deceased boy came within the class of guests invited expressly or by implication, then the authorities are in point here. It is not conceivable, however, that one should in the first instance understand that he was invited to cross the switch tracks which were in constant use, merely because a show was exhibiting near by, and when other plain and safe ways of approach were at hand. In any event, when this boy was told not to go there, he knew he was not invited; and instead of going the safe way, as advised by respondent, he rushed into immediate danger. The cases cited by appellant related to some inherent defect in the premises, which ought not to have existed, but which

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was negligently allowed to exist. In the case of *Bennett* v. *Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235, the injured person fell through a hole in the depot floor, which had been left unguarded and unlighted. In *Powers* v. *Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, dynamite was left exposed upon the premises, where children ignorant of its nature could easily find it and handle it. In *Southern Ohio R. Co.* v. *Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269, a ditch was left unguarded and unlighted in the night-time. Similar conditions existed in *Curtis* v. *Kiley*, 153 Mass. 123, 26 N. E. 421. In *Tucker* v. *Draper*, 62 Neb. 66, 54 L. R. A. 321, 86 N. W. 917, a small child was killed by falling into an open and unguarded well. The conditions considered in the above cases were inherent defects in the premises, and were hidden from and unknown to the injured persons. In the case at bar the premises were not defective. There were no hidden dangers inherent in them, and they were being used for lawful purposes. Any danger which existed was open and apparent, and was the unavoidable consequence of the customary and lawful use of the premises if one placed himself in a position to encounter it. Appellant also cites what are known as the *"Turntable Cases."* These cases are based upon the theory that a turntable is a machine of such a nature as to attract children to play with it, and, being inherently dangerous for children to handle, negligence is predicated upon the failure to lock it or securely fasten it so that it cannot be moved by children. The same principle has been applied where other structures or conditions existed, but the doctrine has not been uniformly adopted by American courts, and it has, indeed, been severely criticised. In Beach, Contrib. Neg. 3d ed. § 51*a*, the author observes that the trend of the most recent decisions is against it, and many cases are cited. This court applied the rule in a turntable case in *Ilwaco R. & Nav. Co.* v. *Hedrick*, 1 Wash. 446, 25 Pac. 335, but, in view of the more modern tendency of the courts, we should, however, hesitate to extend the rule as one of general application to other conditions. For especially forcible reasoning upon this subject we refer to *Delaware, L. & W. R. Co.* v. *Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682. The respondent in the case at bar had not placed upon its premises a dangerous machine or device, that was in its nature and at once particularly attractive to children. The deceased boy neither meddled with nor was he injured by any such instrument. The attractive thing which it is claimed respondent permitted upon its premises was the show. There was, however, nothing dangerous in the show itself, and the boy was not injured by anything in or about it. The case therefore materially differs from *Richmond & M. R. Co.* v. *Moore*, 94 Va. 493, 37 L. R. A. 258, 27 S. E. 70, cited by appellant. There a street railway company advertised a balloon ascension at a park owned by it. A person in attendance was killed by a falling pole used to suspend the balloon while being inflated. The company was held liable because no warning was given that the pole would fall at that time, and the people were allowed to gather near. The danger inhered in the operation of the thing itself, which was the immediate inducement for people to go upon the grounds. It was not occasioned by the lawful use and operation of some permanent machinery upon the premises, and wholly disconnected from the thing which was the attraction. The case of *Thompson* v. *Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L. R. A. 345, 49 N. E. 913, involved conditions similar to those existing in the above case. We are not aware of any case which holds that the operation of trains over railroad premises makes them dangerous machines, within the meaning of the *Turntable Cases*. It was expressly held that they are not such, within the meaning of that rule, in *Barney* v. *Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069, and *Catlett* v. *St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062. We are therefore unable to find that negligence on the part of respondent was shown. The accident was an unfortunate one for appellant, as the mother of the boy; but we are unable to see that respondent is chargeable therewith, when viewed in the light of safe and sound principles. We believe the court did not err in granting the nonsuit on the ground that negligence of respondent was not shown.

Error is assigned upon the court's refusal to admit certain evidence, in the way of an identified show bill, offered for the purpose of showing an inducement to the public to go upon respondent's premises. We are unable to find that the offered exhibit disclosed the place where the coming show would exhibit, further than it would be in the city of Tacoma. It was, however, admitted by the answer that the grounds were leased for the purposes of the show, which showed that respondent had notice that the public would be in attendance. We think the offered evidence was therefore immaterial.

Believing that the court did not err, *the judgment is affirmed.*

Reavis, Ch. J., and **Fullerton, Anders**, and **Mount**, JJ., concur.

Rehearing denied.

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WEST VIRGINIA SUPREME COURT OF APPEALS.

SISTERSVILLE FERRY COMPANY
v.
Joshua RUSSELL, *Plff. in Err.*

(.....W. Va.....)

*1. **A notice of an application and an application for a ferry** give a sufficient description of the proposed ferry in saying that the ferry is to be "across the Ohio river from a point in Lincoln district, in said county of Tyler, on lands belonging to . . . [persons named], to the said . . . [persons'] landing on the farm of Talbott Bros., in Monroe county, state of Ohio."

2. **A report of viewers** appointed to report upon an application for the establishment of a ferry, signed by two of three viewers, the order of the county court authorizing two to act, is good.

3. **Ownership of land on the West Virginia side of the Ohio river** is sufficient to enable the owner to sustain an application to establish a ferry over it, without his showing that he owns land on the Ohio side of the river.

4. **An appeal from the county court to a circuit court** under §§ 47, 48, chap. 39, and § 14, chap. 112, Code 1899, is to be tried by the record as made up in the county court, and does not give right to a new trial by jury, or otherwise than by the record, until reversal on the record.

5. **The owner of a ferry cannot recover compensation or damages** for injury to his ferry flowing from loss of patronage incident to the establishment of a second ferry, either from the owner of the second ferry or the county.

6. **Where there are already two ferries** within a mile of each other, and the owners of one of them apply for the establishment of a third one between them, and its establishment will injure the revenue of the other existing ferry, and it does not appear that the travel will well support three ferries, and there is no imperative public need of the third ferry, it should not be established.

*Headnotes by BRANNON, J.

(January 14, 1903.)

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I. *Definition.*

To determine definitely what the rights and duties with respect to the establishment and regulation of ferries are, it is necessary to have in mind what a ferry is. In a general way, it may be said that a ferry is a public highway or thoroughfare across a stream of water or river by boat, instead of by a bridge (Chilvers v. People, 11 Mich. 43); or, as one court said, a ferry is a moving public highway upon water. Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

But those definitions are wholly inadequate to express the full idea intended to be conveyed by the word "ferry." A boat is undoubtedly the easiest and most simple way to span a stream which intersects a highway. Before the age of bridges it was the only way of crossing waters too deep to ford and too wide to swim. It became a matter of public concern, therefore, to have a boat stationed where it could be used when needed. Any person might supply this need through business enterprise for the reward which he might obtain through contracting to serve travelers. But this private enterprise was likely to prove wholly inadequate to satisfy the public needs. The boat owner would be inclined to drive hard bargains for his services, and there was nothing to require the boat to be in readiness at all times, whether to the convenience of the owner or not. It was, therefore, necessary for the public to have some supervision in the matter. The public good demanded that the boat should be at all times in readiness, and that the

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ERROR to the Circuit Court for Tyler County to review a judgment affirming a judgment of the County Court establishing a ferry. *Reversed.*

The facts are stated in the opinion.

Messrs. **Boreman & Carter** for plaintiff in error.

Mr. **Basil T. Bowers** for defendant in error.

Brannon, J., delivered the opinion of the court:

The Sistersville Ferry Company filed in the county court of Tyler county an application for the establishment of a ferry across the Ohio river. The court appointed viewers to report to the court the matters required by law, and they filed their report. Three viewers were appointed, with power in two of them to act, and only two acted. Joshua Russell owned a ferry across the Ohio river within half a mile of the proposed new ferry, and filed a petition alleging that his ferry would be greatly injured by such new ferry, and that the travel would not support two ferries, and asked to be made a party to the proceeding, so that he might resist the establishment of the new ferry, and was made such party, and resisted the application. The county court decided to establish the new ferry, and Russell took an appeal to the circuit court, and, it having affirmed the order of the county court, Russell brings the case here by writ of error.

The resistant, Russell, says the county court erred in not sustaining his motion to quash the notice of the application and the application, because they do not definitely state the location of the ferry. The notice

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charges should be reasonable and uniform. But to obtain these advantages it was necessary to secure the boatman from ruinous competition, and to make his income certain. The obvious way to accomplish this was to invest him with the royal prerogative, a franchise to take toll, and to make the right to operate the ferry exclusive. So that the ferry means something more than a continuation of the highway across the water, and includes the idea of public service with its incidents of monopoly and toll. The extent of the monopoly is discussed *infra*, IV.

As said by Cooper, J., the continuity of a highway is not broken by a stream which crosses it. The public, for the purpose of travel, have the same right to go on the water over the highway that they have to pass along any other portion of it; but, as a physical obstruction intervenes, it is necessary that some convenient means of transportation shall be furnished, and the simplest and most economical is in many cases by ferry. Sullivan v. Lafayette County, 58 Miss. 790.

The sole and exclusive right of transporting persons over water courses for tolls (by which is meant price independent of contract) resides in no individual, but belongs to the sovereign. But the right of transporting persons over water courses may belong to an individual, and he may by contract, express or implied, receive hire for so doing. It is the exclusive right which makes the franchise. Pipkin v. Wynns, 13 N. C. (2 Dev. L.) 402.

A ferry franchise is, therefore, a privilege to take tolls for transporting men, horses, cattle, and vehicles with or without their loading across a body of water. Except in the mode of transportation, it differs in no essential from a bridge franchise. Hunter v. Moore, 44 Ark. 184, 51 Am. Rep. 589.

A ferry is a liberty to have a boat for passage upon a river for the carriage of horses and men for a reasonable toll. State v. Wilson, 42 Me. 9.

The essential element in a ferry is the transportation over interrupting water from one shore to the opposite shore for a toll. Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633.

A flat-bottomed boat, connected with cables spanning the stream, and moved or propelled back and forth across it by power supplied by a stationary engine on the bank, is a ferry as distinguished from a bridge. Parrott v. Lawrence, 2 Dill. 332, Fed. Cas. No. 10,772.

But a boat equipped with railroad tracks, and used exclusively for the transportation of railroad cars, and which carries no passengers, baggage, or freight, except as they may be contained in such cars, is not a ferryboat within the meaning of the Montgomerie charter conferring upon the city of New York the sole power to establish ferries; and its operation does not invade such exclusive franchise. New York v. New England Transfer Co. 14 Blatchf. 159, Fed. Cas. No. 10,197.

An owner of a small steam yacht, who, mainly on Sundays and holidays, conveys passengers for hire from a village to a wharf upon pleasure grounds not connected with any highway, but maintained by the proprietors for the accommodation of visitors to such grounds at the request of such proprietors, does not maintain a ferry within the meaning of a statute making it a misdemeanor to maintain a ferry without authority of law. People v. Mago, 69 Hun, 559, 23 N. Y. Supp. 938.

Under a statute which provides that a penalty will be imposed where any person keeps a ferry over a navigable stream and charges money or any other valuable thing without complying with the law in relation to obtaining a license, the penalty is not recoverable against one who runs a free skiff as an inducement to persons to trade at his store, where it appears that those transported in the skiff do not agree to buy anything of the skiff owner, and that he makes no charge in money, or otherwise, for the transportation. Shinn v. Cotton, 52 Ark. 90, 12 S. W. 157.

The right of navigation being free to all, the exclusive privilege must be granted with respect to some limits, and the most natural ones are the landing places. So, it was said in an old case that a ferry is in respect of the landing place, and not in respect of the water. Ipswich v. Browne, Savile, 11.

So, a ferry franchise is nothing more or less than a right conferred to land at a particular point and receive toll for the transportation of passengers and property from that point across a stream. Mills v. St. Clair County, 7 Ill. 198.

On this principle, it was held that an injunction against the use of a wharf for the purpose of a ferry is violated where the ferryboat lies at the dock each night, and takes in supplies therefrom. New York v. New York & S. I. Ferry Co. 8 Jones & S. 300.

But there is a distinction between the ferry franchise being connected with the landing and the title to the soil of the landing, for the owner of a ferry need not have the property in the soil on either side of the ferry; it is sufficient if the landing place is a public way, or, if private property, that he has secured the privi-

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and written application say that the ferry is to be "across the Ohio river from a point in Lincoln district, in said county of Tyler, on land belonging to E. W. Talbott, C. Tuel, S. Tuel, K. Tuel, E. E. Tuel, and F. D. McCoy, partners in business as the Sistersville Ferry Company, to the said company's landing on the farm of Talbott Bros., in Monroe county, state of Ohio." The description could not readily have been made more definite. The precise point, as from a stone to another precise point on the other side of the river, might be given; but there is no call for this, and it would not suit for a ferry,—no precise magnetic line, no limited point,—for it must have further reach on the shores and on the water. Less particularity is required in description of a ferry than in a conveyance, or a summons in unlawful detainer. As to these, it is enough to give reasonable certainty, so that by the means of identification given in deed or summons, with the aid of other means outside of the paper description, the tract may be found on the ground. It can thus be made certain. *Foley* v. *Ruley*, 43 W. Va. 513, 27 S. E. 268, and cases cited. And as to the description of a proposed ferry, Judge Baldwin, in *Somerville* v. *Wimbish*, 7 Gratt. 229, expressed sound sense when saying: "In establishing a ferry, the usual form of its designation is from the lands of an individual on one side of the water course to the lands of another or the same individual, on the opposite side; and the place of departure is always regarded as the seat of the ferry. There is no necessity for requiring a more precise description of the ferry ways on either side, and it would be extremely inconvenient to do so, both as regards the pub-

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lege of using it for a landing place, although the title is in another. Peter v. Kendal, 6 Barn. & C. 703.

So, a ferry privilege with right to demand and receive toll has never been incident or appendant to any estate in land, in either England or this country. Day v. Stetson, 8 Me. 365.

The right to one landing is sufficient, for a ferry franchise can be granted giving the right to transport persons and property from one shore of the stream to the other shore only, without the right to bring a return cargo. Power v. Athens, 26 Hun, 282.

And the character of a ferry is not destroyed by the fact that the boats make an intermediate stop between its termini. New York v. New Jersey S. B. Nav. Co. 106 N. Y. 28, 12 N. E. 435.

Property in.

A ferry franchise is property. Conway v. Taylor, 1 Black, 603, 17 L. ed. 191.

And the character of that property is real estate. Mabury v. Louisville & J. Ferry Co. 9 C. C. A. 174, 18 U. S. App. 542, 60 Fed. 645.

A ferry right is a right connected with the soil and grows out of it. It is an incorporeal hereditament. When the ownership of it is not connected with the ownership of the soil, no one can have seisin of it as of land; but still it is classed with real estate, and is subject to the laws which govern the realty. It descends to heirs, is subject to dower, and to all the incidents of real property. Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740.

A ferry, being a franchise and therefore a hereditament, constitutes lands within the meaning of a statute entitling to compensation the owner of lands injuriously affected by the construction of a railroad. Queen v. Cambrian R. Co. L. R. 6 Q. B. 422, 40 L. J. Q. B. N. S. 169, 25 L. T. N. S. 84, 19 Week. Rep. 1138.

A license given a riparian owner to establish a ferry under a statute regulating ferries is an incorporeal hereditament passing to his heirs as an incident of the fee, and not a mere personal privilege, where the statute provides for the condemnation of land on the other side of the stream for a landing in case the applicant owns only on one side thereof, and the grant of such license is put on the footing of bridges and causeways, which is indicative of its permanency, although the statute designates it as a "license," requires a bond from the licensee, confers discretionary authority to require a new bond and power to revoke the license if such new bond is not given at the end of a specified time after demand therefor. Lewis v. Gainesville, 7 Ala. 85.

A ferry franchise is a hereditament, and can only be transferred in accordance with the provisions of the statutes in reference to conveyances of real estate. Dundy v. Chambers, 28 Ill. 369.

Some decisions are, however, noticed under VI., a, in which the ferry license is treated as a personal trust, and not as a franchise; and it is therefore held that it is personal to the licensee, and cannot be transferred or transmitted to successors.

II. *Establishment.*

a. *Necessity of licence.*

1. *Prescriptive rights.*

It being established that the running of a ferry involves the exercise of the royal prerogative, the question arises, Can it ever be done without express governmental sanction? Is a license necessary? The general question of the necessity of a license will be discussed in the next subdivision, where it will appear that generally, at the present time, a license is necessary. Before society was as well organized as it is now, however, many ferries were in operation which had no definite authority to show for their existence, but which had existed so long that it could not be shown that they were not rightfully established. This raised the question of the effect of long use. It was unanimously conceded that to some extent a right could be established by lapse of time. Thus, in Hix v. Gardiner, 2 Bulstr. 196, it was said that it had been adjudged that if a man have a common ferry, and prescribes to have obelum for every footman passing and denarium for every horseman, and that none shall pass but over this ferry, this is a good prescription.

So, it has been held that, from the uninterrupted use and occupation of a public ferry for twenty years, a presumption may be drawn that it had a legal origin, where the question of the right to the franchise is only collaterally presented. Milton v. Haden, 32 Ala. 30, 70 Am. Dec. 523.

A prescriptive ferry privilege is acquired by its exclusive and notorious enjoyment for forty-four years, if the different possessors have been in on the same title. Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

The exclusive possession and enjoyment of a ferry right for seven years creates a pre-

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lic and the ferry keeper; for that would render an exact description on both sides by metes and bounds indispensable, and make every departure from them unlawful, however immaterial, and whatever the urgency of the occasion, and though attended with no invasion whatever of the rights of others." To say that this notice did not let the resistant and all others know the location of the ferry cannot be plausible.

The point is made that one of the three viewers was not notified of his appointment, and did not act. The answer is that the appointment authorized two to act; and § 17, chap. 13, cl. 2, Code, says that, where a joint power is conferred upon three or more, a majority may act. Want of notice to the third viewer could not affect the proceeding, and I see no objection in the county court on this score. The statute on ferries allows a report by two only.

Another point made against the order of establishment is that it is not shown that the applicants owned or had contracted for land on the Ohio side. They showed that they owned—some of them—a tract on this side of the river, and it is not necessary that they own any on the other side, so far as affects their capacity to maintain a proceeding to establish a ferry. As to whether they had landing easement on the Ohio side is another question. They could land on the beach owned by the state, and travelers could use the public way, if any. They might make arrangements with landowners there. They had a landing there already in an unlicensed ferry. That is not in this question. Code, chap. 44, § 2, says any person "who owns, or has contracted for the use of, land at the point at which he wishes to establish the same, may present his application," etc. As seen above in what Judge

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sumption of a grant. Williams v. Turner, 7 Ga. 348; Harrison v. Young, 9 Ga. 359.

One who has been in the continuous use, operation, and enjoyment of a ferry privilege for eight or ten years, whether the rightful owner or not, may, on behalf of the interests of the public, and as one in the actual use and enjoyment of the right for the benefit of the public, enjoin those who seek to violate the laws of Kentucky by erecting another ferry across the line of and within the distance from such established ferry that is prohibited by such laws; at least, such person is entitled to an order continuing the order of injunction, pending an appeal, as provided under a section of the Kentucky Code. Davis v. Connolly, 104 Ky. 87, 46 S. W. 679.

Where it appears that a city has maintained a ferry for a time beyond the memory of living men, it will be held to have obtained a ferry franchise by prescription. Laredo v. Martin, 52 Tex. 548.

And the prescriptive right of a city to maintain a ferry was not abrogated or annulled by the Constitution and laws, where its inhabitants came under the government of the state of Texas, although it was the general policy of the state to subject ferries to the control of county courts. The continued enjoyment of such a franchise by the city, or even by an individual to whom it had been granted by the preceding government, was not so antagonistic to the general policy of the state as to devest the franchise out of the previous grantee, it not appearing plainly that this was the purpose and intent of the state. The franchise would not be devested by implication. *Ibid.*

It is doubtful if the principle by which prescriptive rights were recognized in the early times should be given any application to cases such as those immediately preceding. If the right depends on license under the present system of records, the license may be found, unless it is of very ancient origin. So, it has been held that no prescriptive right to a ferry privilege can be acquired, unless the ferry was established prior to the colonial statute of 7 Wm. III. of 1695. Day v. Stetson, 8 Me. 365.

And the better rule is that an exclusive ferry privilege on a public stream can be established only by public grant. It cannot arise by prescription. Bird v. Smith, 8 Watts, 434, 34 Am. Dec. 488.

In State *ex rel.* Driver v. Talladega Road & Revenue Comrs., 3 Port. (Ala.) 412, it is said that "there is no prescriptive right to a ferry in this state,—the ownership of the land on the banks of our navigable streams gives none."

Even where a prescriptive ferry right is recognised, it will not be held to be exclusive when the court by which the right must have been granted had no authority to confer an exclusive right. Barrington v. Neuse River Ferry Co. 69 N. C. 165.

A prescriptive right of ferry, implying a grant, does not confer an exclusive privilege, as in a public grant nothing passes by implication; and does not prevent the construction of others under authority of the superior court. Shorter v. Smith, 9 Ga. 517.

It is said in Harrison v. Young, 9 Ga. 359, that, the presumptive grant of a ferry right by user not being exclusive, and the grantee taking nothing by implication, a subsequent charter to a bridge company to construct a bridge near the ferry does not impair the ferry franchise.

A police jury has power to sell the privilege of keeping a ferry to the highest bidder, although a private ferry has long been operated at the place. Parish Treasurer v. Russell, 3 La. 93.

The grant of a franchise to keep a ferry cannot be established by prescription, but must be proved by the record of the grant, or, if it is lost, by proof of its contents. Sullivan v. Lafayette County, 58 Miss. 790, Overruling Leake County v. McFadden, 57 Miss. 618.

2. *License usually necessary.*

Riparian owners may maintain ferries along a stream, elsewhere than at the intersection of the stream and a public road, without giving a bond, obtaining a license, or having the rates charged by them regulated by the court,—at least, if they charge customary rates,—and without being amenable to the penalties and punishment imposed by statute, having reference to licensed ferries. Tuscaloosa County v. Foster, 132 Ala. 392, 31 So. 587.

So, no franchise is required to establish and maintain a ferry. But, while its owner may lawfully charge and collect toll from persons incidentally crossing thereon, he cannot maintain the ferry for use by the public. Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770.

But when the attempt is made to exercise an exclusive franchise for toll, a North Dakota case expressed the true rule on this branch of the subject in stating that a riparian owner has no right to operate a ferry without authority from the government, although the landing

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Baldwin says, the seat of this ferry would be on the West Virginia side of the Ohio; and, if an applicant own land at the ferry seat, the place of departure, that is enough. The statute does not say anything about land on the other side. That is in another state. It is said that it was not shown that all the applicants were owners of the land on this side of the river, but the title was only in some of them. What does that matter to Russell? Those who did own made the application, and their application, along with the others, showed their willingness to devote the land for partnership purposes of all.

Russell makes the point that the circuit court upon the appeal erred in not sustaining a motion by him to grant him a jury trial of the merits, with right to produce additional evidence, and assess his damage. There are two answers. An appeal taken from the county to the circuit court under Code, chap. 39, §§ 47, 48, and chap. 112 § 14, is not an appeal in the ordinary sense of that word, importing a process in the superior court by which a new trial of fact is had upon evidence the same as used in the county court or new evidence; but it is triable only on the record as made in the county court. This is apparent from the statute, and by the opinion in *Williamson* v. *Hays*, 25 W. Va. 614. Another answer is that the establishment of the ferry, though it injure Russell's ferry by diminishing its patronage, in the eye of the law gave no right to damages. It is useless to cite us cases to show that a legal ferry is vested property. That is incontestable. *Mason* v. *Harper's Ferry Bridge Co.* 17 W. Va. 396; *Patrick* v. *Ruffner*, 2 Rob. (Va.) 214, 40 Am. Dec. 740. It

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places are upon his own property on both sides of the stream. Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

No man can set up a common ferry for all passengers without a prescriptive right or a charter from the King. Hale, de Jure Maris, chap. 2.

A ferry is a franchise which none can set up without a license from the Crown, and in case of a ferry by prescription a grant or license is presumed. Huxley v. Field, 2 Cromp. M. & R. 432, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855; Murray v. Menefee, 20 Ark. 561; Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770; Prosser v. Wapello County, 18 Iowa, 327; New York v. Starin, 106 N. Y. 1, 12 N. E. 631; Stark v. Miller, 3 Mo. 470; Pennsylvania R. Co. v. National R. Co. 23 N. J. Eq. 441.

To keep a ferry, and to receive anything of value for crossing persons or property, without first obtaining a license, as is required by law, is made punishable by statute in Texas. Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

The right to keep a ferry and charge ferriage is a common-law right, but by the act of Congress of the Republic of Texas of December 20, 1856, such right is made a franchise to be exercised on giving bond and obtaining a license. Johnson v. Erskine, 9 Tex. 1.

Under the law of Texas, the keeper of a private ferry is not allowed by law to charge for passage or for freight, and is liable to a fine if he makes such a charge. Dunlap v. Yoakum, 18 Tex. 582.

In Ladd v. Chotard, Minor (Ala.) 366, it is said that, "by the statute of 1820, . . . no person is permitted to open or establish a public ferry without license, and bond and security [as prescribed]. The party who seeks his remedy by reason of the bond must bring his action on it."

The ownership of the soil on both sides of the stream will not confer the right to set up or exercise the franchise of operating a ferry across the stream; it can go no farther than to authorize the proprietor to establish a ferry for his own convenience and that of his family, or, at the farthest, to ferry, not for tolls, —that is, for a fixed price independent of contract,—but upon a contract, express or implied, when not forbidden by statute, and when it does not affect an established public ferry. Prosser v. Wapello County, 18 Iowa, 327.

In Milton v. Haden, 32 Ala. 30, 70 Am. Dec. 523, it is said that from the year 1820 the right to keep a public ferry for toll has been a franchise which could not be exercised without a license or legislative grant, and the unauthorized exercise of such right has all the time been prohibited by a penalty.

A ferry franchise must be conferred by the government; must be founded by a grant or license, or upon a prescription which presumes the existence of such license. Prosser v. Wapello County, 18 Iowa, 327.

It is said in Williams v. Turner, 7 Ga. 348, that the right of ferry is a franchise; that is to say, the riparian proprietor has not, as an incident to the ownership of land, the right to erect a ferry and charge and collect toll. So far as it does not interfere with public rights, as of navigation, it is incident to the title to lands, and may be exercised for private purposes. Public ferries are for public convenience, and the granting or withholding the right to establish them is an attribute of sovereignty.

In Young v. Harrison, 6 Ga. 130, it is said that the right to receive compensation from travelers and others for their transportation across a river on a public highway is, both at common law and by statute, a public franchise, and from its nature ought so to be; for no greater evil could be imagined than the unrestrained power, on the part of individuals, to exact from the traveler, who cannot brook delay nor stipulate for terms, whatever cupidity might exact.

The owner of land on both sides of a freshwater stream may maintain a ferry or bridge across it for his own use, even in defiance of legislative prohibition. But without legislative authority he cannot maintain a bridge or ferry for public or general use, because such things are subject to legislative regulation and control. Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407.

The right to maintain and operate a ferry, and collect tolls, is a franchise. It is a sovereign prerogative, and in this country vests in individuals only by legislative grant; and it makes no difference whether the grant is made directly by the legislature or by a subordinate body to whom the power is delegated, it is still a grant emanating from the authority of the state. Evans v. Hughes County, 3 S. D. 580, 54 N. W. 603.

Where a company seeks to operate a ferry under a charter of incorporation and without authority of the county court, there exists a usurpation of right that may be abated by quo warranto. Darnell v. State, 48 Ark. 321, 3 S. W. 365.

A statutory provision authorizing the owner of land on both sides of a stream to establish a bridge or ferry thereon at his own expense,

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is useless to cite those cases to show that such ferry franchise owner can maintain action against one damaging it by another ferry unauthorized by public authority. In the present case the applicants for the ferry were asking their ferry by due process of law in such case by a procedure directed by the legislature. The point of error made under this head asserts that the legislature cannot authorize a second ferry injuring another by diminution of its patronage, because it is damaging private property for public use without compensation. But that contention is repudiated in the *Mason Bridge Case;* in *Somerville* v. *Wimbish*, 7 Gratt. 205, also; and it is held, further, that a second ferry passing along the same line as that of an existing one may be established. In *Wheeling Bridge Co.* v. *Wheeling & B. Bridge Co.* 34 W. Va. 155, 11 S. E. 1009, this court went to the length of deciding that a ferry licensed long before the statute prohibiting a second ferry within a half mile of an existing one had no contract which could prohibit the legislature from repealing the act, and did not vest in its owners a perpetual monopoly, or render illegal the establishment of another ferry or bridge within half a mile, after the repeal of the prohibition. When the case was appealed to the United States Supreme Court, it was there held that the old ferry grant made no contract, and the decision of this court was affirmed. It was held that an alleged surrender or suspension of the powers of government respecting any matter of public concern must be shown by clear and unequivocal language, and cannot be inferred from any inhibitions upon particular officers or tribunals, or uncertain expressions. 138

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and charge toll for crossing, must be construed to authorize only the establishment of a private ferry for the use of the owner of the land, and not open to the public at its demand; but for the occasional use of which he may take ferriage, although not as a regular business, in view of a later statutory provision to the effect that the right to construct a bridge or establish a ferry for private use, within or adjoining lands, is appurtenant to the ownership of the land, but the right to establish and keep a public bridge or ferry is a franchise, and must be granted by the state. Greer v. Haugabook, 47 Ga. 282.

When the rates for a ferry are settled by the public authority therefor, it recognises by implication its lawful existence. Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am Dec. 83.

The owner of a perpetual grant of a ferry franchise from the legislature is under no obligation to secure a ferry license from the county court, and is not liable for the penalty prescribed by statute for maintaining the same without such license. Multnomah County v. Knott, 6 Or. 279.

b. *Authority to establish.*

1. *Character of water.*

(a) *In general.*

A ferry may be established and operated over water not so wide but that it can be traversed at regular and brief intervals by boats adapted to the business. New York v. New Jersey S. B. Nav. Co. 106 N. Y. 28, 12 N. E. 435.

General authority to a court to establish ferries will include the right to establish them over tidal water. Fay, Petitioner, 15 Pick. 243.

A narrow cut-off separating a neck of land from the mainland is not a river or part of it, which sweeps around the neck of land, in the sense that a ferry across it would be illegal because over the river within 2 miles of another ferry. Robinson v. Lamb, 131 N. C. 229, 42 S. E. 701.

(b) *Boundary waters.*

While each nation has absolute control of its own citizens, it has no control whatever over those of other nations so long as they are in their native countries. Therefore, when a ferry is to be set up over water which is a boundary between two nations, each may require its own citizens to procure licenses, and forbid interference with the licensees by its other citizens. It might also prohibit citizens of the other nation from landing on its shores. Such a course would, however, result in retaliation, and destroy all intercourse. So the only feasible plan is to let each nation regulate the ferries from its shores, and let the opposite nation regulate those from its shores. A boundary water may, however, be so wide that the traffic on it will lose the character of ferry, and assume that of commerce. In such cases no attempt can be made to license or regulate it. Upon this principle, every citizen has a right, without any grant, to transport passengers and freight across Lake St. Croix, and to land upon the shores, provided the owner of the land does not object. Perrin v. Oliver, 1 Minn. 202, Gil. 176.

Before the act of January 23, 1850, there was, in Texas, no law which authorized the grant of a license, by the county court, for a ferry across a stream which constituted a national boundary; and that act is operative only so far that it provides a system of reciprocity. Ogden v. Lund, 11 Tex. 688.

Under the power given county commissioners' courts in Texas to establish public ferries, such a court has the power to grant a franchise for a ferry across the Rio Grande, but such grant, of itself, can only be efficient to the middle of the stream, the limit of the political jurisdiction of the state. Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

A state legislature may authorize a ferry across the Mississippi river, and give individuals exclusive privileges within reasonable limits, when done in good faith for the purpose of operating such a ferry. United States *ex rel.* Jones v. Fanning, Morris (Iowa) 348.

Where a navigable river forms the boundary between two states, it is within the jurisdiction of either state to grant a franchise for a ferry across such river, with the same privileges of landing on the opposite bank as belong to the citizens of the sister state. Memphis v. Overton, 3 Yerg. 387.

Where, under the laws of a state, riparian ownership is necessary as the basis of a ferry franchise in case the water separates that state from another, riparian ownership on the opposite shore is not necessary. Conway v. Taylor, 1 Black, 603, 17 L. ed. 191.

The exclusive privilege, within certain distances, granted by the laws of Kentucky to ferries across the Ohio river, and the provisions contained in such laws, prohibiting all ferries except those established on the opposite

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U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301. In *Williams* v. *Wingo*, 177 U. S. 601, 44 L. ed. 905, 20 Sup. Ct. Rep. 793, was involved the same question,—whether a ferry licensed while the act of 1840, fixing the half-mile limit, was in force, gave a vested right denying power to grant a ferry within half a mile of another after repeal of that act by the Virginia legislature. It was held that it did not. It was held that the act of 1840 only tied the hands of the county court against a grant within half a mile, but did not bind the legislature. The cases upholding exclusive grants of franchise are those where the monopoly is in the body of the charter. The courts will not concede it where it is sought to deduce it from general law. See *Pearsall* v. *Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705, and *Central R. & Bkg. Co.* v. *Wright*, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. Rep. 80, discussing this subject. Also, 12 Am. & Eng. Enc. Law, 2d ed. p. 1101. Now, it cannot be pretended that when Russell obtained his ferry grant in 1899 under the Code (chap. 44 of general law) there was any intimation in the Code of any exclusive grant. It is neither contract nor vested property in the sense that it restricts governmental power. Neither the public nor the Sistersville Ferry Company would be subject to damages from a second ferry. This is pointedly settled by *Hostler* v. *Marlowe*, 44 W. Va. 707, 30 S. E. 146. These days grants of exclusive privileges are rare, and should be. They are in restraint of public power, and hurtful to the public. It may be truly asserted that the courts have always disfavored monopolies, and have even been fertile in find-

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side from taking passengers from or carrying them to the Kentucky side within the prohibited distance of a ferry established thereon, and prohibiting ferries established on the opposite side from taking passengers from the Kentucky side within that distance, is not an assumption of exclusive jurisdiction over the Ohio river, contrary to the conceded right of concurrent jurisdiction vested in the states bordering that river on the opposite side, but is a lawful exercise of jurisdiction within her own boundaries to protect and preserve her own established ferries, without denying to the states on the opposite side the right to establish ferries across that river whenever and wherever desired. Newport v. Taylor, 16 B. Mon. 699.

No authority to establish a ferry across a river which is the boundary of a state is given by a statute authorizing county courts to establish ferries and regulate the rates of ferriage. Zane v. Zane, 2 Va. Cas. 63.

(c) *Interference with commerce.*

The power to regulate commerce having been granted to the Federal government, the question has arisen whether or not this deprives the states of the power to license ferries across waters forming the boundaries between states. It has been held that the commerce power does not interfere with the regulation of ferries as such.

The power to establish and regulate ferries is reserved to the state. Conway v. Taylor, 1 Black, 603, 17 L. ed. 191.

A state may impose a license fee upon the proprietors of ferries living in the state for boats owned by them and used in ferrying passengers and goods from a landing in the state across a navigable river to a landing in another state. Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.

The grant of a ferry franchise belongs exclusively to the state government, and is among the mass of reserved powers never granted by the states to the general government. Elizabethport & N. Y. Ferry Co. v. United States, 5 Blatchf. 198, Fed. Cas. No. 4,362.

The right to control ferries, although operating between different states, is a matter of state jurisdiction, and is not included in the right of the Federal government to regulate commerce between the states. St. Louis v. Waterloo-Carondelet Turnp. & Ferry Co. 14 Mo. App. 216.

The power to grant ferry leases or licenses belongs to the police power of the state, and may be exercised upon navigable rivers, subject to the power of Congress to supersede the subordinate control. Nixon v. Reid, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57.

The Hudson county freeholders were given power by the act concerning ferries (February 6, 1799) to fix the rates of ferriage from Jersey City to New York; and the statute does not infringe the constitutional prerogative of the Congress of the United States to regulate interstate commerce. State v. Hudson County, 23 N. J. L. 206. Affirmed in 24 N. J. L. 718.

A city ordinance charging a license fee for the privilege of operating a ferry is not a regulation of commerce within the meaning of the Constitution of the United States, and does not conflict with the power of Congress in that regard, although the ferry route is over boundary waters between a state and Canada. Chilvers v. People, 11 Mich. 43.

An exercise of the power to establish ferries over a stream which is the boundary of a state does not infringe that provision of the Constitution of the United States which gives the Congress power to regulate commerce between the states and with foreign nations. Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

The privilege of keeping a ferry on waters entirely within or bordering upon a state, with the right to take toll, is a franchise granted by the state to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public; in the exercise of which power the state may employ such instrumentalities as it may select, subject, only, to the constitutional inhibition against the imposition of taxes or burdens upon interstate commerce, and to the further duty of not permitting conflicting or inconsistent regulations which would tend to impede interstate communication. Madison v. Abbott, 118 Ind. 337, 21 N. E. 28.

Neither the commercial power of Congress, nor the provision in the ordinance governing the Northwest territory that the navigation of certain rivers shall be free, will prevent a state, in the exercise of its police power, from licensing ferries. Fanning v. Gregorie, 16 How. 524, 14 L. ed. 1043.

The power of the state of Illinois to authorize a municipal corporation to impose a license fee upon each ferryboat operating between the city and the opposite shore of the Mississippi river is not impaired because such boats are steam ferryboats, and have been inspected under an act of Congress requiring all steam fer-

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ing ways in which to repel them. There was no right to a jury to assess damages.

Another assignment of error is that the court erred in establishing the ferry, because by the evidence it was shown that the travel would not well support two ferries. I am not sure whether point 5 in *Williamson* v. *Hays*, 25 W. Va. 609, is only admonitory to the county court in saying that it is an important inquiry whether the travel will well support two ferries, as that inquiry must have much weight, or whether its action can be reversed for that cause alone. Can the county court's action, based on the report of viewers and evidence, be reversed for that cause, or is its discretion final? It may be thought that, as the Constitution vests that court with police jurisdiction, and the establishment of a ferry falling within that jurisdiction, the discretion of that court is not reviewable. But the legislature took a different view in giving an appeal in a ferry case in Code, chap. 139, § 47, and I think this covers the whole case, evidence and all. It is not an unlimited discretion upon the evidence; only a reasonable one, which must not be abused. The *Williamson Case*, above, is a precedent for such review. Then, did the county court err in this case? We think that it did. The record shows that these same parties owned at Sistersville a steam ferry, half a mile below the proposed new ferry, and that Russell owned a ferry half a mile further up the river from the proposed ferry. The applicants asked a third. For what? Was it only to drive out Russell, and monopolize the business? It does not appear that the travel would well support two ferries. It does not distinctly so appear. According to the *Williamson Case*, that is an important element. I do not construe that case as saying that it is controlling; for if the public need, for any reasons, would plainly demand a proposed ferry, I think the fact that the travel will not support both would not deny the ferry. I think

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ryboats to be inspected. Such inspection laws are in no sense to be regarded as a regulation of commerce, but are a police regulation for the safety of persons. Neither is such license fee a towage tax, or its imposition an attempt by a state to regulate interstate commerce. Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560.

The state of Illinois has the power to grant the right to establish a ferry across the Mississippi river from the Illinois side, which right, thus conferred, in no way conflicts with the provisions of any treaties made by the United States with foreign powers, or with any acts of Congress relative to the free navigation of that river; and the exercise of that right devests no right or privilege which any citizen theretofore enjoyed freely and uninterruptedly to navigate the river. Mills v. St. Clair County, 7 Ill. 197.

The legislature of Iowa may grant the exclusive privilege to operate a ferry across the Mississippi river, and to use the land in front of Dubuque, although by act of Congress of 1836, this land is appropriated for "public highways and other public uses." United States *ex rel.* Jones v. Fanning, Morris (Iowa) 348.

A license to a steamboat, issued under the laws of the United States regulating the coasting trade, does not entitle such boat to engage in the regular business of ferrying from shore to shore across a navigable river in violation of the privileges held and possessed by an established ferry at that point under authority of a state grant, and in violation of the laws of that state regulating the establishment of ferries across such river. Newport v. Taylor, 16 B. Mon. 699; Chilvers v. People, 11 Mich. 43.

A suit to enjoin the defendant from operating a ferry alleged to be conducted in violation of the plaintiff's exclusive right does not interfere with the defendant's right to navigate the waters of the United States under his coasting license, or raise a Federal question cognizable by a Federal court. New York v. Independent S. B. Co. 22 Fed. 801.

The legislature of Iowa may grant an exclusive privilege to ferry to and from a locality in that state across the Mississippi river, although Congress has declared that stream to be forever free and a public highway. Phillips v. Bloomington, 1 G. Greene, 498.

The act of Congress of February 20, 1811, declaring the Mississippi river a navigable stream and a common highway, forever free, as well to the inhabitants of the state as to other citizens of the United States, was not intended to interfere with the right of the state to create and regulate ferries. Chiapella v. Brown, 14 La. Ann. 185.

The power of the states to regulate ferries and grant ferry privileges to their own citizens across navigable rivers bordering them cannot be questioned in the absence of Federal legislation on that particular subject. Newport v. Taylor, 16 B. Mon. 699.

The right of a municipality, under its charter, to establish ferries with exclusive privileges between points within the state does not raise any question within the jurisdiction of the Federal courts. Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28.

The construction of a bridge across the Mississippi river and the building of a dike into the river, both done under and in pursuance of an act of Congress, the one for the promotion of the commercial interests of the country, and the other for the improving of the navigation of the river by throwing more water into the main channel, are acts of which the owner of a ferry franchise across the river at that point, granted by the state legislature, cannot complain, and such owner can recover no damages from the bridge company for injuries sustained by him in consequence of being prevented from landing his ferry at certain points on account of the construction of the dike. Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508.

The owner of a ferry chartered by the state of Illinois and operating across the Mississippi river acquires no interest whatever in the flow of the river, and cannot control the channel or prevent its improvement without compensation to him by the United States. Lonergan v. Mississippi River Bridge Co. 2 McCrary, 451, 5 Fed. 777.

The restriction of the transportation across the Ohio river to the established ferries for 1 mile above and below those established on the Kentucky shore, and the exclusive privilege within that distance secured to ferries established from that side for the transportation therefrom, as provided by the Kentucky laws, is not an infringement of the right secured to all citizens of the United States to the free

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the public interest paramount. But the fact specified enters into the question. We will not go so far as to say that the public convenience does not, to a limited extent, support the present application; but there is no real, imperative public need. We must consider other facts entering into the matter. The first is as to the sufficiency of travel for support. If there were already only the Russell ferry, we would say that, though it is not plain that the travel will support two ferries, especially as it is diminishing during the decay of the oil business on the Ohio side of the river, yet the county court did not clearly err on the evidence. But the report and evidence show the presence of another,—a steam ferry. The evidence does not show that the travel will well support three. It shows that it will not. The investigation in the county court does not appear to have brought this existing steam ferry into the estimate, and that investigation was, therefore, too narrow. Another element in the question is that Russell had a ferry granted by authority, and it is property, and the report and evidence show that it will be injured by the proposed ferry. You will say that his property cannot bar the public need. I say so, too. It cannot bar it, but it goes into the scales. The *Williamson Case* says that he has a special interest entitling him to be heard. Why is this, if that interest is not to be considered? He is admitted as a party; not as an *amicus curiæ*, but to defend his property. And it appearing that there is no real, substantial, imperative public need for this third ferry, it was error to his prejudice to inflict an injury upon him.

Therefore *the judgment of the Circuit Court is reversed*, and, this court rendering such judgment as the Circuit Court ought to have rendered, the judgment of the County Court is reversed, and the application to establish the ferry is dismissed. Costs to Russell in both Circuit and County Courts.

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navigation of that river. Newport v. Taylor, 16 B. Mon. 699.

The power of the state is not absolute in the matter, however. It must not interfere with commerce along the river, and its authority may be superseded by the Federal authority in some instances.

Thus, a ferry authorized under the Iowa statute permitting the county judge to license ferries must be constructed upon the Des Moines river in such a manner as not to cause annoyance, inconvenience, or damage to boats navigating the river. The Globe v. Kurtz, 4 G. Greene, 433.

So, a ferry is a means, and a necessary means, of commercial intercourse between states bordering on dividing waters, and it must therefore be conducted without the imposition by the states of taxes or other burdens upon the commerce between them. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Interst. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

The grant of a ferry franchise across the Mississippi river, under an act of the legislature, confers upon the grantee the right to run his boats across it and to land upon the shore, but does not confer upon him any right which would hinder, or in any manner obstruct, the free navigation of the river, or impede the commerce of the country along or across the same; and such grant was accepted with the implied understanding that Congress might at any time, in the exercise of the power to regulate commerce, authorize a bridge to be erected, and dikes to be placed in the river to change the current and thus facilitate the navigation of the river. Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508.

One who, being in the exercise of a ferry privilege between the United States and Mexico, then at war with each other, was forced to discontinue it by a military officer of the United States, who was in command at that place, had no right of action against the officer; the exercise of the ferry privilege in such a place being inconsistent with a state of war. Ogden v. Lund, 11 Tex. 688.

2. *Power of municipality.*

(a) *To establish and regulate.*

The authority of a municipality depends on grant, and its authority over ferries is therefore largely a matter of construction of granted powers.

Power conferred upon a city by its charter to license, continue, and regulate ferries authorizes the common council to pass a by-law prohibiting anyone from keeping a ferry without a license. Chilvers v. People, 11 Mich. 43.

A municipal corporation cannot require the owner or keeper of a ferry within its corporate limits to procure a license from the city authorities before operating his ferry where such action is not authorized by the general law for the incorporation of cities, under which such municipal corporation is organized. Shallcross v. Jeffersonville, 26 Ind. 103.

The power to "regulate ferries," conferred upon municipal corporations by statute, does not include the power to prohibit without a license being first obtained therefor from the city, where the statute expressly confers that power in all cases where it is intended, and therefore it is not to be inferred from other provisions,—especially as the power to establish and regulate ferries exists in the county commissioners. Duckwall v. New Albany, 25 Ind. 283.

An act of legislature vesting the trustees of a town on the Ohio river with the jurisdiction and control of the ground fronting on such river does not thereby empower such trustees to establish ferries across such river without regard to the provisions of the statutes regulating the establishment of ferries across it. Maysville v. Boon, 2 J. J. Marsh. 224.

The provision of the charter of a municipal corporation that "any matter for the doing which a license is required by the laws of the state shall not be done in this corporation unless under authority of a license obtained from the corporation for doing the same, under a penalty of twice the amount which may be demanded by the corporation for the issue of such license," does not apply to a ferry license which the municipal corporation has no power to grant. Mason v. Harper's Ferry Bridge Co. 20 W. Va. 223.

Where a city is authorized to regulate ferries within its corporate limits, it has power to regulate a ferry on a river only one of the banks of which is within its limits; and it also has authority to regulate ferries operated from the opposite bank of the river, as such power is necessary to enable it successfully to exercise the power to regulate ferries within

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its limits. Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark. 371, 19 S. W. 1053.

A municipal corporation cannot grant exclusive ferry franchise in the absence of legislative authority. Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.

And general authority to establish and regulate ferries gives no right to grant any exclusive ferry license. Minturn v. Larue, 23 How. 435, 16 L. ed. 574, McAll. 370, Fed. Cas. No. 9,646.

But a municipal charter conferring upon a city the exclusive power to license a ferry, and also authorizing it to grant or refuse the license, permits the granting of an exclusive license because the city may grant or refuse. Burlington & H. County Ferry Co. v. Davis, 48 Iowa, 133, 30 Am. Rep. 390.

A municipality is not liable for the acts of its officers in establishing a free ferry so close to an existing one that it draws its custom away from it. Gibbes v. Beaufort, 20 S. C. 213.

Although an ordinance is void so far as it grants an exclusive ferry franchise for ten years, it is not necessarily invalid as to a provision which authorizes the issuance of a license every six months to the grantee upon his paying the license tax as provided therein. State *ex rel.* Campbell v. Cramer, 96 Mo. 75, 8 S. W. 788.

Ordinances of a municipal corporation governing ferries are not within the constitutional provision forbidding the legislature to pass local or special laws. St. Louis v. Waterloo-Carondelet Turnp. & Ferry Co. 14 Mo. App. 216.

The statute of Texas committing to the county courts the right to grant ferry licenses and franchises did not repeal a former act of the state incorporating a city and giving it the right to establish and regulate ferries within its corporate limits. A general law does not, by implication, repeal a special one, although both relate to the same subject-matter. Laredo v. Martin, 52 Tex. 548.

Municipal officers empowered, in their discretion, to grant a ferry license, cannot be compelled by mandamus proceedings to grant a license to an unsuccessful applicant. State *ex rel.* Campbell v. Cramer, 96 Mo. 75, 8 S. W. 788.

An ordinance of a municipal corporation requiring ferryboats on ferries across an interstate stream to land at the landing place within the corporate limits every so often, and to remain there at one time only a certain interval, which applies to every day and all hours of the day and night, is void and unenforceable under a statute conferring general power upon municipal corporations to establish and regulate ferries, as prescribing regulations inconsistent with later acts conferring upon county commissioners the power to regulate the hours during which licensed ferrymen across interstate streams are required to keep their ferries open and to run their boats, and requiring such ferrymen to obtain a license from such commissioners, and to enter into a recognizance to the state containing conditions to operate their ferries according to the regulations prescribed by the board, and repealing all laws inconsistent therewith. Madison v. Abbott, 118 Ind. 337, 21 N. E. 28.

A charter giving a municipality power to license and regulate ferries does not deprive the state of the same power. Harrison v. State, 9 Mo. 526.

The municipality acquires no vested right by a grant of authority over ferries, so that the state, after granting to a municipal corporation the exclusive right of establishing ferries within its limits, and of applying the revenues in aid of municipal improvements without any consideration inuring to the state, may grant to a parish on the opposite bank of the river the right to participate in the regulation of the intermediate ferries and to share in the net profits, without violating any contract or vested right within the protection of the United States Constitution. Police Jury v. Shreveport, 5 La. Ann. 661.

(b) *To operate or lease.*

The running of a ferry is not one of the purposes for which municipal corporations are created, and, in order to be entitled to do so, the authority must be expressly given.

A ferry franchise granted to the trustees of an incorporated town by the county commissioners' court is unauthorized and void, where the statute under which such court derives its power to grant ferry franchises neither expressly, nor by implication, authorizes such privileges to be granted a corporation, and the act of incorporation creating such trustees a corporate body does not confer upon them the power to accept such a grant, or to delegate that right to others. Betts v. Menard, Breese (Ill.) 10, Appx.

On the same principle, the statutory power of the board of supervisors over ferries is limited to the right to license and regulate them, and does not authorize them to use the money of the county to establish a free ferry. Leake County v. McFadden, 57 Miss. 618.

A town is without authority to lease a ferry from a parish, and is not liable for the amount of its bid therefor. Millsaps v. Monroe, 37 La. Ann. 641.

Upon the division of a town no part of its franchise to operate a ferry passes to the new town, except such as the legislature may see fit to grant it. Hartford Bridge Co. v. East Hartford, 16 Conn. 149, Reaffirmed in 17 Conn. 79.

Where a municipal corporation is making an unauthorized appropriation of the corporate funds by establishing and operating a free ferry outside the corporate limits, equity, at the suit of the taxable inhabitants of the corporation, will restrain it and the officers thereof from making the appropriation. Jacksonport v. Watson, 33 Ark. 704.

Although express authority must be given, the legislature may not only authorize, but it has power to require, a city to incur a debt without its consent for the acquisition of public ferries, in the absence of any constitutional prohibition. Simon v. Northup, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 500.

So, the trustees of a town on the Ohio river, owning the land on such river, are qualified, under the law regulating the establishment of ferries across the Ohio river, to receive the grant of a ferry franchise across such river for the benefit of such town; and their legal right thereto would be restricted only by questions of public expediency, irrespective of the number of ferries already existing at that point under previous franchises. Maysville v. Boon, 2 J. J. Marsh. 224.

By the Montgomerie charter, all ferries to be established around Manhattan island were granted to the municipal corporation of New York. *Re* Union Ferry Co. 98 N. Y. 139; New York v. Starin, 106 N. Y. 1, 12 N. E. 631.

And such right is not confined to ferries established at the time of the Montgomerie charter, but extends to, and includes, all other ferries which the corporation might thereafter establish from Manhattan island to any of the

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opposite shores. New York v. New York & S. I. Ferry Co. 8 Jones & S. 232.

A city owning a ferry landing with boats and appurtenances to operate a ferry, and having a charter power to operate the ferry and to fix the rates, rents, and fees thereof, may do with such property whatever a private person might do if he were the owner, except that, holding it as an agent for the state for a public purpose, it cannot surrender its control and supervision to the unrestricted control and management of another person. Macdonell v. International & G. N. R. Co. 60 Tex. 590.

A grant to a municipal corporation of power to keep in order and repair streets and roads does not confer on it power to establish and work a ferry across a river which runs through it. Cooper v. Athens, 53 Ga. 638.

A statute permitting a municipal corporation to purchase a ferry, and, upon the completion of said purchase, to determine whether it shall be free of tolls, or free for a time and then for toll, gives the municipal corporation only one choice, so that when it has determined to charge toll it cannot afterwards make the ferry free. Atty. Gen. v. Boston, 123 Mass. 460.

Where the legal title to the land bordering on the Mississippi is vested in the trustees of the town, an act of legislature providing that the trustees of such town may fix the rates of ferriage across the Mississippi river, and may also lease out ferries for any term of years not exceeding five, and apply the rents to the improvement of the town, vests in such trustees at least the exclusive beneficial interest in the ferry privileges, absolutely, which right cannot be devested by a subsequent act of legislature establishing a ferry in favor of another. Walker v. Columbus, 4 B. Mon. 259.

Where a municipal corporation has no express grant of authority to expend the corporate funds in establishing and operating a free ferry outside the corporate limits for the purpose of promoting trade and commerce, it has no such power under a statute authorizing a municipal corporation to pass ordinances for the purpose of providing for the safety, preserving the health, promoting the prosperity, comfort, and convenience of such corporation and the inhabitants thereof. Jacksonport v. Watson, 33 Ark. 704.

Where, upon the division of a town, the new town accepts its charter giving it the privilege of keeping one half of the ferry operated by the old town during the pleasure of the legislature, it cannot afterward claim greater rights than those conferred by such charter. Hartford Bridge Co. v. East Hartford, 16 Conn. 149, Reaffirmed in 17 Conn. 79.

It is within the discretion of a city owning a ferry franchise to convert it into a bridge privilege for a term of years in consideration of a specified annual payment to it, and it may lawfully pass an ordinance to that effect. Laredo v. International Bridge & Tramway Co. 14 C. C. A. 1, 30 U. S. App. 110, 66 Fed. 246.

Property owned by a municipal corporation for the purpose of operating a ferry franchise is, although leased to a private individual who operates the ferry, held for public and governmental purposes so as not to be subject to taxation. People *ex rel.* New York v. Brooklyn, 111 N. Y. 505, 2 L. R. A. 148, 19 N. E. 90, Affirming 47 Hun, 383.

But a municipal corporation which has received a grant of a ferry franchise under which it has for a long time maintained a ferry may sell the property connected therewith to an individual, provided the public is not deprived of the improvement of intercommunication. People v. Albany, 4 Hun, 675.

Lease.

Without legislative authorization, a municipal corporation cannot lease a ferry under a power to regulate and manage it, as it is a public highway. Roper v. McWhorter, 77 Va. 214.

But it has been held that a town operating a ferry has power to lease the right to operate the same, and to charge an annual rental for such privilege. Rocky Hill v. Hollister, 59 Conn. 434, 22 Atl. 290.

And, it being the duty of the selectmen of a town to maintain its ferry, they have authority, without an express vote of the town, to lease it to one who will maintain it. *Ibid.*

A city, under the authority in its charter to establish ferries and to fix the rates, rents, and fees thereof, has power to contract with an individual to operate a ferry owned by the city, he paying a sum to the city for the right to do so, where the city reserves in the contract the right to exercise control and supervision over the ferry through its ordinances. Macdonell v. International & G. N. R. Co. 60 Tex. 590.

Although the lease of a ferry by the selectmen of a town may have been without authority, a subsequent vote at town meeting authorizing an action to recover the rent reserved by the lease amounts to a ratification of the same. Rocky Hill v. Hollister, 59 Conn. 434, 22 Atl. 290.

Injunction will lie to prevent a municipal corporation from making illegal lease of its ferry franchises. People v. New York, 32 Barb. 102.

The licensee of a ferry franchise from a municipal corporation is entitled to an injunction to prevent the municipality from alienating the franchise to another during the term of the lease. Benson v. New York, 10 Barb. 223.

A lease by a municipal corporation of its ferry with covenants for exclusive enjoyment will not prevent the municipality from exercising its statutory power to grant a ferry license over the same water if it is required for public convenience. Fay, Petitioner, 15 Pick. 243.

3. Exercise of authority.

(a) Who may exercise.

The power to establish ferries resides in the state, and is usually exercised under authority of the legislature. It is usually vested by that body in some local board whose duties are more or less strictly defined, and which must act within the scope of the authority delegated to it.

The right of establishing ferries is in the legislature, and the extent of the rights of the grantee of a ferry franchise depends upon the terms of the grant made to him, and they are not exclusive unless expressly made so by those terms. Bush v. Peru Bridge Co. 3 Ind. 21.

Although the legislature, pursuant to the state Constitution, has conferred authority on the boards of county supervisors to license ferries, the legislature still possesses the power to grant a ferry franchise. Chapin v. Crusen, 31 Wis. 209.

The power of the legislature to grant a license to keep a ferry is not restricted by the constitutional provision conferring on boards of supervisors full jurisdiction over ferries, subject to the right of the owner of the soil to compensation. Blake v. McCarthy, 56 Miss. 654.

The power to grant a ferry license is not judicial, but political, in its nature, and cannot

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be delegated to the courts. Chard v. Harrison, 7 Cal. 113.

And the board of commissioners of a county, in granting a ferry lease under the laws of South Dakota, acts as the agent of the state, and not of the county. Evans v. Hughes County, 3 S. D. 580, 54 N. W. 603.

Under the statute of West Virginia, the board of supervisors has jurisdiction to establish and regulate ferries. Cross v. Hopkins, 6 W. Va. 323

A mere grant to an inferior court of the right to establish bridges and ferries will not include the right to make a grant of the right to establish such works exclusive. Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921..

In Louisiana a police jury has power to establish ferries over all watercourses and lakes, whether navigable or not. Gillespie v. Freeman, 7 La. Ann. 350.

The power to establish ferries is vested by statute in the police jury. A municipal corporation is without authority to make such a grant. Plaquemine v. Decaudine, 16 La. 588; Hebert v. Maillan, 16 La. 585.

Under the statutes of Texas, which give the commissioners' court authority "to establish public ferries whenever the public interest may require it," such courts have the power to license public ferries in their respective counties in all cases except in those instances where the legislature has especially granted to some person or persons, or some municipal body the privilege of establishing a ferry. Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

In view of the great similarity in the privilege of passing the public over a stream by means of a ferry and pontoon bridge, it seems that the act granting a charter to make and keep a bridge would operate as a *pro tanto* repeal, or limitation, of the general power conferred upon the county courts to establish ferries. Hudson v. Cuero Land & Emigration Co. 47 Tex. 56, 26 Am. Rep. 289.

In New York city the dock department has not been vested by the legislature with power to grant a ferry license. New York v. New York & S. I. Ferry Co. 8 Jones & S. 232.

And it has, therefore, no power to grant either ferry franchises or the exclusive use of the bulkhead or pier or any part thereof to persons running a ferry without a ferry franchise. Cunard S. S. Co. v. Voorhies, 18 Jones & S. 253.

When the opposite sides of the river are within the jurisdiction of different boards, there is usually a concurrent jurisdiction delegated to them over the matter of ferries.

The right of counties separated by a river to establish a ferry thereon under a statute regulating ferries is concurrent, but is exhausted by the exercise of the right by either county. Jones v. Johnson, 2 Ala. 746.

The right to establish an additional ferry at or near a town when public interest demands it is not exclusively within the jurisdiction of the authorities of the county in which the town is situated, where the river over which it is to be operated is the boundary between two counties; but the jurisdiction of such counties is concurrent, and the authorities of either may exercise the right if not already exercised by the other. *Ibid.*

Under the act of 1805, granting to each parish the right to establish within its limits as many ferries as it pleases, the parish of Orleans and the city of New Orleans stand in the same relation as two parishes, and each has the right of establishing a ferry across the Mississippi before the city. Police Jury v. New Orleans, 8 Mart. (La.) 711.

(b) *Restrictions on exercise.*

Within the limits of the power delegated to them, the acts of the local boards are final, it being held that the whole matter is committed to their discretion.

The discretionary power conferred upon the county court by a statute authorizing the establishment of ferries by such courts "whenever they shall deem it necessary" is unlimited, and the propriety or necessity of a ferry established by such court is not a subject of revision by the court of appeals. Lawless v. Reese, 4 Bibb, 309.

The necessity for a new ferry or bridge is to be judged of by the public authorities, and that decision must be final. It is right that the public mind be consulted, as otherwise the rights of existing ferries or bridges might needlessly be interfered with. Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

A provision of a statute permitting the establishment by the court of sessions of ferries nearer together than prescribed thereby, where public convenience requires it, gives the court a discretionary power, the exercise of which will not be disturbed in the absence of anything showing that such power has been exceeded or abused. *Re* Hanson, 2 Cal. 262.

Under the law of Kentucky prohibiting the establishment of ferries across the Ohio river within less than a mile from previously established ferries, an exception providing that such restriction need not be enforced where it becomes necessary to establish a ferry within less than that distance by reason of an impassable creek emptying into that river, confers upon the county courts the discretionary power to decide when a creek is impassable within the meaning of such exception; and their judgment will not be reversed upon appeal, except in cases where such discretion has been palpably abused. Sanders v. Craig, 1 A. K. Marsh. 196.

An order of the county court establishing a ferry across the Ohio river within a mile of another ferry previously established, contrary to statute, will not be reversed on appeal, unless the record in that court contains conclusive proof of the previous establishment of such ferry within the distance prohibited by such statute. Givens v. Pollard, 3 A. K. Marsh. 320.

An order of the county court establishing a ferry will not be reversed on appeal, where it appears from the record that the applicant was the owner of the land on both sides of the stream, and the provisions of the statutes regulating such proceedings were in all respects complied with. Ackler v. Oldham, 1 A. K. Marsh. 471.

Under the statutes of Texas, the commissioners' courts have the jurisdiction to decide whether or not the right to operate a public ferry should be granted, and their decisions are not subject to collateral attack. Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

The discretion conferred upon the county courts of Kentucky by statute as to the establishment of ferries is given chiefly for the public good; and, although not unlimited when private rights may be injuriously affected by its exercise, yet it is not subject to the control or revision of courts of appeal, except in cases of clear abuse. Harvie v. Cammack, 6 Dana, 243.

The discretion conferred by statute on coun-

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ty courts of counties bordering on the Ohio river to grant ferry franchises at towns on such river where they deem the same necessary, although large, is subject to revision and control upon appeal, and their judgment will be reversed where they have palpably abused such discretionary powers, and it is manifestly contrary to public or private interests. Carter v. Kalfus, 6 Dana, 43.

Under the statute of Arkansas, where a license is granted to operate a ferry near a town and near another ferry, whether or not the ferry created by such license is for the public convenience is a question to be determined by the proper county court, and the decision of that court is binding upon everyone, where no exceptions have been taken to the decision, and the judgment has not been set aside. Haynes v. Wells, 26 Ark. 464.

There are, however, certain restrictions upon the granting of franchises which will control the discretion of the boards. The boards must comply with the statutes upon the subject, and recognize vested rights.

In determining whether a particular ferry shall be established or maintained, the county court should act with reference to the public interest; and when the legislature has granted the privilege of having a pontoon bridge, it is in the discretion of the county court to determine that the public good does not require a ferry at or near the same place. Hudson v. Cuero Land & Emigration Co. 47 Tex. 56, 26 Am. Rep. 289.

Although an owner of land on the Ohio river is, alone, entitled, under the statutes of Kentucky, to be the grantee of a ferry across it from that point, yet he has no legal right to demand such a grant unless the public convenience shall require the establishment of a ferry from his land, and then he is not entitled to it if his ferry would be within 1½ miles above or below another previously established ferry, unless it be in a town, or necessary in consequence of an impassable stream putting into the Ohio river, or opposite to some established ferry in the Ohio state. Carter v. Kalfus, 6 Dana, 43.

The court will not grant a license to operate a ferry at a point but little more than a mile below an existing ferry, and not as much above another, where the existing ferries are in good repair, and are properly performing their public duties, and there is no public road leading to the proposed ferry, the only road being a private one, laid out by the petitioner, and no public convenience is to be obtained by granting a license, though there exists a possibility of the new ferry being able to carry at a lower rate by reason of the narrowness of the stream at the point in question. Beard v. Long, 4 N. C. (2 Car. Law Repos.) 69.

The circuit court will, in the exercise of its discretion, refuse a license for a ferry over the east branch of the Potomac river, where the object is by competition to compel bridge companies to take less toll than they are authorized by law to take, whereby they might be unable to keep the bridges in repair, and become liable to prosecution and forfeiture. Young's Case, 2 Cranch C. C. 453, Fed. Cas. No. 18,150.

A person is not entitled to a franchise for a ferry at or near a public bridge, where the only benefit the public would derive from its establishment would be the production of competition which might result in a reduction of the bridge tolls below the amount allowed by law, it being shown that such bridge is sufficient at all times to afford ample accommodations to the traveling public at that point. Nashville Bridge Co. v. Shelby, 10 Yerg. 280.

A grant of a ferry franchise to the owner of land on one side of a stream at the same point where another ferry is in operation under a prior grant will be refused, where public needs do not require the establishment of another ferry at that point. Clark v. White, 5 Bush, 353.

Where public convenience does not require the establishment of another ferry across the Ohio river, an order of the county court refusing such grant will not be reversed on appeal. Everston v. Sanders, 6 J. J. Marsh. 142.

Injury to existing ferries is not a matter of much moment if the franchises are not exclusive and the public welfare demands additional facilities.

In Knott v. Jefferson Street Ferry Co. 9 Or. 530, it is held that the fact that the establishment of ferries at different points than those at which one already established is maintained may incidentally diminish the profits of such previously established ferry, the franchise of which is not coupled with exclusive privileges, is not ground for refusing a license for a ferry necessary for public convenience.

A statute authorizing the county commissioners' court to grant licenses to individuals to operate ferries does not vest in the licensee rights superior to the power of the court itself to establish ferries; and a licensed ferryman is not entitled to damages against the county where such court directly establishes a competing ferry. Burrows v. Gonzales County, 5 Tex. Civ. App. 232, 23 S. W. 829.

Although a county court may have power to establish a free ferry where it will not interfere with a privilege already granted to a private person, such court, being prohibited by statute from establishing a ferry by license granted to a private person within 1 mile of a ferry already established by license, has no power to establish a free ferry within 1 mile of a private ferry. *Re* Howell, 36 Ark. 466.

Under the statute of West Virginia, the board of supervisors is prohibited from granting leave to establish a ferry across a water course within half a mile of another ferry legally established; but this prohibition expressly excepts the grant of a ferry across the Ohio river, and the statute provides that ferries on that river may be established at any place the board may determine. Cross v. Hopkins, 6 W. Va. 323.

The board of supervisors, in granting a ferry privilege or license, cannot bind its successors in office by a stipulation that no rightful ferry shall be established within a certain distance of the one licensed by it, either within a specified period or during all time. Seal v. Donnelly, 60 Miss. 658.

When a county court, having power to settle and discontinue a ferry, is required to give notice for a new ferry within 2 miles of one already existing, it can make no irrevocable grant of an exclusive franchise. Barrington v. Neuse River Ferry Co. 69 N. C. 165.

An attempt to grant an exclusive ferry franchise for ten years, which is void because not authorized by law, may yet create a valid franchise for short periods for which a license fee is paid. Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884, Affirmed in 110 Mo. 557, 19 S. W. 809.

Mandamus will not lie to compel the court of commissioners of revenues and roads to grant a ferry franchise under a statute providing that when the land is owned by the same person on both sides of the river he may have a ferry established thereon, but that no public

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ferry shall be established within less than 2 miles by water of any ferry already established, where the applicant is not the owner of the land on both sides of the river, and it appears that there is a ferry established within 2 miles of the point at which he desires to establish his ferry. State *ex rel.* Driver v. Talladega Road & Revenue Comrs. 3 Port. (Ala.) 412.

The acts of local boards must be confined to the territorial limits over which their jurisdiction extends.

The board of county commissioners of a county to which an unorganized county is attached for judicial purposes has no power to grant a ferry franchise between points one of which is within the unorganized, but neither of which is within the organized, county, whose board granted the franchise. Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

But the right to establish a ferry at a certain place on a river within the jurisdiction of county commissioners may be granted by them so far as their jurisdiction goes, although the opposite side of the river is within an Indian reservation. Nixon v. Reid, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57.

A small creek, impassable at its mouth, but passable at all times a short distance therefrom on the usual road, is not the kind of an intervening impassable stream required by the statute regulating the establishment of ferries across the Ohio river to authorize a grant for a ferry franchise across such river within 1½ miles of a previously established ferry. Cotton v Houston, 4 T. B. Mon. 288.

A proceeding before the commissioners of one county to establish a ferry across a river is not an estoppel to a subsequent proceeding in another county for the same purpose, if any relief can be had in the latter county not obtainable in the first proceeding. Robinson v. Lamb, 131 N. C. 229, 42 S. E. 701.

An application by the officers of a city for a franchise for a ferry across the Ohio river will be refused, where, by a previous judgment of the court, an application by the trustees of the town, to which such city is the successor, for a ferry across such river, was refused on the ground that the act of legislature incorporating such town reserved the exclusive ferry privileges in the original proprietor of such town, and there is nothing of record in the second application showing a loss by such proprietor, his heirs or assigns, of any part of such privilege, or the acquisition on the part of the city of any new or additional rights or interests; and the fact that public necessity requires another ferry now, which it did not require at the time of the former application, does not empower the courts to grant relief. Newport v. Taylor, 11 B. Mon. 361.

(c) *Other matters.*

A statute which vests in the commissioners' court the power to establish public ferries whenever the public interest may require, necessarily carries with it the power to construct and operate them; and a statute providing for the granting of ferry licenses does not restrict them to the one means of providing ferries for the public, by granting licenses to individuals or corporations to operate them. Burrows v. Gonzales County, 5 Tex. Civ. App. 232, 23 S. W. 829.

A contract entered into by the supervisors of adjoining counties jointly to construct, equip, and operate a free public ferry across a river between the two counties, is void, no power being given by statute to construct ferries except within the limits of the county, and there being no similar provision relating to ferries such as the one relating to bridges constructed between counties. Johnston v. Sacramento County, 137 Cal. 204, 69 Pac. 962.

Under the Washington statute, providing for the operation and maintenance of ferries across unfordable streams, the board of county commissioners has the right to lease a ferry to a private person, without submitting the privilege of leasing such ferry to competitive bidding, and subject only to the condition that the board must retain the right to require that the tolls are reasonable and the service adequate. State *ex rel.* Jackson v. King County (Wash.) 69 Pac. 1106.

The grant of a ferry lease by a board of county commissioners does not, under the laws of South Dakota, constitute a sale or lease of the property of the county, and does not impose upon the county any liability to refund to the grantee of such lease money paid by him as rent in case the law under which it is granted shall be held invalid. Evans v. Hughes County, 3 S. D. 580, 54 N. W. 603.

A ferry lease for five years, with a privilege of five or ten more years, at the option of the licensee, is not in excess of the power to grant a lease for a term not exceeding fifteen years. Nixon v. Reid, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57.

A grant of a ferry franchise will not be annulled as not being in compliance with the Kentucky statute regulating the establishment of ferries, where the face of the record of the proceedings granting such franchise does not show that the grantee owned the land on the side of the stream from which the ferry is to run. Patrick v. Bush, Sneed (Ky.) 69.

Although, under the statutes of Kentucky, a ferry franchise across the Ohio river cannot be granted to other than the owner of the land at the landing on the Kentucky shore, yet, inasmuch as the county court, in granting such franchises, decides upon the title of the applicants, when the record recites that the grantee proved his title to such land, the grant is not void, only erroneous, where it appears from extraneous facts in another case that another was in fact the true owner, and such order will be conclusive as to such other if he was a party to the original proceedings. Kennedy v. Covington, 8 Dana, 50.

Refusal by the court of commissioners of roads and revenues of a ferry franchise solely on the ground of the illegality of the applicant's certificate of entry embracing land on the river bank at the point where the ferry is to be established, which had been relinquished by another applicant to whom the franchise is granted, without taking into consideration which grant will produce the greatest public benefit and least private injury, is erroneous, where such certificate is good as against everybody except the general government. Cox v. Easter, 1 Port. (Ala.) 130.

Although a contract for the construction and operation of a ferry between two counties, entered into by the supervisors of said counties, is void, and the operating of the ferry would not be a legal charge against the county, an injunction will lie restraining the carrying out of said contract. Johnston v. Sacramento County, 137 Cal. 204, 69 Pac. 962.

c. *Practice.*

1. *In general.*

The proceedings for the establishment of

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ferries are generally regulated by statute, and to make them valid the essential provisions of the statute must be complied with. There is usually a provision for notice to interested persons, and if such notice is not given, they will not be bound.

Under the New York statutes, notice of application for a ferry license need not be given to all who claim a right to the ferry. All that is required, where the applicant is not the owner of the land through which the highway runs adjoining the ferry, is that the person applying for license shall give notice to the owner of such land. Wiswall v. Wandell, 3 Barb. Ch. 312.

But notice to the owner of the land through which a highway runs is necessary, under the New York statutes, before granting a ferry license to a third person to connect with such highway. *Re* Talcott, 31 Hun, 464.

The statutes of Kentucky regulating the establishment of ferries do not require notice of an application by the owner of the land on one side of a stream to establish a ferry across the same to be given the owner of the land on the opposite side lying in another county. Pentecost v. Miller, 7 T. B. Mon. 313.

Notice of an application to establish a ferry across the Ohio river in pursuance of the statute regulating their establishment need not be given the owner of another ferry within a mile thereof, unless it appears of record that such other ferry had been duly established prior thereto. Givens v. Pollard, 3 A. K. Marsh. 320.

But one present at the sale of a ferry privilege, and bidding therefor, is estopped from thereafter disputing the regularity of the sale, or from asserting that it had not been properly advertised, or that he holds an unexpired lease of the same ferry. Chiapella v. Brown, 14 La. Ann. 185.

And, under the statute of Arkansas, the proceeding before a county court to obtain a ferry license is *ex parte*, and the judgment of the court is binding on all persons, including one whose private interest is invaded by effecting a right to maintain a ferry over a private stream, unless by voluntary appearance he made himself a party to the proceedings. Murray v. Menefee, 20 Ark. 561.

The record must usually show that the statutory requirements have been complied with.

The proceedings to establish a ferry must show on their face that the applicant for such franchise is the owner of the land on the bank from which such ferry is to run, or that notice of such application was served upon the owner thereof, where the statute authorizing the establishment of ferries provides that such land must be owned by the applicant, or notice of such application be given the owner of the same; and a statement in the order to the effect that the applicant held and possessed such land is not sufficient. Lawless v. Reese, 4 Bibb, 309.

The record of the proceedings for the establishment of a ferry, in pursuance of the statute regulating their establishment, must show that the applicant therefor is the owner of the land on one or both sides of the stream at the point from which such ferry is to run, or that notice of such application was duly given to the owner thereof. Givens v. Ferguson, 6 T. B. Mon. 186.

Where the record in the proceeding under the statute to establish a ferry across the Ohio river does not show that the applicant therefor is the owner of the land on the Kentucky shore, the order of establishment is void. *Ibid.*

The record must show, in an application for a ferry franchise, that the applicant was the owner of the land on one or both sides of the stream at the point where the ferry was to be established, or that notice had been given the owner thereof, or that a former franchise had been granted the applicant, as required by statute, to warrant an order of court granting such franchise. Lawless v. Rees, 1 Bibb, 495.

Under the law of Arkansas, the county court, composed of the county judge and justices, has no jurisdiction to establish ferries; and the report of the commissioners appointed by such a court, of the letting out of a free ferry established by the court, and of taking bonds of the ferryman, to a court consisting of the county judge alone, and which has jurisdiction to grant a ferry privilege, does not establish the ferry, in the absence of an order expressly made for that purpose, although the latter court confirms the report and approves the bonds. *Re* Howell, 36 Ark. 466.

An order granting the right of the applicant to establish a ferry across the Cumberland river from opposite applicant's lots Nos. 11 and 12, to a point opposite to such lots on the other side, is not a sufficient suggestion of ownership in the land on one or both sides of the stream to satisfy the requirements of the statute regulating the establishment of ferries. Givens v. Ferguson, 6 T. B. Mon. 186.

Where the owner of a ferry franchise, who had leased it to another for a term of years, requested the county judge not to revoke his license but to compel his lessee to give a bond, but the lessee, in lessor's absence, obtained an order from the county judge granting him the ferry privilege, and thereupon he operated such ferry and paid the agreed rent during the term of the lease, but after such term expired claimed the ferry privilege as belonging to him under the order of the county court,—such order, if it be construed as granting an original ferry franchise to such lessee, is, nevertheless, void because no notice of the application therefor was given as required by the laws of Kentucky. Hazelip v. Lindsey, 93 Ky. 14, 18 S. W. 832.

A lease by the trustees of a town of the ferry privileges of the town, across the Ohio river, by private contract, where the act of legislature authorizing the leasing of such privilege by such town provides that such leasing should be "at public outcry," is, at most, voidable at the election of the lessors or the state, and not void; and its validity cannot be questioned by a stranger who attempts to run an unlicensed rival ferry within the distance therefrom prohibited by statute. Owens v. Roberts, 6 Bush, 608.

The California act of 1893, providing for the sale of franchises in municipalities to the highest bidder, does not include a franchise for a ferry over a river between two counties, but the sale of such a franchise is controlled by Pol. Code, §§ 2843 *et seq.*, which gives discretion to the board of supervisors to grant such a franchise to a suitable person, to subserve a public benefit, subject to rules and regulations, and that the license required to be paid as fixed by the board is to be full compensation to the counties, and to be divided between them. Pool v. Simmons, 134 Cal. 621, 66 Pac. 872.

A bond with security to be approved by the court is indispensable to an order granting a ferry franchise, where the statute requires such condition. Sanders v. Craig, 1 A. K. Marsh. 196.

Failure to fix the rates of ferriage in the order establishing a ferry does not invalidate

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such order. Pentecost v. Miller, 7 T. B. Mon. 318.

On the establishment of a ferry, it is error to give judgment for costs against the party opposing such establishment, where neither the statutes regulating the establishment of ferries, nor the general laws concerning costs, authorize it. Ackler v. Oldham, 1 A. K. Marsh. 471.

A ferry is "established" from the date of the lawful order for its location. Robinson v. Lamb, 129 N. C. 16, 39 S. E. 579.

2. Contesting grant.

(a) Right to contest.

The interest which will entitle one to be heard on an application by another for a ferry license must be an interest in property relating to him separately as an individual proprietor, and must exist as a private right, which he, as a private individual, may vindicate by suit, and not a mere interest which he holds in common with the rest of the community. Creswell v. Greene County, 24 Ala. 282.

A person who has an established ferry near a proposed ferry which is sought to be established in the county court has a peculiar interest, not common to the residue of the community, in the proceeding, although his ferry privilege is not exclusive; and he is a proper party contestant, and is entitled to apply for a writ of error to the judgment of the county court establishing the new ferry, under a statute which provides that "a party to a controversy" may obtain a writ of error. Williamson v. Hays, 25 W. Va. 609.

The owner of a ferry across the Ohio river at a town has no exclusive ferry privilege at that place inconsistent with the public interests; yet he may object to the establishment of another ferry on the ground that public interest will not be promoted thereby, and, upon appeal from an order of the county court establishing another ferry, may have the discretion of such court reviewed, and, in case of palpable abuse, reversed. Carter v. Kalfus, 6 Dana, 43.

The statutory provision prohibiting the establishment of ferries across the Ohio river within a mile of a previously established ferry, except in certain cases, recognizes such an interest in the owner of a previously established ferry as will give him the implied right of protecting it by means of a writ of error to reverse an order of the county court granting another the right to establish a ferry within a mile of his ferry. Givens v. Pollard, 3 A. K. Marsh. 320.

A person not a party to the proceedings cannot prosecute an appeal or writ of error to reverse an order of court granting a franchise for a ferry across the Ohio river, merely because he thinks himself aggrieved thereby, when the statute under which such franchise was granted does not give that right, and the statute authorizing such action by a person who may think himself aggrieved by an order establishing a ferry does not refer to ferries across the Ohio river. Cosby v. Lynn, 4 Bibb, 249.

A bridge company cannot defeat the operation of a ferry on the ground that the one attempting to do so has not obtained a conveyance from the owner, but it is sufficient if he is operating with the owner's consent. Johnson's Appeal, 95 Pa. 78.

(b) Method of contesting.

An injunction should not be issued upon the application of one operating a ferry, against another, to prevent him from applying for a license, also, to operate a ferry near the same point, when the statute does not make ferry licenses exclusive; but whether there shall be one or more ferries at or near a particular locality should be left to the judgment and discretion of the officials whose duty it is to issue licenses therefor. Green v. Ivey (Fla.) 33 So. 711.

The remedy of one who seeks to set up a dormant ferry right based upon a reservation in a deed, and as against an established ferry, is not at law, but by a suit in equity. Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740.

Where a ferry is established at or near a town under the statute of Arkansas, which provides that the county court "shall not permit any ferry to be established within 1 mile above or below any ferry previously established, except at or near cities or towns, where the public convenience may require it, and satisfactory proof of the same shall be adduced," the county court, in granting the right to establish the ferry, passes upon and determines the question of public necessity or convenience; and where the proprietor of an established ferry voluntarily appears before the county court, and resists the establishment of the ferry, his only remedy is to invoke the appellate jurisdiction of the circuit court by writ of certiorari to quash the proceedings; otherwise the judgment of the county court is conclusive as to the question of public convenience, and the owner of the rival ferry will not be heard to attack it in a court of chancery. And this is the case although the county court has renewed the license annually under the statute, and the owner of the rival ferry did not appear at the time of the renewal, as the question of public convenience is not subject to review at the time of each yearly renewal of the license. Lindsay v. Lindley, 20 Ark. 573.

Conflicting claims to a ferry license cannot be determined by certiorari. Fay, Petitioner, 15 Pick. 243.

But a writ of certiorari may be granted to review an action of county supervisors in granting a ferry license within the prohibited distance of a previously established ferry, where it is alleged to have been granted without the proper notice as required by statute, and that it was granted on the ground that no legal excuse was shown against it, instead of on the affirmative showing that public convenience required it. Murray v. Mariposa County, 23 Cal. 492.

The validity of a grant of a ferry franchise by the county court, which does not appear void on its face, cannot be questioned in a collateral proceeding. Everston v. Sanders, 6 J. J. Marsh. 142.

The judgment of the county court granting a ferry franchise across the Ohio river, appearing correct on its face, cannot be incidentally called in question in an application of another for a ferry franchise at the same point. New Port v. Taylor, 6 J. J. Marsh. 134.

The validity of a ferry franchise, regular and valid on its face, cannot be questioned in a proceeding for the establishment of another ferry on the Ohio river within less than 1½ miles of such previous ferry, prohibited by statute. Churchill v. Grundy, 5 Dana, 99.

d. Who entitled to.

1. Riparian owner.

From his location and the fact that strangers cannot land on his shores without his consent, there are strong reasons why the riparian own-

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er should have the prior right to the ferry franchise. Consequently, the statutes usually make provision for such priority. But, in the absence of statute, the riparian owner has not the prior right. The right of ferry is not a natural riparian right. It arises out of a duty resting on the government, and should be delegated to the one who will best serve the public interests. In most instances the riparian owner, because of his natural facilities, most nearly meets the requirements, and so is usually accorded the first opportunity. But this is not always so.

It is a principle of the common law that ferries are *publici juris*, and can be granted by the sovereign power; it follows, therefore, that riparian proprietors are not thereby, and as a part of their rights as such, entitled to the franchise. Mills v. St. Clair County, 4 Ill. 53.

An owner of land on the banks of a river has not, as a riparian proprietor, without grant from the public, a vested right to keep a public ferry, or transport persons or effects over the river for pay. Young v. Harrison, 6 Ga. 130.

The right to keep a public ferry for toll is not inherent in a riparian proprietor, and he is not, as a riparian proprietor, entitled to an injunction restraining the operation of a ferry at the crossing of a public road. Gant v. Drew, 1 Or. 35.

A riparian owner has no greater or better right, in the absence of any statutory authority, to exercise the right of keeping a ferry than anyone else has; and, where a preference is given by statute to the riparian owner to exercise such a franchise, the legislature has power to repeal the statute giving the preference. Hudson v. Cuero Land & Emigration Co. 47 Tex. 56, 26 Am. Rep. 289.

That one is a riparian owner on the Mississippi river does not give him the right to establish and maintain a rival ferry to that of one who has the exclusive right from the legislature to operate a ferry in that territory. McRoberts v. Washburne, 10 Minn. 23, Gil. 8.

Peter v. Kendal, 6 Barn. & C. 703, in holding that the owner of a ferry need not have the property in the soil on either side, expressly disapproves of the law as laid down in Savile, wherein it is stated "that in every ferry the land on both sides of the water ought to belong to the owner of the ferry, for otherwise he cannot land on the other side."

The grant by a county court of a ferry franchise across a private stream, whereby other individual proprietors of the bed of the stream are prevented from establishing ferries, is not a private appropriation of private property to public uses, but is a mere inhibition upon the use of the property of one person in such a manner as to interfere with the vested rights of another. Murray v. Menefee, 20 Ark. 561.

In Arkansas the mere ownership of soil on a stream does not entitle the owner to a public ferry franchise; but such privilege can be exercised only in case the right to do so is conferred by the county court under the statute. Bell v. Clegg, 25 Ark. 26.

In the absence of any legislation on the subject, the right to maintain a public ferry is common to all riparian owners, and restricted only when interfering with special grants. Braddock Ferry Co.'s Appeal, 3 Pennyp. 32.

The above decision cannot possibly be right, but it illustrates the uncertainty which absence of legislation creates. As seen by the cases cited in subdivisions I. and II., a ferry right involves a right to take toll, and no individual is accorded that right without a grant from the state. Consequently, in the absence of legislation, there is no ferry right except through tolerance.

The disinclination of the courts to ignore the claims of the riparian owner is illustrated further by the following cases:

The power of granting ferry franchises to persons other than the owners of the soil is an extraordinary power, which ought not to be favored, and, when it exists, must be conferred by the legislature. Jefferson Seminary v. Wagnon, 2 A. K. Marsh. 379.

And in an early Pennsylvania case it is said the late proprietors claimed a right, by way of prerogative, to grant patents for ferries, but they never pretended this claim where the patentee was not possessed of lands on both sides of the water, or at least had not the permission of the owners of the landings. Chambers v. Furry, 1 Yeates, 167.

The North Carolina court has vacillated more than the other courts, and the rule in that state is scarcely apparent from its decisions.

In Raynor v. Dowdy, 5 N. C. (1 Murph.) 279, it is said a person may be granted the privilege of erecting and operating a ferry, although he is not the owner of the land on either side of the stream.

In Stark v. M'Gowen, 1 Nott & M'C. 387, 9 Am. Dec. 712, it was held that the legislature has power to grant a ferry franchise to one other than the owner of the land at the place where the ferry crosses the stream.

But in Pipkin v. Wynns, 13 N. C. (2 Dev. L.) 402, it is said that a riparian owner has "the preferable right" to call for the ferry franchise across a public river bordering his land, and it cannot arbitrarily and capriciously be granted to another, or until the owners be in default. It is further said that Raynor v. Dowdy, 5 N. C. (1 Murph.) 279, does not rule this case.

In Biggs v. Ferrell, 34 N. C. (12 Ired. L.) 1, which was an action for injuries caused by negligence in running a ferry, the ferry franchise was treated as an incident to the riparian land, and as pertaining to the holder of the land, whether in fee or for a lesser estate.

But in Barrington v. Neuse River Ferry Co. 69 N. C. 165, it was held that there is no obligation on the legislature,—at least, none which the courts can enforce,—to offer a ferry franchise first, to the riparian proprietor.

That the legislature may grant a ferry franchise to anyone, and empower him to condemn riparian land for a landing. *Ibid.*

Finally, in Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633, it was said that the franchise of keeping a public ferry, and demanding toll for transportation, resides in the state, and is so incident to riparian ownership that it can be granted to none others than those who own the land at one or the other of its terminal connections, unless such proprietor refuse to exercise it, when it may be conferred upon another, who can only obtain the right to use the soil for the purpose by making compensation, and this even when those termini are public roads.

Perhaps the last statement may be explained on the ground that the ferry pertains to the landing, and not to the water; but, even so, the franchise need not be conferred on the riparian owner, because a right to landings can always be obtained under the eminent domain.

The general rule does not apply to private ferries, however.

While grants from the state of lands on water courses do not carry with them, as an appurtenance, the privilege of keeping a public ferry, yet the grantee takes a right of private ferry, for interference with which by a bridge constructed under legislative authority compensa-

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tion must be made. Harrison v. Young, 9 Ga. 359.

In assessing the damages which the owner of land condemned for a ferry landing will sustain thereby, neither the value of a ferry owned and operated by him from the same land across the same river nor the value of the ferry privilege is to be taken into consideration, where such ferry was operated without a license or grant of a franchise therefor, and had been established less than twenty years. Mills v. St. Clair County, 4 Ill. 53.

But it has been held that the construction of a wagon and foot-way bridge by a company upon land which it is authorized to condemn for railway purposes creates a new servitude for which the owner is entitled to compensation; and, in estimating the value of the land, the fact that it possesses peculiar advantages as a site for a ferry landing may be considered. Payne v. Kansas & A. Valley R. Co. 46 Fed. 546.

Statutes.

A franchise for a ferry across the Ohio river, being a statutory incident to the land bordering on such river, must be granted only to the owner of such land; but the beneficial interest may be transferred to, and held by, another, who may enforce the trust which entitles him to the profits. Kennedy v. Covington, 8 Dana, 50.

A ferry franchise is the creature of our statute law, and generally the owner of the ferry seat (the place of departure) is incidentally the owner of the franchise, the instances being extremely rare where it has been granted to individuals personally; and the owner of the opposite shore may exercise a like franchise without invading the first granted franchise. Somerville v. Wimbish, 7 Gratt. 205.

The statutes of Illinois in relation to ferries give to the owners of land adjoining or embracing the water course over which a ferry is proposed to be established a preference over others, provided the privilege shall not have been granted to any other person; thus recognizing the common-law principle, and implying a power in the government to make the grant to persons other than the owners of the land. Mills v. St. Clair County, 4 Ill. 53.

One not owning or having an interest in land on either side of a stream forming the boundary between two counties, from which he seeks to establish a ferry, is not entitled to a franchise therefor under a statute authorizing application to be made by "any person . . . holding lands on either side of said river or creek" to the commissioners of the county "in which such lands lie," who are authorized to establish such ferry "from the land of such applicant to the opposite side." Hazleton v. De Priest, 143 Ind. 368, 42 N. E. 751.

A franchise to establish a ferry across the Ohio river will not be granted a person not the owner of the land on the Kentucky shore, under the provisions of the statute regulating and conferring the power of establishing ferries across such river, which construction of such act is based upon an express recital, among the conditions of the bond an applicant must enter into before the county court, that the ferry must be from the lands of the applicant across the river, although the act in other respects contains neither express nor implied obligations on the part of the applicant as to the ownership or non-ownership of such lands. Jefferson Seminary v. Wagnon, 2 A. K. Marsh. 379.

A person is not entitled, as a matter of right, to the privilege of keeping a public ferry, simply because he is the owner of land on both banks of a river; but he is entitled, by virtue of such ownership, to a preference over all others, under the Tennessee statutes, when public convenience requires the establishment of a ferry at that point. Nashville Bridge Co. v. Shelby, 10 Yerg. 280.

Alienation of the land by an applicant for a grant to establish a ferry across the Ohio river, during the pendency of the proceedings, will defeat his right and that of his alienee to the grant, under the provisions of the statute regulating the establishment of ferries across that river, requiring an applicant to be the owner of the land from the point of embarkment on the Kentucky shore. Churchill v. Grundy, 5 Dana, 99.

The statutes of Kentucky do not require the grantee of a ferry franchise to be the owner of the land on any stream except the Ohio river, but merely makes such owner a preferred applicant; and therefore such franchise, except on the Ohio river, is not a right incident to, and growing out of, the title to such land. Richmond & L. Turnp. Road Co. v. Rogers, 1 Duv. 135.

Under the Kentucky statutes, it is not necessary that the grantee of a ferry franchise should own the land on any stream except the Ohio. Brown v. Given, 4 J. J. Marsh. 28.

A franchise for a ferry over a stream within the exclusive jurisdiction of the state of Kentucky may be granted, under the statutes of that state, to one not the owner of the land at either landing, provided due notice of an application therefor was previously given such owner or owners. Harvie v. Cammack, 6 Dana, 243.

The owners of land on streams within the exclusive jurisdiction of the state of Kentucky have no exclusive legal right, under the statutes of that state, to be the grantees of a ferry across such streams; and a grant by the commonwealth of an exclusive ferry franchise to one person for the benefit of all, and which only entitles the grantee to the use of the banks for landings, should not be deemed a devestiture of any vested or exclusive right of the owner of such bank. *Ibid.*

Under statutes which recognize in the owner of land fronting on a stream the right to operate a ferry, to be regulated by the county court, such right is not an absolute one, since the public have rights and interests in the franchise; but it is a qualified right, dependent for its exercise upon the consent of the state. Little Rock & Ft. S. R. Co. v. McGehee, 41 Ark. 202.

The owner of the banks of a stream at a point where it is intersected by a public road has a priority of right to a license to maintain a ferry, upon executing the statutory bond; such right is not absolute, however, it being within the court's discretion whether it will establish a ferry at such point or not. Tuscaloosa County v. Foster, 132 Ala. 392, 31 So. 587.

Under the law authorizing ferries to be granted to the owners of the land, it is not material whether the title thereto be joint or several, or whether it be held in trust or in one's own right. Maysville v. Boon, 2 J. J. Marsh. 224.

An applicant for a ferry across the Ohio river, required, by a statute regulating their establishment, to be the owner of the land on the Kentucky shore, need not prove his title to such land by an actual production of his title papers; but such title will be presumed from his possession thereof, in the absence of all other proof. Givens v. Pollard, 3 A. K. Marsh. 320.

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Mere possession of land is not prima facie sufficient evidence of title, under a statute requiring the grantee of a ferry franchise to be the owner of the land at the point where the same is to be established, to authorize the grant of a ferry to the possessor. Mullis v. Cavins, 5 Blackf. 77.

A ferry license granted for ten years to the occupant and recognized owner of the adjacent soil is not revoked by a subsequent recovery of the land by the true owner; and the latter is not entitled to the grant of a license during the term of the one granted to the prior occupant. McCearly v. Swayze, 65 Miss. 351, 3 So. 657.

The dedication or taking of land for a public highway does not, in cases where the owner retains the fee, and the public have only an easement, deprive such owner of his preferable statutory right to a ferry if one is established. Prosser v. Wapello County, 18 Iowa, 327.

2. *Priorities.*

Under the statutes of Texas, in granting a ferry franchise, preference is given to the owner of the land on the bank of the stream, lake, or bay across which such ferry is to be established, upon his making application and complying with the statutory conditions. Hudson v. Cuero Land & Emigration Co. 47 Tex. 56, 26 Am. Rep. 289.

Where a preference for a ferry franchise is given by law to the owner of the land on a river, or, in case different persons own land on opposite sides, a franchise therefor may be granted both, a person owning land on both sides of a river at the landing places of such ferry is entitled to a preference for an exclusive franchise, as against the owner of land on one side only, above and below, but not at the landing place of such ferry. Allen v. Farnsworth, 5 Yerg. 189.

Where two applicants for ferry franchises across a stream file their applications therefor at the same time, the one for a ferry from his land on one side of a stream across the same just below the mouth of a fork thereof, and the other from his land between the fork and main stream across such main stream to a public highway on the land of the other applicant, both have equal rights to such franchises, and both will be granted, such fork constituting an impassable stream between the two landings on the one side, within the exception to a statutory prohibition against granting a franchise for a ferry within a mile of another ferry on the same stream, except in a town or city, or where an impassable stream intervenes. Ballow v. Pettus, 3 Bush, 608.

A ferry is a franchise, and belongs to the person to whom the county court may grant it; and, although the owner of the soil at the landing place is entitled by statute to the grant of this franchise, in preference to another, and if he applies to the county court, it is its duty to grant it to him, yet, if he does not so apply, and another does, the grant may be made to the other, and such party is entitled to the fees received therefrom, and is not subject to account to the owner of the land for the same. Sparks v. White, 7 Humph. 86.

The reservation of ferry privileges by the vendor of lands does not deprive the county court of the power to grant a ferry franchise to the vendee. Such reservation would relate solely to the vendor's right to the profits derived from the operation of such ferry. Brown v. Given, 4 J. J. Marsh. 28.

A reservation, by the original proprietors, in the grant of a town site situated on the Ohio river, of the exclusive right to the benefits of the entire ferry franchise incident to the land within the town limits, indorsed on the plat thereof, and not denied in the act of the legislature incorporating such town, vests in the trustees thereof the legal title to such land, and consequently the exclusive right to be the grantees of a ferry franchise across the Ohio river; but, by virtue of such reservation, the beneficial interest in such ferry remains in the original proprietors, their heirs or assigns, which may be enforced as an available trust. Kennedy v. Covington, 8 Dana, 50.

A grant of land bordering on a navigable river for use as a common and public square is not inconsistent with the reservation of a ferry right. Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740.

The owner of the fee to a public landing on the bank of a river, for a ferry, is entitled by law to the preference of being licensed as ferry keeper, as against a municipal corporation, within the limits of which such landing is situated, even though such ferry has been established and operated by such corporation for a number of years. Memphis v. Overton, 3 Yerg. 387.

The dedication of land to the water's edge for the public use and benefit of a town, without reservation, renders the town the virtual owner thereof, and the trustees of such town are entitled to a grant of a franchise for a ferry across the Ohio river, although the naked legal title still remains in the original proprietor of such town, and the statutes of Kentucky provide that no franchise for a ferry across the Ohio river shall be granted to one not the owner of the land on the Kentucky shore at the point of embarcation. Dover v. Fox, 9 B. Mon. 200.

Grantees of the exclusive right to the use of the river front of a riparian owner for ferry landing purposes, but in connection only with a particular ferry, cannot be deemed adjoining owners within statutes giving the owner of land embracing or adjoining the stream where the proposed ferry is to be established the preference to keep the same on proper and reasonable application therefor. Knott v. Jefferson Street Ferry Co. 9 Or. 530.

The original proprietor of a town site on the Ohio river is entitled to the exclusive ferry privileges across such river from lands fronting thereon, which he dedicated to the use of such town as a common, but reserved to himself, his heirs, and assigns, "every advantage and privilege which he has not disposed of or which he would by law be entitled to," and which reservation was preserved to him in the act of legislature in establishing such town, irrespective of the question as to whether or not such dedication devested him of the legal title to such lands; for, although, under the statutes of Kentucky, a ferry franchise across the Ohio river will not be granted one not the owner of the land on the Kentucky shore, such act of the legislature reserved to him the incidental ferry privilege, irrespective of the legal title. New Port v. Taylor, 6 J. J. Marsh. 134.

A ferry franchise over the Ohio river, under the statutes prohibiting a grant thereof to other than the owner of the land on the Kentucky shore, is incident to the freehold, and a stipulation in a contract for the sale of land including a ferry thereon, granting to the purchaser the exclusive ferry rights and privileges, not only at that point, but on all other lands of the vendor bordering on such river, is not an abridgment of the right of the sovereign power to grant ferry franchises to the owners of the shore, whenever and wherever it chooses, but simply conveys such vendor's right to the

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benefits of any such ferries, and is a valid and enforceable contract. Lytle v. Breckenridge, 3 J. J. Marsh. 663.

The easement which a turnpike company acquires by condemnation proceedings to the land comprising its roadway does not vest it with the exclusive ferry privilege across a stream to the edge of which such roadway extends, although its charter authorizes it to receive a franchise therefor from the county court of that county; but in such case the company has such an interest in the establishment of a ferry at that point as to entitle it to notice of an application for a ferry franchise by another, even if that other be the owner of the fee, notwithstanding the general statutes regulating the establishment of ferries in Kentucky do not require notice of an application for a ferry franchise to be given, except where the applicant is not the owner of the land. Lexington, H. & P. Turnp. Road Co. v. McMurtry, 3 B. Mon. 516.

A riparian owner loses his preferential right to a ferry franchise only during the term of a license granted another, under a statute limiting such franchise, and at the expiration of such license he may assert his preference to the exclusion of the former licensee who seeks a renewal. Beckley v. Learn, 3 Or. 470. And that such statute dispenses with notice and other formalities on the application for a renewal does not affect such right. Beckley v. Learn, 3 Or. 544. Under an earlier statute such a franchise was perpetual, and failure of the owner to assert his preferential right at the establishment of a ferry lost him the right forever.

It seems that, under a statute which provides that any person wishing to establish a ferry shall apply to the commissioners' court, and shall show that he is the owner of the land on which the ferry is sought to be established, the right of preference in favor of the landowner does not exist at points where public roads have been established across the streams of the state. Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

The title to the center of a street extending to a river does not inure to purchasers of land alongside thereof by the subsequent dedication of such street, which at the time of their purchase could not have been in the contemplation of the parties, so as to make them adjoining owners, entitled to a preference to keep a ferry to be established at such street, under statutes giving such a preference to the owner of the land embracing or adjoining the stream where the proposed ferry is to be established. Knott v. Jefferson Street Ferry Co. 9 Or. 530.

Peremptory mandamus will not issue to compel the granting of a ferry license to one whose application was denied, although filed prior to the application of one to whom the license was granted on the consideration of both applications at the same time, where but one ferry is needed to supply the needs of the public, and it is not shown that the board acted capriciously, corruptly, arbitrarily, or oppressively,—the best interests of the public, and not priority of filing, controlling in case of a conflict of applications. Oxford Ferry Co. v. Sumner County, 19 Kan. 293.

e. *Limitation of rights.*

The sovereign may make an irrevocable grant of a ferry franchise. New York v. Starin, 106 N. Y. 1, 12 N. E. 631.

A county ferry license need not designate a definite and particular spot on each shore between which the ferry may be operated; and it is sufficient, although it permits the ferry to land on the shore of a river between two designated points, one 4 miles above a city, and the other 2 miles below it, it being impossible, owing to sand bars, always to land immediately at the city. Capital City Ferry Co. v. Cole & C. Transp. Co. 51 Mo. App. 228.

A ferry franchise between a municipal corporation and the "opposite" shore refers to that portion of the shore which would be included if the corporation were moved straight across the river. Sunbury Steam Ferry & Towboat Co. v. Grant, 2 Monaghan, 287, 15 Atl. 706.

Although the termini of a ferry should be in places where the public have rights, as towns or villages or highways leading to them, a license from the Crown to a municipality is not rendered invalid by the fact that it authorizes it to establish a ferry between it and a township, as it will be construed as authorizing the municipality to determine the exact point of terminus in the township to which landing place it will be restricted. Jellett v. Anderson, 27 Grant Ch. (U. C.) 411.

That section of the ferry laws of Illinois providing that the owner of a ferry shall have the exclusive privilege of the transportation or passage of all persons, their teams, etc., and other property over the same for hire, is restricted to the ferriage at the point where a ferry is established, and does not prevent the establishment of other ferries beyond the limits of such landing. Gales v. Anderson, 13 Ill. 413.

A franchise to establish a ferry between certain points on the shore of a stream does not thereby make the whole distance between those points a landing place so as to prevent the establishment of other ferries within those limits, but imposes upon the ferry owner the duty to fix his landing place at some point within the prescribed limits, at which place in ordinary times it is his duty to land; and the fact that during high water he is authorized to change his landing place, temporarily, does not extend his limits, or prevent the establishment of another ferry there or elsewhere outside his fixed landing place. *Ibid.*

When the grantee of ferry privileges, which are to be exclusive within a certain distance, once locates a point where the privilege is to be exercised, he is bound so that he cannot afterwards extend his limits in either direction by a change of location. Mills v. St. Clair County, 7 Ill. 198.

Where, under a general grant of a right to construct a ferry at any point within the district, a ferry has been constructed at a particular point in the district, the grantee cannot change it. Pim v. Curell, 6 Mees. & W. 234.

Owners of a ferry, whose exclusive franchise has ceased to exist by the expiration of the term thereof, have but one ferry right, which is confined to the established landings, and cannot change their landings from one street to another, or establish new ones at other streets, to the injury of the wharves of adjoining landowners, without authority from the county court. Price v. Knott, 8 Or. 438.

There is no presumption that a grant of a ferry privilege extends beyond the place actually occupied in the exercise of the privilege. Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35.

A ferry need not run exclusively between a certain point on one shore and a certain point on the other shore. New York v. New Jersey S. B. Nav. Co. 106 N. Y. 28, 12 N. E. 435.

An injunction restraining the operation of a ferry is violated where it covers its former route, although the point of departure is

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changed to another pier. New York v. New York & S. I. Ferry Co. 8 Jones & S. 300.

A contract awarding a ferry privilege for the term of five years, made by the president of the police jury and the lessee of the privilege, is not binding on the parish, where the power of the president was limited by ordinance to a lease for one year. De Russy v. Davis, 13 La. Ann. 468.

A ferry franchise granted for a single year is invalid where the statute authorizing the commissioners to grant such franchise contemplates only the establishment of a permanent ferry, and the owner of such franchise is therefore not entitled to an injunction restraining the operation of another ferry near by. Cason v. Stone, 1 Or. 39; Gant v. Drew, 1 Or. 35.

A grant unrestricted as to time, of the right to keep a ferry, made by a Spanish governor and thereafter unrestricted by the legislature, will be considered as unlimited. Davis v. Police Jury, 1 La. Ann. 288.

The right given the freeholders by statute to fix rates of ferriage is not an unconstitutional delegation of the legislative power, and it applies as well to ferries having but one landing in the state or county as to those with both landings in the same county. In the former case the right is limited to fixing tolls taken at the one end. Hudson County v. State, New Jersey R. & Transfer Co., Prosecutor, 24 N. J. L. 718.

f. Other matters.

License fees.

The power of a municipal corporation, under a clause in its charter authorizing it "to license, tax, and regulate ferries," to pass an ordinance requiring keepers of ferries to pay a certain license fee for each boat ferrying between that city and the opposite bank, is not in violation of the constitutional rule of uniformity of taxation, since such license fee is not a "tax" in the sense of that clause, but is a rightful exercise of the police power of the state, which may be delegated to municipal corporations. Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560.

A license fee charged for the privilege of operating a ferry is not a tax within the meaning of the term as used in the Constitution of the state of Michigan or the charter of the city of Detroit. It is a price paid for a franchise or a public right vested in an individual. Chilvers v. People, 11 Mich. 43.

Although a municipal corporation which is given the power to regulate ferries by license has no right to use the power to license as a means of increasing its revenue, a license fee of $25 for the privilege of keeping a ferry within the city will be held a reasonable regulation, and not a tax, where it appears that the city may incur expenses in the enforcement of its police regulations as to ferries. Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark. 371, 19 S. W. 1053.

A common council authorized by the city charter to direct the manner of issuing and registering ferry licenses, and to prescribe the sum of money to be paid therefor, is entitled to charge such an amount as will make licenses a source of revenue to the city, and the sum of $50 is not unreasonable. Chilvers v. People, 11 Mich. 43.

Statutory authority conferred upon a municipal corporation to levy a specific tax on "vehicles used and run for passengers for hire" does not authorize the imposition of a license fee, for revenue purposes, upon ferry boats running to and from any point within the corporate limits. Duckwall v. New Albany, 25 Ind. 283.

Although a commissioners' court undertakes, in granting a ferry privilege, to grant more than it has power to grant, the grant may be valid; and the fact that it exacted a tax for the license greater than the limit fixed by the statute does not operate to defeat the grant. Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

The right of a municipal corporation to require the owner of a ferry operating between that city and the opposite bank of a river to pay a license fee for each boat operated by it, in pursuance of an ordinance passed under authority of its charter permitting it to "license, tax, and regulate ferries," cannot be denied on the ground that such ferry was established and is operated under a grant from the state which provided that such ferry should be subject to the same taxes as should be imposed on other ferries in the state, and under the same regulations and forfeitures, and therefore is exempt from such license fee,—especially as it has conceded its liability to pay a license fee annually imposed by the county under authority of the general ferry laws, thus giving the legislature the right to act on that construction of its charter, and to authorize the city to impose the fee instead of the county. The term "tax," as used in such grant, cannot be construed to include such license fees. Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560.

Acceptance of license.

No rights can be claimed under a ferry franchise before the conditions precedent contained therein have been complied with by the grantee. Day v. Stetson, 8 Me. 365.

The right to a ferry franchise does not vest until the grantee commences the keeping of the ferry, and an unreasonable delay so to begin will result in a forfeiture of such franchise, where the same is granted so long as the grantee, his heirs or assigns, shall well and faithfully keep the same. Clarke v. Calloway, Sneed (Ky.) 46, 2 Am. Dec. 706.

Stretching a cable across a river twice, and taking the boat to the place where the franchise designated the ferry should be operated and for the purpose of so operating, are sufficient acceptance of the franchise. Chapin v. Crusen, 31 Wis. 209.

A ferry franchise granted to two persons cannot be made operative by the acceptance of only one of the two, but must be accepted by both. Ferrel v. Woodward, 20 Wis. 458.

Public revenue from.

The statute of South Dakota, authorizing a grant of a lease of a ferry to a person securing the payment of the highest rent, such lease to be executed by the county commissioners and such highest bidder, precludes the grant of a ferry license to one who does not secure rent or execute a lease. Wilson v. Gabler, 11 S. D. 206, 76 N. W. 924.

In the absence of bad faith, the sale of ferry franchises by the sinking-fund commissioners will not be restrained at the suit of a taxpayer to prevent illegal conduct and waste, on the ground that, unless a minimum rate of ferriage is prescribed, railroad corporations may acquire the franchise, and, by prorating a joint charge for ferriage and railway fare, so depress the ferriage receipts that, notwithstanding the company's covenant to pay a greater percentage of the gross receipts than any other competitor, they may never become obligated to pay more than the fixed minimum annual rent-

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al; but it is sufficient where the commissioners, in the exercise of a sound administrative discretion, have fixed the minimum annual rental at an amount which is in excess of the percentage upon the estimated gross receipts for ferriage which have accrued to railway companies during any one year in the past. Robinson v. Gilroy, 10 Misc. 205, 30 N. Y. Supp. 411.

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A company which has procured from the city a lease of a ferry franchise in consideration of the payment of 5 per cent of the gross receipts which are derived from a 10-cent fare may subsequently construct a railroad stopping at some of the points theretofore covered by the ferry, which thereafter stops at but one point, and reduce the ferry fare to 5 cents, where there is nothing in the lease to the contrary. Staten Island Rapid Transit Co. v. New York, 2 N. Y. Supp. 680.

In a Texas case it was held that a city which has authority, under its charter, to establish ferries, and to fix the rates, fees, and rents of the same, has power, where the revenues arising from the ferries constitute a part of the general city fund, to employ counsel to defend its possession and secure its right to ferry privileges; and it has power to contract that the counsel shall receive as his compensation a certain portion of the annual rent of the ferry. Waterbury v. Laredo, 60 Tex. 519.

But subsequently the court held that where a city owning a ferry franchise contracts with an attorney to give him as compensation for services, for a period of twenty years, one third of the rents of the ferry privileges and the receipts of the ferry when not rented; and where the contract by its terms is made irrevocable, and it mutually binds the contracting parties to do no act and to enter into no contract which will interfere with its terms,—such contract is void as against public policy, for the city thereby places it beyond its power to establish a free ferry, or to charge such tolls, only, as will defray the expenses of operating the ferry. The ownership by a city of such a franchise involves a public trust, and it must be administered by the city for the benefit of the public. Waterbury v. Laredo, 68 Tex. 565, 5 S. W. 81.

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A special act of the legislature authorizing the county court to grant to a certain person a franchise for a ferry across the Ohio river from a point on his land about ½ mile from another ferry, does not dispense with the requisition of the general law requiring an applicant for such franchise to be the owner of the land at the point from which such ferry is proposed to be established; and a failure on his part to prove title to the land in question will defeat his right to such franchise. Henry v. Underwood, 1 Dana, 245.

The owner of a ferry across the Mississippi river cannot enjoin the establishment of another ferry at that point and the condemnation of his land as a landing therefor upon the ground that the act of legislature under which the right to establish such ferry was acquired is unconstitutional and void as an impairment of the obligations of the contract existing between the state and such owner by virtue of an act granting him the exclusive ferry privileges at that point, under which he established and has since operated his ferry in strict compliance with the terms of such act, where that act provided that the ferry should be established from lands at that place belonging to such grantee, and should be in operation within eighteen months thereafter, and it does not appear with certainty that he owned any land on the Mississippi river at that place at the date such act was passed, or within eighteen months thereafter, upon which such grant could operate, or that he owned any land upon which the same could be removed at the date of a subsequent act authorizing such removal. Mills v. Brown, 3 Ill. 548.

A ferry license to operate ferries on Sunday, issued under an act of Parliament, is not in the nature of an ancient ferry, so as to entitle the licensee to maintain an action for infringement, where none of the ordinary obligations and burdens of a ferryman are imposed on the licensee, although the license is called in the act of Parliament a ferry license. Letton v. Goodden, 14 L. T. N. S. 298, L. R. 2 Eq. 123, 35 L. J. Ch. N. S. 427, 14 Week. Rep. 554.

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The provision of the Arkansas statute in relation to ferries, that when a ferry license has been granted by the county court, and the ferry once established, it shall be the duty of the county court to levy a tax on the privilege annually thereafter, whether application for a renewal of the license be made or not; and that it shall be the duty of the clerk to issue, annually, a license, and deliver it to the sheriff, for the person to whom the privilege was granted, who, on presentation of the license, is bound to pay for it,—relates more especially to the mode of taxing the privilege, and does not deny to the county court the power to discontinue the franchise when the public interest demands it; and such court has the power to discontinue the franchise by refusing the annual license for its further exercise. Bell v. Clegg, 25 Ark. 26.

The owner of a ferry franchise, who, on application for a renewal of his license, makes proof of having kept and run the same according to law, which, under the statute, entitles him to a renewal, is entitled to a writ of mandamus, which is the proper remedy to compel the issuance thereof, where the renewal is refused on the ground that his franchise has been sold under execution, to which it is not subject. Thomas v. Armstrong, 7 Cal. 286.

Where, upon the division of a town, the new town is granted, during the pleasure of the legislature, the privilege of using one half the ferry formerly operated by the old town, and such ferry is, later, discontinued by legislative enactment, its subsequent revival gives the new town no greater rights than it possessed before, and it holds its franchise subject to the pleasure of the legislature. East Hartford v. Hartford Bridge Co. 17 Conn. 79.

In granting a franchise for a ferry, the county commissioners have no right to grant such franchise to the person who would pay the largest amount of money therefor in addition to the tax which they might legally impose, where such condition is not imposed by the ferry laws, and no such power is conferred thereby upon such commissioners; and money so paid by an applicant for a renewal of his franchise, although called a donation to the county, may be recovered back, together with interest thereon from the date of payment. La Salle County v. Simmons, 10 Ill. 513.

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a. *No right to use.*

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And under the Iowa statute, if the right is conferred upon another than the owner, he must obtain the consent of the owner, or condemn the right and compensate the owner. Prosser v. Wapello County, 18 Iowa, 327.

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owner of the soil, and cannot be taken for a ferry landing by reason of the grant of the ferry franchise. Cooper v. Smith, 9 Serg. & R. 26, 11 Am. Dec. 658.

On the question whether or not the same rule applies with reference to landing where a highway terminates at the water's edge, the courts are not fully in accord. On one side, it is held that land cannot be taken for a road and then used for a ferry. Pipkin v. Wynns, 13 N. C. (2 Dev. L.) 402.

The owner of a ferry franchise cannot establish a landing in a public highway without the consent of the owner. Douglass's Appeal, 118 Pa. 65, 12 Atl. 834.

A ferry licensed to a stranger will not authorize him, against the consent of the owner of the fee in land over which the public have a highway easement, or without compensating him therefor, to use the termini of such highway, at high-water mark, for the purpose of fastening boats, and of receiving and discharging freight and passengers. Prosser v. Wapello County, 18 Iowa, 327; Prosser v. Davis, 18 Iowa, 367.

A legislative grant of an exclusive ferry privilege across a river between the termini of two streets confers no special right to the streets occupied as a landing, as the grantee obtains only the right to navigate the river there with a public ferry without competition. Pittsburgh & L. E. R. Co. v. Jones, 111 Pa. 204, 56 Am. Rep. 260, 2 Atl. 410.

The owner of the soil over which a highway is laid may maintain ejectment against a ferry owner for using it as a landing place without his consent. Cooper v. Smith, 9 Serg. & R. 26, 11 Am. Dec. 658.

It is sufficient for the owner of land, in an action for mesne profits, to show title to the premises on which there is a ferry landing; and he need not show authority for a ferry, as against a trespasser who shows no title to the landing. Averett v. Brady, 20 Ga. 523.

A riparian owner on one bank is under no equitable obligation to continue a license for a ferry landing originally founded on mutual advantage. Chambers v. Futry, 1 Yeates, 167.

A court of equity will enjoin the establishment of a ferry landing on land, where the same was originally sold to the grantor of the present owner by one owning other land on both sides of a river across which he was operating a ferry, and, for the purpose of protecting the same from opposition, he provided in the deed of conveyance of such land that neither the purchaser nor his heirs or assigns should establish or authorize the establishment of a common ferryboat landing on the land conveyed without the permission of such grantor. Frye v. Partridge, 82 Ill. 267.

In estimating the rent of a landing used by a trespasser in connection with a ferry run by him, the jury may take into account the proceeds of the ferry after deducting the expenses of fitting up and carrying on the same, and making due allowance for all risks and expense. Averett v. Brady, 20 Ga. 523.

On the other side, it is held that the grant of a ferry right carries with it whatever right the public then has, or may thereafter acquire, to use the landing place as a highway; and, if the grantee claims anything more, he must show title thereto by private contract. Somerville v. Wimbish, 7 Gratt. 205.

Therefore, no additional servitude is placed upon land used as a highway by the necessary use thereof as a ferry terminus. Patrick v. Ruffner, 2 Rob. (Va.) 209, 40 Am. Dec. 740.

The changing of the grade of a street by ferry owners to render it suitable for landing purposes, without authority for the establishment of a landing at the foot of such street, will be enjoined at the suit of the owners of adjoining premises, whose wharves, constructed at the foot thereof by authority of the municipality, or access thereto, will be injured and destroyed thereby. Price v. Knott, 8 Or. 438.

One through whose land a highway runs, intersected by a stream, is not entitled to compensation for the use of the bank within the limits of the highway as a landing for a public ferry, as, when a public highway crosses a stream of water it is not interrupted, but the water and the soil beneath it within its limits are a continuous part of the road, compensation for the taking of his land for which includes compensation for all incidents connected therewith. Mills v. Learn, 2 Or. 215.

On principle, it would seem that the decisions denying the right to land on a public highway magnify too much the equities of the riparian owner, and overlook the true character of the ferry franchise. It would seem that an adjoining owner has no right to question the use of a highway as a ferry landing.

Where a ferry franchise has been granted by the county court, the grantee has the right to land on a public street of a town in accordance with the express provisions of the grant without obtaining the consent of the council of the town, where there is nothing in the town charter prohibiting such a landing. Mason v. Harper's Ferry Bridge Co. 20 W. Va. 223.

One licensed to maintain a ferry while a bridge is being repaired need not, under a statute requiring all ferries to be located on land over which a public road is kept up, operate it precisely at the bridge; since, if a public way is impassable, the public have a right to pass over adjacent lands as long as the necessity therefor continues. McInnis v. Pace, 78 Miss. 550, 29 So. 835.

The owner of a ferry franchise has such right to the use of a highway at a terminus of his ferry, and of which his ferry is a link, that he may maintain suit for damages resulting from injury to such right. Patrick v. Ruffner, 2 Rob. (Va.) 209, 40 Am. Dec. 740.

The right of a ferry includes the right to use the soil for ferry ways, and one owning a ferry right is not liable to a municipal corporation owning a wharf at the ferry landing for wharfage for ferriage purposes. A municipal corporation can maintain its wharf only so far as will not interfere with the ferry franchise. Jeffersonville v. Louisville & J. Steam Ferry Co. 27 Ind. 100, 89 Am. Dec. 495.

Under the New York statutes, the proper authorities of New York city may lease with its ferry franchises the wharves or piers required for the use of the ferry as part of the franchise, and may include in one leasing two franchises. Starin v. Edson, 112 N. Y. 206, 19 N. E. 670, Reversing 42 Hun, 549.

b. *On opposite shore.*

One who acquires a franchise on one side of the river only is under the necessity of acquiring a right to land on the opposite shore, but it is generally sufficient if he acquires the right from a private owner.

A lessee from a municipality of the "privilege of the ferry front," if he acquires an exclusive privilege thereunder, does so only as regards the landing on the side of the river controlled by the municipality. Murphy v. Police Jury, 9 La. Ann. 434.

It seems that, under the statute of Arkansas, although exclusive ferry rights are in general allowed only to those who own land, or have

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possession of it by pre-emption or settlement on both opposite banks of the river, one who owns land or has possession of it by pre-emption on one side of a river only may be granted a ferry privilege from his own shore, with the privilege of landing his boats and passengers on the opposite shore, where he may make a landing and road; but, under the statute, a license to keep a ferry will not be granted in any case unless the county court is satisfied that the ferry will promote the public convenience, and unless, where the proposed ferry is not near a city or town, a ferry has not been established within a mile above or below the proposed ferry. Cloyes v. Keatts, 18 Ark. 19.

The grant of a franchise for a ferry, to the owner of land on only one side of a river, does not entitle him to an exclusive right to run a ferry at that point as against the owner of the land on the opposite side, where the statute provides for exclusive license only where one person owns both banks; and a court of equity will not enjoin the operation of a ferry by the opposite landowner and the use by him of complainant's landing place, on the ground that he has not obtained a license therefor. Levisay v. Delp, 9 Baxt. 415.

A ferry franchise may be granted the owner of land on one side of a stream upon condition that he procure from the owner of the land on the other side a right of way for such ferry, under the provisions of the Kentucky statutes, requiring the issuing of a writ of *ad quod damnum* to ascertain the damages the owner of land on the opposite side will sustain; for, if the owner is compensated, or waives his right, the law is satisfied, and no condemnation proceedings are necessary. Combs v. Hogg, 101 Ky. 178, 40 S. W. 453.

It seems that, where rival ferries are in operation at the same place and on opposite sides of the river, the owner of one has, under the statute of Arkansas, the right to take passengers from the bank on which the other ferry is established. Bell v. Clegg, 25 Ark. 26.

Where, upon a petition for a franchise to operate a ferry from a town to a township, a license is granted to establish a ferry between the town to the designated township, it will be construed as granting a ferry both ways, when considered in connection with the ferry act providing that when one of the termini is in the town and the other in a township the license shall be issued to the town. Jellett v. Anderson, 27 Grant Ch. (U. C.) 411.

Under the statutes of Kentucky, the owner of land on one side of a stream, being the grantee of a ferry privilege across such stream, is entitled to use a public highway on the opposite side for a landing place, without instituting condemnation proceedings for that privilege. Clark v. White, 5 Bush, 353.

The consent of the owner of land on one side of a stream at and above its confluence with a fork thereof and bordering on such fork, to its use by the owner of the land on the opposite side of such main stream for a ferry landing, although sufficient to authorize the grant to such owner for a ferry from his own land across such main stream below the mouth of the fork to the land of such consenting owner, is not sufficient as the basis of a grant to him of another franchise for a ferry from the land of such consenting owner as its site to the opposite side of such fork on the land of another, who not only does not consent to such use, but is himself a rival applicant for such franchise, where the statutes regulating that subject require an applicant for a ferry franchise either to be the owner of the land, or to have the privilege of its use for ferry purposes from such owner; and if such ownership or privilege to use as the site of such ferry is confined to one side only, the right to land on the opposite side must be acquired by condemnation proceedings. Ballow v. Pettus, 3 Bush, 608.

The reservation of the rights of the Wyandotte Indians in an existing ferry, and the sale thereof by and under the provisions of the treaty of 1855 between such Indians and the United States, give no rights to the purchaser thereof as against and within the limits of an exclusive ferry franchise subsequently granted by the legislature, where, at the time of the reservation and sale, the only right the Indians had was the ownership of the ferry and fixtures and of a landing on one side of the river, having on the other side of the river only a right of landing in common with the public in general at a point within the limits of the subsequent grant; since the latter right would continue only until the grant by the legislature of an exclusive franchise at that point, and the perfection of the right by the grantee. Walker v. Armstrong, 2 Kan. 198.

c. *Acquisition of right.*

The right may be acquired by prescription.

Continued use and enjoyment of land on one side of a stream for a ferry landing, for more than thirty years without interruption or hindrance from the owners thereof, will be sufficient to establish a presumption of a grant of such privilege. Clark v. White, 5 Bush, 353.

The grant of an exclusive privilege of a ferry landing on another's land may be presumed by its use for the prescriptive period in a manner necessarily exclusive. Bird v. Smith, 8 Watts, 434, 34 Am. Dec. 488.

The fact that land is used at such points on the banks of a river as convenience or the condition of the river might make most suitable for ferry landings, where no improvements of any character to facilitate the landing of boats have ever been made, cannot be regarded as such evidence of possession of the lands as would, if held for the requisite period, ripen into a title adverse to the true owner, in the absence of a paper title thereto. Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508.

Actual occupation of the banks of a stream for the purpose of operating a ferry raises a presumption of right to use them. Sleight v. Kingston, 11 Hun, 504, Appeal dismissed in 78 N. Y. 592.

And it may be acquired by eminent domain.

Equity will not restrain the taking of riparian lands for a ferry landing when it can be assumed that full indemnity has been, or can be, obtained. Barrington v. Neuse River Ferry Co. 69 N. C. 165.

Land cannot be appropriated for a ferry landing without compensation to the riparian proprietor. Pipkin v. Wynne, 13 N. C. (2 Dev. L.) 402.

If the grant of a ferry franchise is to one not the owner of the land, and it becomes necessary, to enable such grantee to exercise the franchise for the public good, to use or take the property of the riparian owner; or if a new or different servitude is imposed in furtherance of a public purpose,—such grantee will be required to make adequate compensation to the owner for such property so taken. Hudson v. Cuero Land & Emigration Co. 47 Tex. 56, 26 Am. Rep. 289.

Testimony offered to show that a ferry is not a public use, and also as to its proper location, may properly be excluded in an action to condemn land for a ferry landing, when those questions were contested before the board

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of supervisors, who granted the franchise, and there determined. Pool v. Simmons, 134 Cal. 621, 66 Pac. 872.

An act giving the right of eminent domain to appropriate lands for right of way for railroads, canals, turnpikes, roads, and bridges as works of public utility does not give the right to appropriate lands for a ferry landing. Sandford v. Martin, 31 Iowa, 67.

Permitting the lessee of a ferry belonging to a municipal corporation to acquire terminal facilities by eminent domain is not prohibited by a constitutional provision against local bills granting exclusive privileges or franchises to corporations, since the grant is not to a private corporation, but for the benefit of the public ferry. *Re* Union Ferry Co. 98 N. Y. 139, Reversing 32 Hun, 82.

Access to the landing from the land side may also be obtained under the power of eminent domain.

A ferry franchise is not void because the public at the time it was granted did not have the right to reach the landing places of the ferry on either side of the river. It seems that necessary highways can always be established; and, if the owner of the franchise refuses to connect with the public highway, but operates the ferry from his own land, and imposes an additional burden upon the public for the privilege of coming upon his land, the state can, in a proper proceeding, have his franchise set aside for the breach of an implied condition of the grant. Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

A highway, strictly speaking, connects with a ferry only at the water's edge, and an open space between the termination of the highway and the water cannot be presumed to go by the name of Bristol ferry, in the absence of positive proof. State v. Peckham, 9 R. I. 1.

IV. *Exclusiveness of right.*

a. *License may be exclusive.*

One of the elements originally belonging to a ferry, in the popular understanding, was exclusiveness. It certainly is exclusive as against an unlicensed person, and in most cases the public interest requires that the licensee shall not be subjected to competition. The duty to furnish adequate service, and the limitation of toll, being enforceable by the public, there is no reason for competition, and a better chance of faithful service will be secured if the licensee is secure from rivalry. Therefore, the idea of exclusiveness is intimately connected with ferries. So long as most of the ferries were ancient, so that the grant did not distinctly appear, there seems to have been no inclination to establish rivals. But under the more rapid growth, and therefore more urgent need, of modern times, and with the title more directly in evidence, there has been a tendency to depart from the ancient ideas, and to hold that the franchise is not exclusive unless it is expressly made so. And this ruling is sanctioned by true principle.

Justice Baldwin says, the rule that a ferry cannot be set up to the detriment of an ancient ferry applies only to ancient ferries by prescription, and those in a ville. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 948.

But the statutes and constitutional provisions against monopolies and special privileges do not prevent making the grants exclusive.

The grant of an exclusive right to take toll at a ferry is not a monopoly, nor an unconstitutional grant of exclusive privileges. Charles River Bridge v. Warren Bridge, 7 Pick. 344. This is put upon the ground that the performance of public service is a condition to the exaction of the toll.

The statute of North Dakota, authorizing boards of county commissioners of the several counties of the state to grant exclusive ferry franchises for a period of years to the highest bidder therefor, is not repugnant to § 20 of the Constitution, which declares that no privileges or immunities shall be granted to any citizen or class of citizens which shall not be granted to all citizens on the same terms. Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

A statute providing that no toll bridge or ferry may be established within 1 mile immediately above or below a regularly established ferry or toll bridge is not in conflict with a constitutional provision prohibiting the granting of special privileges or immunities; nor with one prohibiting special laws granting any special or exclusive right, privilege, or immunity; nor with one prohibiting local or special laws chartering or licensing ferries, bridges, or roads. Fortain v. Smith, 114 Cal. 494, 46 Pac. 381. In the opinion it is said: Nor are the privileges it authorizes in any way obnoxious to the spirit or intent of the constitutional laws, or open to the objection of authorizing monopolies. The granting of such franchises under proper restrictions, such as are found in the Political Code, and in the exclusive enjoyment of which the grantee is to be protected within reasonable limits, is not antagonistic to the provisions of the Constitution cited, or any others that have been called to our attention, nor to any rule of public policy of which we are aware. Nor does the enjoyment, by the grantee of such right, of the limited immunity from the encroachment of others which is contemplated under the statute, in any respect lend to the privilege granted the semblance of monopoly. The theory upon which such rights are granted is to promote the public good and convenience, the advancement of commerce, and the more ready intercourse of the people; and a reasonable protection of those who hazard their private means in thus ministering to the public need is in the interest and direction of good government by encouraging enterprise.

A ferry lease granted under a statute which allows to all who choose the privilege of bidding therefor is not within the prohibition of the organic act of Dakota territory as to "granting especial privileges." Nixon v. Reid, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57.

And therefore the franchise granted by it to a person or corporation to run a ferry may be, and usually is, an exclusive franchise. Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

So, it has been said that the state cannot consistently, if at all, grant a license for a ferry to the material prejudice of an old one, unless the public accommodation requires it. Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740.

A municipal corporation having the same power to establish ferries which formerly belonged to the King of England may, in its discretion, grant exclusive privileges. Costar v. Brush, 25 Wend. 628.

The Iowa legislature is authorized to confer upon a city the right to grant an exclusive license to ferry across the Mississippi river. Burlington & H. County Ferry Co. v. Davis, 48 Iowa, 133, 30 Am. Rep. 390.

The right to keep a public ferry rests upon legislative authority. The legislature, in the

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absence of constitutional inhibition, may grant an exclusive privilege of this kind, but such grant must be made exclusive in the charter itself, which will be most strongly construed against the grantee. Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884, Affirmed in 110 Mo. 557, 19 S. W. 809.

An exclusive ferry franchise granted to the owner of land on one side of a stream by an order of the county commissioners, and afterwards confirmed by statute, continuously operated by such owner for more than thirty-one years until his death, and by his heirs thereafter for more than twenty-three years, is a property right which they have a right to enjoy and use, and which a court of equity will protect by enjoining an interference therewith by the establishment of a rival ferry, and which right they have not lost by accepting the provisions of an act of the legislature conferring upon them a franchise for twenty years, and under which they held in connection with the original grant; nor are they thereby estopped from claiming under the original grant after the twenty years have expired. Golconda v. Field, 108 Ill. 419.

The statutes frequently forbid the establishment of rivals within a certain distance.

A ferry license is exclusive of the right to operate any other ferry within the limits prescribed, where the law provides that no other license shall be granted within 2 miles on either side. Nixon v. Reid, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57.

Under the provision of the Kentucky statutes that no ferry shall be granted within a city or town unless those established therein cannot properly do all the business, or unless public convenience greatly requires a new ferry at a site not within 400 yards of that of any other, one ferry is entitled to the exclusive ferry privileges at a town where neither of these conditions exist. Combs v. Hogg, 101 Ky. 178, 40 S. W. 453.

Under the statutes of Kentucky regulating the establishment of ferries across the Ohio river, the county court is expressly prohibited from establishing a ferry within less than a mile of another ferry across such river previously established by such court, except it is in a town, or where it shall be made necessary by the putting into such river of some impassable creek, or is opposite to some ferry established in the state of Ohio. Casey v. Jones, 2 Litt. (Ky.) 301.

Under the statute of Arkansas, which provides that a ferry privilege shall not be granted in case a ferry has been established within a mile above or below the proposed ferry, except in case it is to be established near a city or "town," the term "town" does not include a place which has a store doing business to the amount of $4,000 per year, a dwelling house for two families consisting of six persons, and a warehouse from which produce is shipped varying in value from $200 to $1,500 per year. Murray v. Menefee, 20 Ark. 561.

Where the county court has granted the privilege of keeping a public ferry, the privilege is exclusive within the distance and subject to the restrictions mentioned in the statute, so long as it is exercised under the annual grant of license provided for by the statute. *Ibid.*

Where, some time after a license was issued to operate a ferry, a general law was passed, gratuitously and without further consideration from established ferries, providing that county courts should not license a ferry within ½ mile of one already established, such law does not create a perpetual monopoly, but is repealable at the will of the legislature. Wheeling Bridge Co. v. Wheeling & B. Bridge Co. 34 W. Va. 155, 11 S. E. 1009.

But, in order to be secure from interference by the legislature, the exclusive right must be in the charter, for a state law prohibiting the licensing of ferries within a certain distance of existing ferries is not a contract which cannot be repealed to the injury of existing ferries. Wheeling & B. Bridge Co. v. Wheeling Bridge Co. 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301.

A ferry license granted under a general statute making it unlawful to grant a license for a ferry within ½ mile of any other ferry is not a contract which will be impaired by a subsequent statute authorizing the establishment of a ferry within less than that distance of a former one. Williams v. Wingo, 177 U. S. 601, 44 L. ed. 905, 20 Sup. Ct. Rep. 793.

And, although the legislature has prohibited the county court from authorizing a competing ferry within ½ mile of another, the legislature itself may authorize it. Somerville v. Wimbish, 7 Gratt. 205.

When a legislative grant, for good consideration, of a perpetual ferry franchise is made exclusive and protected by penalty without further consideration, the state cannot be held to be prevented by contract from subsequently granting another franchise, although the first be impaired thereby. Johnson v. Crow, 87 Pa. 184.

A proposition made to the inferior court and the public by ferry owners, to construct and maintain a ferry at a designated point and transport a certain class of inhabitants free of toll, in consideration of the removal there of the county seat, and the removal of the county seat to such place, do not constitute a contract between the inferior court and such ferry owners preventing the construction, under authority of such court, of other ferries at such new county seat. Shorter v. Smith, 9 Ga. 517.

Rival grant at same place.

There is more reason for holding that the licensee should be free from competition between the same termini than at points a short distance away. But even in such cases the only safe way is to have the exclusiveness expressed in the charter or license.

In the absence of a grant of an exclusive privilege to a ferry company under its act of incorporation, the city may confer a similar franchise upon a competing company. Collins v. Sherman, 31 Miss. 679.

In Shorter v. Smith, 9 Ga. 517, it is said that the common-law doctrine that a franchise of ferry, although not declared to be exclusive, is, by necessary implication, exclusive, is at war with the universally recognized principles of American constitutional law, and totally inapplicable to our local situation and change of circumstances.

Where a ferry is established, after the passage of a statute permitting the establishment of rival ferries, the county court has authority to establish another ferry within a few miles of the established ferry, without in any manner infringing upon the franchise of the existing ferry, or rendering the proprietor of the new ferry liable for damages because of the loss of traffic on the established ferry. Hostler v. Marlowe, 44 W. Va. 707, 30 S. E. 146.

The owner of a ferry franchise across the Ohio river at a town has no exclusive right to operate a ferry at that point. The law authorizing their establishment across such river

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at towns fixes no restriction except the discretion of the county court as to the number that may be established. Maysville v. Boon, 2 J. J. Marsh. 224.

The statute of Kentucky regulating the establishment of ferries does not limit the number of ferries the county court, in its discretion, may establish at one point across all rivers in the state except the Ohio river. Brown v. Given, 4 J. J. Marsh. 28.

Under the Mississippi statute empowering boards of supervisors to establish public ferries, and conferring a preference upon the owner of the soil, there can be no monopoly created by the board in the privilege of keeping ferries. The licensee of such privilege enjoys it subject to the right of the board to establish as many other ferries as the public convenience may, in its judgment, require. Montjoy v. Pillow, 64 Miss. 705, 2 So. 108.

It is no objection to the establishment of a ferry required by the public convenience that its operation will diminish the revenue of an existing ferry. Public ferries are established for the accommodation of the public, rather than for the gain and advantage of individuals. *Ibid.*

The duty imposed upon a ferry company by its act of incorporation to keep its works in constant repair does not confer upon it an exclusive privilege, or debar the state from granting a similar franchise to other persons. Collins v. Sherman, 31 Miss. 679.

The owner of a ferry franchise cannot enjoin the grant of a like franchise for another ferry so near his own as to enter into direct competition therewith, on the ground that his ferry is the older, and is well established, and that, by reason of its location on the river, it will be of more public benefit than the one proposed to be established; where, by legislative acts, the county court has full power and authority to appoint and settle ferries when necessary, and to grant two or more ferry keepers the privilege of using the same landing place, and there is nothing to show that such county court has unreasonably abused or exercised such discretionary power. Blair v. Carmichael, 2 Yerg. 306.

A Spanish grant of the right to maintain a ferry "con exclusion" is not a renunciation on the part of the sovereign power of the right to establish another ferry, but only prohibits the transportation of persons or property by others across the river for hire within a reasonable distance above or below the ferry established. Davis v. Police Jury, 1 La. Ann. 288.

The proprietor of an existing ferry is not entitled to compensation for the establishment of another ferry by the police jury at the same point. The establishing of ferries is an act of sovereignty which harms no one. Gillespie v. Freeman, 7 La. Ann. 350.

There are cases, however, which hold that the grant of a ferry franchise includes the idea of exclusiveness, although not expressly saying so.

A grant of a ferry franchise is exclusive to the extent that no other ferry can be set up so near as to cause injurious competition. Charles River Bridge v. Warren Bridge, 7 Pick. 344.

When a franchise has been granted for a ferry between two municipalities, it is exclusive as to ferrying from any point in one municipality to any point in the other. Jellett v. Anderson, 7 Ont. App. Rep. 341, Affirming 27 Grant Ch. (U. C.) 411.

The public grant of a ferry or bridge franchise should be protected by being held to be exclusive in the grantee, unless legally and duly ordered otherwise by the public authorities; and both common law and equity, in their proper spheres, give redress, and protect an unlawful invasion of such a franchise. Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

But Carrow v. Washington Toll Bridge Co. 61 N. C. (Phill. L.) 118, does not take the same view of the question.

The grant of a ferry franchise by the legislature of a state, unless limited by some general law, or some restrictive provision in the grant itself, is necessarily exclusive to the extent of the privilege thus conferred, which right, once conferred, cannot be taken back or transferred to another until the public interests and welfare shall demand its resumption, and provision shall have been made for just compensation to the owner in the manner required by law. Mills v. St. Clair County, 7 Ill. 197.

The county court, under the Oregon statutes which give a person licensed to keep a ferry an exclusive privilege therefor "where such ferry is established," exhausts its jurisdiction by the granting of such a franchise, and is precluded from establishing another ferry substantially at the same place, although not at the particular point where the other ferry lands, the object of which is to serve the same custom and form a part of the same highway which the prior franchise covers. Montgomery v. Multnomah R. Co. 11 Or. 344, 3 Pac. 435; Hackett v. Wilson, 12 Or. 25, 6 Pac. 652.

A grant by a municipal corporation of ferry franchises under the authority of the legislature, giving the municipality the exclusive control over ferry rights at the *locus in quo*, confers a right which cannot be impaired by subsequent legislation. Aikin v. Western R. Corp. 20 N. Y. 370.

When bridge and ferry franchises, purporting on the face of the grant to be exclusive, are conveyed by deed in fee simple with warranty of title against the vendor and his heirs only, the purchaser, in the absence of any fraud on the part of the vendor, takes the risk of the grant proving exclusive or not exclusive in its legal operation. Wright v. Shorter, 56 Ga. 72.

b. *Grants strictly construed.*

The general rule is to construe grants of ferry franchises strictly.

A provision in a grant of a ferry license to a man and his heirs for a period of twenty years that no county or board of county commissioners shall authorize a person to keep a ferry within the limits of the franchise, will not prevent a grant of a license by the city council when that is substituted by the legislature for the county commissioners for the purpose of licensing ferries. The exclusive right must be clearly expressed or necessarily implied. Fanning v. Gregorie, 16 How. 524, 14 L. ed. 1043.

The statutory prohibition of the establishment of a private ferry within 3 miles of any public bridge does not prohibit the establishment of a private ferry within 3 miles of a public ferry. Greer v. Haugabook, 47 Ga. 282.

An act of legislature authorizing a county to establish a ferry across the Mississippi river from the Illinois side opposite St. Louis, and to condemn land at the most eligible site for that purpose, is not unconstitutional as being in violation of the provisions of both the Federal and state Constitutions forbidding the passage of any act impairing the obligations of any contract, where the site selected and con-

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demned, from which to operate the ferry, was on land belonging to the owner of a ferry previously established by an act of legislature, granting him the exclusive ferry privilege within 1 mile of his ferry to be established upon land then owned by him, and such site so selected, although acquired subsequent to the date of the passage of the act granting his franchise, was claimed by him as a necessary part of his ferry landing, owing to the character of the banks at that place, which frequently caved in or were washed away so as to make it necessary to change his landing place from time to time, and owing to the fact that a sand bar had formed between such old landing place and the opposite side, thereby making it necessary to move his ferry further down upon the site selected and condemned for the other ferry, although such grant was essentially a contract between him and the state, and could not be impaired without compensation, yet its terms restricted his franchise to land then owned by him and gave him no exclusive ferry right to lands he might subsequently acquire, and consequently no contract existed as to the land in question; and in estimating its value, the damages such owner may sustain to his franchise, although such land may be necessary to the secure and permanent enjoyment thereof, need not be taken into consideration. Mills v. St. Clair County, 7 Ill. 197.

An act of the legislature merely granting the right to establish and operate a ferry across any water does not confer an exclusive right so as to deprive the legislature of the power to authorize a competing ferry at or near the same place. Power v. Athens, 99 N. Y. 592, 2 N. E. 609, Affirming 26 Hun, 282.

The grant of a franchise to keep a ferry between two places does not necessarily exclude the right of the state from granting a similar right to others between different points, unless there is something exclusive in the terms of the first grant. Meads v. Wandell, 4 Ch. Sent. 14.

A grant of a right to establish a public ferry does not carry with it exclusive privileges where none are expressed, and by such grant the state is not deprived of the power of making other grants for ferries near the first one, provided they do not thereby violate any terms expressed in the first grant. Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770.

It seems that a licensed ferryman, under the laws of Texas, is protected against unlicensed interference; but he is not entitled to damages against the county where a license is granted to a rival by a commissioner's court. Burrows v. Gonzales County, 5 Tex. Civ. App. 232, 23 S. W. 829.

The state has undoubted power by the legislature, under its authority, to establish a ferry, notwithstanding its propinquity to a bridge or ferry established under an existing franchise. Carrow v. Washington Toll Bridge Co. 61 N. C. (Phill. L.) 118.

One granted by a city a ferry privilege within its limits cannot complain because the parish authorities have established another ferry across the river outside of the corporation, in the absence of any restriction as to the proximity of ferries, and where the operation of the new ferry is advantageous and convenient for the public. O'Neill v. Police Jury, 21 La. Ann. 586.

A license to receive, for a period not fixed or limited, a compensation supposed to be a fair equivalent for services rendered as ferryman, cannot be regarded as a vested interest beyond public control, and does not preclude the granting of other licenses for the same place. Day v. Stetson, 8 Me. 365.

Bridge rival.

The tendency to strict construction is seen in the ruling that a bridge will not interfere with a ferry franchise.

The grant of an exclusive right of ferry to one, within certain limits, does not confer upon him the right to exclude all other modes of transportation and conveyance within those limits. Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35.

A franchise may be granted to construct a toll bridge alongside a ferry at a town where the ferry was constructed under a statute prohibiting the operation of any other ferry within 2 miles of a ferry already established, except where such ferry is at or near a town; and the delegation by the legislature to the county court and road commissioners of the general power to make such grants does not prevent it from making the grant directly. Dyer v. Tuskaloosa Bridge Co. 2 Port. (Ala.) 296, 27 Am. Dec. 655.

The grant of a franchise or ferry over a public water course for the convenience of the community is not exclusive, so as to prevent interference therewith by a franchise for the construction of a toll bridge for the benefit of the public, on the ground that it is an impairment of the obligation of the contract; and injunction will not lie at the instance of such ferry owner to restrain the construction of such toll bridge. *Ibid.*

The grant of an exclusive franchise for a ferry across the Ohio river does not thereby vest in the owners thereof the exclusive privilege of transportation for hire across the river at that point, so as to prevent the legislature from authorizing the erection of a bridge whenever the convenience of the public and the increase of travel demand such means of transportation; and such owner can recover no damages for diminished income caused by the diversion of custom and travel to such bridge. Platt v. Covington & C. Bridge Co. 8 Bush, 31.

Extending the approaches to a bridge so as to intersect the highway beyond the toll gate of a ferry across a river, thereby diverting travel from the ferry and seriously reducing its revenues, where such extensions are reasonably essential to the public convenience, and are built to subserve that end, does not constitute a shun-pike, and is not an impairment or violation of a contract within the constitutional prohibiton. Hydes Ferry Turnp. Co. v. Davidson County, 91 Tenn. 291, 18 S. W. 626.

Depreciation of the profits of a ferry franchise, caused by the opening of a bridge, erected at that point by the proper public authorities, will not be allowed as part of the incidental damages in estimating the compensation to be allowed such ferry owner for a strip of land condemned for the erection of one of the bridge piers, where the franchise itself, and its exercise, are not impaired by the existence of such pier. Moses v. Sanford, 11 Lea, 731.

The state is not prevented by a provision in a ferry law under which a ferry across a stream was established, prohibiting the establishment of a new ferry within a certain distance above and below a regularly established ferry, unless the public convenience requires it, from authorizing the construction of a toll bridge across the stream at the same point at which such ferry is located. Bush v. Peru Bridge Co. 3 Ind. 21.

It is not beyond the power of the legislature to revoke a license to keep a ferry, or to im-

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pair the ferry privilege by granting a charter to build a bridge where ferries have been kept: although the owner of the ferry must be paid for his property. Jones v. Keith, 37 Tex. 394, 14 Am. Rep. 382.

Where a law passed after the establishment of a ferry, which provides that no ferry shall be established within ½ mile of a ferry already established,—and which is construed as prohibiting the establishment of a toll bridge within that distance,—is validly repealed as against the owner of such ferry, the purchase of such ferry by a bridge company under an enabling act authorizing it to make the purchase does not create in any way a perpetual monopoly, but such law is subject to repeal as against the bridge company, and a new bridge may be erected within the restricted territory without any violation of vested rights. Wheeling Bridge Co. v. Wheeling & B. Bridge Co. 34 W. Va. 155, 11 S. E. 1009.

If the ferry franchise was exclusive the construction should not be so strict as to result in a confiscation of property without compensation, contrary to the constitutional inhibition, for there can be no question that a destruction of the value of the ferry is a destruction of property. As said by the West Virginia court, an exclusive ferry franchise is private property within the meaning of the Constitution of West Virginia, which declares that private property shall not be taken or damaged for public use without just compensation. Mason v. Harper's Ferry Bridge Co. 17 W. Va. 396.

So a statute providing that no ferry within ½ a mile of another ferry can be legally established over the same water course prohibits the erection of a toll bridge within ½ mile of an established ferry. *Ibid.*

And the act of the legislature of West Virginia giving the secretary of state authority to issue a certificate of incorporation for works of internal improvement, which include a toll bridge, did not take away the right of a ferry owner, who had exclusive privileges under a prior statute, and, where the secretary incorporates a company with the privilege of maintaining a toll bridge at or near the place where the ferry is operated, the corporation has no right to interfere with the ferry franchise without making just compensation. *Ibid.*

Where a toll bridge is erected near a ferry, the owner of which has the exclusive right to operate the ferry, the ferry franchise, although not "taken," is "damaged" within the meaning of the Constitution of West Virginia, which provides that private property shall not be taken or damaged for public use without just compensation. *Ibid.*

But other courts have refused to take this view of the question, holding to the narrow conception of what constitutes a taking of property.

The impairment or total destruction of the value of a ferry franchise, by the erection of a bridge nearby, is not a taking of the former's franchise which will entitle its owner to compensation, where the public convenience demanded the building of the bridge, and the same was built to subserve that end, and the grant of franchise for the ferry was not by its terms exclusive. Hydes Ferry Turnp. Co. v. Davidson County, 91 Tenn. 291, 18 S. W. 626.

The diminution of the value of a ferry franchise by the granting of a franchise for the construction of a toll bridge to meet the public need for greater facilities is not a taking of property for public use for which compensation must be made, as the owner of a franchise of ferry over a public water course, granted for the convenience of the community, takes subject to the contingency of greater facilities being required for the benefit of the public. Dyer v. Tuskaloosa Bridge Co. 2 Port. (Ala.) 296, 27 Am. Dec. 655.

The legislature may lawfully grant authority to erect a toll bridge within the limits in which one owns the exclusive right to maintain a ferry, without providing for compensation to him, if the *locus in quo* occupied by such owner is not taken, and he is left to the enjoyment of an exclusive right of ferry as before. Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35.

So, an act of the legislature conferring upon a corporation the exclusive right to build and maintain a toll bridge anywhere between two specified points is not void as being unconstitutional for failing to provide for compensation to one who owns a ferry privilege between the limits specified for the erection of the bridge. *Ibid.*

V. *Regulation and supervision.*

The government exercises supervision of ferries for the purpose of insuring to travelers the manner of crossing narrow waters without delay, in safe boats, managed by experienced persons, upon the payment of reasonable tolls. Kerby v. Lewis, 6 U. C. Q. B. O. S. 207.

The legislature may limit a ferry franchise according to its pleasure. Power v. Athens, 99 N. Y. 592, 2 N. E. 609.

Ferries and bridges are not authorized for remunerative purposes to the owners only, but for the benefit of the public, whose interest is the first and paramount object of the legislature; and, in the absence of express law, the legislature should not be presumed to have intended to deprive itself of the power of promoting that object. Platt v. Covington & C. Bridge Co. 8 Bush, 31.

The transfer of the management and control of public ferries may be made by the legislature to any governmental agency, such as the county court, although the ferries belong to a city. Simon v. Northup, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560.

The establishing and maintaining of public bridges and ferries where public roads cross navigable streams, lakes, or bays, has always been held in Texas to be a franchise, subject to the regulation and control of the legislature, or of the municipal authorities to which it has been committed by the legislature. Hudson v. Cuero Land & Emigration Co. 47 Tex. 56, 26 Am. Rep. 289.

The city of New York took its grant of ferry franchises subject to the right of governmental regulation. People v. New York, 32 Barb. 102.

The right to run a ferry for public accommodation, and charge tolls, is a franchise, and within the control of the legislature. McRoberts v. Washburne, 10 Minn. 23, Gil. 8.

Whether the state will itself operate the public ferries within its borders, or whether it will confer this right on others, and the terms on which it will give others this special privilege, and whether an exclusive franchise shall be granted,—these, and all other questions connected with the subject, are absolutely within the control of the legislature. Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

In West Virginia a ferry is the creation of the statute law, and must be regulated by its provisions. Cross v. Hopkins, 6 W. Va. 323.

One of the inhabitants of a town who have the right of passing a ferry toll free cannot maintain an action for permitting the ferry

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to decay, by which he is deprived of the right, since the injury is common to all inhabitants of the town. Pain v. Patrick, 3 Mod. 289, *sub nom.* Payne v. Partridge, 1 Salk. 12.

An action will not lie against the owner of a ferry for failing to operate it, by a person entitled to ride toll free under a custom by which all the inhabitants of ancient cottages in a certain village pass toll free, as the remedy is by indictment. *Ibid.*

If toll had been extorted from such a person, then he would have been specially damaged and entitled to his action. *Ibid.*

Those who show no right to set up a ferry have no standing to allege that the occupant of an exclusive ferry franchise has not complied with the law. His right can only be questioned by the state. Douglass's Appeal, 118 Pa. 65, 12 Atl. 834.

The municipal authorities of a village cannot institute a suit to contest an owner's right to a ferry. Conner v. Paxson, 1 Blackf. 207.

Where a person is enjoined from operating an illegal ferry at a specified point on a river, and the county court afterwards establishes a ferry at that point, and licenses such person to maintain and operate it, the injunction is properly dissolved. Hostler v. Marlowe, 44 W. Va. 707, 30 S. E. 146.

Rates of toll.

The right to operate a ferry is always subject to the right of the public to regulate the rates of ferriage, and of so controlling the franchises that they shall not be abused to the serious detriment or inconvenience of the public. People v. New York, 32 Barb. 102.

The rates of ferriage fixed in a ferry franchise, granted by the county court, must conform to the directions of law authorizing such grants. Bedinger v. Drake, Sneed (Ky.) 97.

Where the owner of a ferry extorts excessive toll of divers persons, each act constitutes a separate offense. King v. Roberts, 1 Shower, 389.

An omission of the county court to fix the rate of ferriage at the time the order was issued granting the right to establish a ferry, although an omission of duty, will not make such grant void, as the order fixing the rates must necessarily be subsequent to that granting the franchise. Ackler v. Oldham, 1 A. K. Marsh. 471.

A variation in rate of toll exacted by a ferry keeper will not affect his franchise so as to deprive him of a right of action against another for disturbing it. Trotter v. Harris, 2 Younge & J. 285.

In exercising the jurisdiction conferred by the statutes of Kentucky upon the county courts to change the rates of ferriage to be charged by a ferry, the provisions of the statute must be strictly followed. Troutman v. Smith, 105 Ky. 231, 48 S. W. 1084.

An act of legislature reducing the rates of toll of a ferry to such an extent that the costs of operating such ferry will exceed its income is virtually a destruction of the franchise and a taking of private property for public use without just compensation, and is, therefore, unconstitutional and void. Com. v. Covington & C. Bridge Co. 14 Ky. L. Rep. 836, 21 S. W. 1042.

The right conferred upon a municipal corporation by a provision in a private statute granting a ferry franchise, to regulate and control the rate of toll to be charged by the ferry owner, implies that such regulation shall be reasonable, so as to render the ferry fairly remunerative. Rohn v. Beardstown, 32 Ill. App. 407.

The burden is on the owner of a ferry seeking an increase, to show that ferry rates established by an ordinance of a municipal corporation are unreasonably low; and, in the absence of definite proof as to fixed charges and receipts, it will be presumed that the rates so fixed are fair and reasonable. *Ibid.*

A ferry company whose charter is subject to alteration at the pleasure of the legislature may be required to take lower rates of tolls from passengers on street cars which cross on its boats. Parker v. Metropolitan R. Co. 109 Mass. 506.

Upon appeal from an order of a county court of Kentucky reducing the ferry rate to be charged by a certain ferry for foot passengers, the court of appeals will reverse such order where such reduction appears unreasonable, when the net profits derived therefrom and the risk from accidents assumed are taken into consideration. Troutman v. Smith, 105 Ky. 231, 48 S. W. 1084.

Where, as provided by statute, the rate of ferriage for wagons has been fixed by the county court and posted, the ferryman cannot charge as a common carrier for the contents of a wagon separately from the wagon itself. Kelly v. Altemus, 34 Ark. 184, 36 Am. Rep. 6.

A statute requiring ferry companies to post conspicuously schedules of the rates of ferriage charged thereon by them and authorized by law to be charged, and making a violation of its provisions a misdemeanor, is not applicable to a foreign corporation, since it could not be punished within the state for a misdemeanor; nor does it require rates to be posted except in cases where they are restricted by law. Blanchard v. Hoboken Land & Improv. Co. 25 N. Y. S. R. 560, 6 N. Y. Supp. 279.

When a railroad is limited by the terms of its charter to charge a given rate per mile per passenger and per ton of freight, and required to furnish boats at its termini, it cannot collect an additional charge for transportation on the boats as a common carrier; and, when it does so, is liable for the penalty imposed for such an overcharge by a statute passed after the granting of its charter. Camden & A. R. & Transp. Co. v. Briggs, 22 N. J. L. 623.

Where a ferry license fixed the rate of ferriage, such rate will continue on the subsequent renewals of the license, although the renewals are silent on that question. State v. Sickmann, 65 Mo. App. 499.

No vested right is acquired by the owner of a ferry franchise in the rate of tolls fixed by county commissioners, where the charter provides that such ferry shall be subject to the same regulations as other ferries are, "or may hereafter be," by the laws of the territory; but such rates are subject to change under a subsequent law giving county commissioners authority to alter rates of ferriage. Stephens v. Powell, 1 Or. 283.

VI. *Transfers and contracts.*

a. *Right to transfer.*

Viewed in its true light as an incorporeal hereditament (*supra*, I.), there is no doubt that a ferry franchise is transferable, and may be transmitted to successors. Many of the states have, however, so changed the character of the right that the question of transfer will depend on the character which the property has acquired.

The franchise to operate a ferry in the hands of a private citizen is an incorporeal, hereditament that may be leased or assigned if not pro-

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hibited by the grant. Evans v. Hughes County, 3 S. D. 580, 54 N. W. 603.

A franchise of a ferry is in the nature of an incorporeal right lying in grant, and the subject of sale and of inheritance. Greer v. Haugabook, 47 Ga. 282.

A ferry franchise is property subject to governmental control, and may be passed from the original grantee to others, subject to such conditions as are lawfully imposed. Billings v. Breinig, 45 Mich. 65, 7 N. W. 722.

The Indiana statute recognizing ferry rights in riparian proprietors does not limit the right to the grantee of the soil, but he may convey it and still retain the fee in the land; and the grantee of such right acquires the use of the soil for a ferry landing as fully as though he were the grantee of the soil. Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740.

A license to keep a ferry is assignable under the Indiana statute. *Ibid.*

An exception of a ferry right in a conveyance of land reserves the right unimpaired in the grantor and his heirs. *Ibid.*

An assignment of a ferry lease is not invalid,—at least, when it is made with consent of the state by its agents. Nixon v. Reid, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57.

The court, in Montgomery v. Multnomah R. Co. 11 Or. 344, 8 Pac. 435, says that there is no question but that a ferry license may be assigned with the consent of the granting power, but declines, as unnecessary, to decide whether the county court, to whom the legislature has delegated the power to grant such licenses, is authorized to give its consent to a sale or assignment thereof upon the filing of a bond, or whether, upon the filing and acceptance thereof, it would be unassailable; but remarks that the statute imposes no restrictions upon such a sale or transfer, but is simply silent upon the subject.

Absence from the state of the original grantee of a ferry license without giving a new bond, as required by law, is no sufficient reason for revoking the ferry franchise, as such grant is an incorporeal hereditament, which is a subject of sale, and would descend to the heirs, and such bond might be given by the heir, alienee, or lessee. Garrett v. Ricketts, 9 Ala. 529.

Likewise a ferry franchise is not lost by the death of the party to whom it was granted, but passes to his representatives. Lippencott v. Allander, 27 Iowa, 460, 1 Am. Rep. 299.

An injunction will be granted at the suit of the owner of a ferry franchise to restrain the operation of another ferry between the same points by the administratrix of one not the riparian owner, who carried on such ferry under a license from the county court, as, under the Oregon statutes, such a ferry license is a mere personal trust which expires with the death of the grantee. Knott v. Frush, 2 Or. 237.

The widow and children of a ferry owner who died without disposing of his real estate, and who since his death, have maintained the ferry, and are in possession, have such a joint interest in an award of damages against a toll-bridge company that they are proper parties to the proceedings to procure it, and a satisfaction will protect the company paying against all further claims; and with the method of apportionment the company has no concern. Columbia & D. Bridge Co. v. Geise, 34 N. J. L. 268.

A ferry franchise being an incorporeal hereditament, the legal title can only be transferred by deed; but one who buys and pays for a ferry boat and appurtenances, and is placed in full possession of the ferry by the owner under such purchase, has the equitable title thereto, though no deed has ever passed, and can maintain an action for damages for injury to such franchise caused by the unauthorized act of another. Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508; Charles River Bridge v. Warren Bridge, 7 Pick. 344.

Where the right to the franchise is made to depend on riparian ownership, the franchise will pass with the riparian land.

Where a ferry franchise can be granted to no one not owning land on the river, it will be alienable and descendible with the land. Maysville v. Boon, 2 J. J. Marsh. 224.

A ferry franchise passes with the land on which it is established. Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

So, a lessee of land and ferry annexed becomes the owner during the term. Biggs v. Ferrell, 34 N. C. (12 Ired. L.) 1.

Under the Kentucky laws, a franchise for a ferry across the Ohio river is a property right incident to the title to land on that side, alienable and descendible, of which the legislature has no power to devest the owner by a retroactive statute. A statute, therefore, giving the county courts the power to revoke the franchise of a nonresident who has not sold such ferry to a resident citizen within one year after his removal from that state or the accrual of his right, if he was already a nonresident, is unconstitutional and void as to the vendee of one who acquired his franchise prior to the enactment of such statute. Dufour v. Stacey, 90 Ky. 288, 14 S. W. 48.

Where one of two tenants in common to land and a ferry which was appurtenant to the land purchased the other's interest in the land, such other's interest in the ferry franchise passed as an incident of the grant of the land, and the grantee as such proprietor is liable to indictment for failure to keep it in repair. State v. Willis, 44 N. C. (Busbee L.) 223.

A ferry franchise may be partitioned, in connection with the land on each side of the stream forming the landings, in the same manner as real estate. Rohn v. Harris, 130 Ill. 525, 22 N. E. 587.

Under the statute of Arkansas, the right to obtain a ferry license is limited to those persons who own, or who are rightfully in possession of, land on the river, and a ferry franchise is subject to the control of the state for the public good; therefore, it is not within the power of the owner of the land on a river to transfer a ferry privilege, as an incorporeal hereditament, separate and apart from the real estate. Haynes v. Wells, 26 Ark. 464.

The owner of one or both banks of a navigable stream is given a preference in Arkansas to keep a ferry, and no ferry franchise exists separate from the ownership of the land; but such preference is an incorporeal hereditament appurtenant to the land, descendible to heirs and capable of being leased, sold, or assigned. Little Rock & Ft. S. R. Co. v. McGehee, 41 Ark. 202.

Where the franchise is not connected with the land title, it may be transferred independently thereof.

A ferry operated under a license from the state does not pass to the grantee under a conveyance of the adjoining land. Gourdine v. Davis, 1 Bail. L. 469.

A ferry franchise is a personal trust confided to an individual by the government, and does not go to a successful claimant to land whereon the same is established, by eviction under process of law. Fisher v. Higgins, 5 T. B. Mon. 140.

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A grant of riparian lands on one side of a stream "with all the appurtenances" confers no right or interest in a ferry franchise belonging *en gros* to a plankroad company, but which, since its nonuser, had been occupied and claimed by the grantor who owned the fee to the land at both termini. Haithcock v. Swift Island Mfg. Co. 72 N. C. 410.

An act of the general assembly confirming the transfer of a ferry property to an individual, and declaring his title thereto to be absolute and perfect, with full power to sell and convey the same, merely confirms in such grantee such rights as he acquired under his purchase, and does not devest the title of remaindermen in an undivided one half thereof. Rohn v. Harris, 130 Ill. 525, 22 N. E. 587.

A prohibition against transfer of a ferry franchise does not apply to a transfer of his interest by one person to another. Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809.

Personal trust.

There are some cases which have regarded the right as a mere license, and therefore a personal trust which could not be transferred.

Under a statute providing that no person shall keep a ferry without obtaining a special license therefor, the license to operate a ferry is not assignable. The Maverick, 1 Sprague, 23, Fed. Cas. No. 9,316.

A ferry is a franchise involving a personal trust granted by the sovereign upon conditions imposed upon the grantee alone, whose liability cannot be removed by substitution, and is not the subject of levy, sale, or delivery under execution. Munroe v. Thomas, 5 Cal. 470; Thomas v. Armstrong, 7 Cal. 286.

In Hackett v. Multnomah R. Co. 12 Or. 124, 53 Am. Rep. 327, 6 Pac. 659, it was held that, although a ferry franchise might be a personal trust which was not assignable without the consent of the granting power, such objection was obviated where it appeared that such consent was given, and that a part owner thereof, who subsequently disputed it, recognized and acquiesced in the transfer of an interest therein.

Under a statute authorizing a board of supervisors to grant a license to keep a ferry to a suitable person owning the land through which the highway adjoining the ferry shall run, and requiring the execution of a bond that he will faithfully keep and attend such ferry, a license to keep a ferry is not assignable. Willard v. Forsythe, 2 Mich. N. P. 190.

It will be presumed that a ferry is kept by and for the person who has a license to keep it, and who is responsible to the public and to individuals for its safe and commodious condition. Brearly v. Norris, 23 Ark. 514.

b. *Other contracts.*

Permission to operate a ferry across a bayou under the control of a canal company, given on condition that it shall not impede navigation, may be recalled when ascertained to be inconvenient and a hindrance to vessels. Singer v. Carondelet Canal & Nav. Co. 39 La. Ann. 478, 2 So. 102.

A lease of a ferry, requiring the lessee to keep a good and sufficient steam ferryboat for the safe conveyance of passengers at all usual and reasonable times without delay, is broken by frequent failure of the lessee to answer applications of persons for passage over the river and for refusing for hours to notice such applications; and the facts that the lessee's wood was green, and his boat moored on the opposite shore from where the persons desire to embark, are immaterial. Phillips v. Bloomington, 1 G. Greene, 498.

The lessee of a ferry and a tract of land on one side of a stream, being the only ferry at that point, is not evicted therefrom, so as to justify an abandonment and release him from the payment of further rent, by the passage of an act of legislature giving a landowner on the opposite side of the stream the right to a license for a ferry on his side, and to have all the privileges of a ferry keeper from that side with mutual privileges of landing, under which act the lessee, having purchased the opposite shore, acquired a license, and thereafter operated such ferry therefrom, and abandoned his rights under the lease. Huff v. Walker, 1 Ind. 193.

The lessee of a ferry, who continues to operate the same after his lease expires, claiming exclusive privilege under an act of legislature passed just prior to such expiration, nevertheless would be deemed to hold and operate under the title of his lessor also holding under a legislative grant, where he never surrendered his possession obtained under the lease, and had obtained the consent of a subsequent lessee to allow him to operate the same until the respective rights of the parties were determined by a subsequent legislature. Walker v. Tipton, 3 Dana, 3.

Where a proprietor of one bank of a river, who has a license to keep a ferry at a place where a public highway crosses the river, executes a written obligation for a lease of the ferry rights of the proprietor of the opposite side of the river, who has obtained from the county court an order for a ferry from his shore, such obligation is founded upon a valid consideration, where it appears that the obligor, by leasing the ferry, avoided competition, and could thereby avail himself of the entire profits from carrying freight and passengers from both shores of the river. Clegg v. Roane, 21 Ark. 361.

Where one operates a ferry under a license, from the bank of a river owned by him to the opposite bank owned by one who subsequently obtains a license to operate a ferry from his bank, and the prior licensee rents the rival privilege, and, after the expiration of the lease, the county court refuses to renew the license of the rival ferry, but does renew the license upon a subsequent application, the prior licensee, who operated the ferry at the same place between the time that the court refused to renew the license and the time when it was granted, is not liable to account for half of the profits to the rival ferry owner, since, when the county court refused to renew the license, the right of the licensee ceased, and he had no foundation for his claim against the defendant. Bell v. Clegg, 25 Ark. 26.

Failure to operate a ferry between designated points for twenty-nine days while in the custody of a marshal under a libel and seizure for money due employees, except that a schooner owned and operated by others than the lessees of the ferry was run between such points as the wind and weather permitted, the ferry being subsequently continuously operated by purchasers at the sale to whom the lease was assigned, does not work a forfeiture of the lease by virtue of a covenant therein that the premises shall be used in good faith continuously during the existence of the lease for the usual and ordinary business of a ferry, and a provision that the lease shall be forfeited for default in any covenants. Heywood v. Berkeley Land & Town Improv. Asso. 71 Cal. 349, 12 Pac. 232.

A contract between a railroad company and a ferry company by which the former binds itself

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to employ the latter to transport for it across the Mississippi river at St. Louis all persons and property which shall be taken across the river either way "to or from Bloody island" and "to or from St. Louis," being a contract in restraint of competition in trade, will not be construed as implying a prohibition on the part of the railroad company to extend its tracks to some other point and there employ another ferry to transport its passengers and freight from and to St. Louis. Wiggins Ferry Co. v. Ohio & M. R. Co. 72 Ill. 360.

An executed agreement to advance purchase money of land in consideration that the purchaser shall secure the ferry right on the land for the use of the lender, and the taking of the title in the name of the purchaser, create, as to the ferry right, an implied trust in favor of the lender. Williams v. Turner, 7 Ga. 348.

VII. *Rights and duties of ferryman.*

a. *In general.*

The holder of a ferry franchise owes certain duties to the public because of the privileges given him, and he has certain rights in return, which are accorded him as compensation for the duties performed. Among his duties are to provide adequate means for accommodating the traffic, and to have the ferry in readiness for use at all times when it could reasonably be demanded under all the circumstances of the case. Furthermore, he must refrain from interference with traffic on the river more than is reasonably necessary.

Failure to exercise a ferry franchise may be ground of forfeiture. New York v. Starin, 106 N. Y. 1, 12 N. E. 631.

The law establishes ferries for the public good and convenience, and not for the individual profit of the keeper; and he who accepts this trust must provide himself with proper boats to accommodate the public at all stages of water, either high or low, or suffer the consequence of his neglect. Jabine v. Midgett, 25 Ark. 474.

One who accepts a ferry franchise is bound to furnish reasonable accommodations to the public, to submit to the general ferry regulations throughout the state, and to take just and reasonable toll as from time to time the legislature shall establish. Charles River Bridge v. Warren Bridge, 7 Pick. 344.

The public grants the exclusive privilege of ferrying for a consideration; that consideration is, that the public, or traveling community, shall be crossed at all reasonable hours without unnecessary delay. Jabine v. Midgett, 25 Ark. 474.

Where a railroad corporation, whose charter is subject to alteration by the legislature, has, under legislative sanction, acquired an existing ferry franchise as an extension and part of its railroad line, the legislature may require such corporation and its successors to operate the ferry. Brownell v. Old Colony R. Co. 164 Mass. 29, 29 L. R. A. 169, 41 N. E. 107.

A railroad company is not authorized to become the owner of, or operate, a ferry, unless such power is expressly or by necessary implication given to it by statute; and hence, a railroad company operating a ferry without such statutory authority is not liable to indictment for failure to keep it in repair. State v. Wilmington & M. R. Co. 44 N. C. (Busbee L.) 234.

b. *Right to tolls.*

The licensee has, under his license, a right to tolls, and the only question that can arise is whether or not he has in any case released them.

A custom by which all inhabitants of a certain village dwelling in ancient houses had passage on a ferry free of toll is good if founded upon a lawful beginning. Pain v. Patrick, 3 Mod. 289, *sub nom.* Payne v. Partridge, 1 Salk. 12.

And the keeper of a ferry is not discharged from his duty to carry certain persons free of toll by his constructing a bridge over which they can find passage. *Ibid.*

An agreement to carry a person on a ferry free of toll is not a covenant real, so as to bind a subsequent purchaser of the ferry, although it was made on a partition of a tract of land including the ferry landing and as part consideration for the transfer of the ferry landing to the covenantor. Morse v. Garner, 1 Strobh. L. 514, 47 Am. Dec. 565.

A reservation in a sale of a ferry franchise of ferriage for the grantor and his family free from all charges or demands forever, without any specified limitation, entitles such grantor to the free transportation of lumber which, under a contract for the running of his mill by another, it is his duty to haul to a point requiring the crossing of the river. Stephens v. Knott, 2 Or. 304.

The owner of a ferry franchise cannot encumber it with perpetual burdens the tendency of which would be to destroy its public usefulness. A contract, therefore, made by a ferry owner with the owner of land adjoining his landing on one side, granting free ferriage to such owner and family in consideration of the privilege of tying his ferry boat to a tree on his land, and of using a portion thereof for ferry purposes, is a mere personal contract, binding upon such owner and his successors so long as they voluntarily continue to use the property of such owner, but cannot be enforced against remote successors after the original franchise has expired, and they have ceased to make use of the privileges granted by the contract. Potts v. Park, 106 Ky. 202, 49 S. W. 1058.

One continuously using a ferry without objecting to the failure of the proprietor to comply with a statute providing for the forfeiture of tolls by owners of ferries neglecting to keep fixed up in a conspicuous place the rate of toll will be presumed to have used such ferry under a contract to pay the tolls, and cannot, in an action to recover them, set up such forfeiture as a defense. Addison v. Hard, 1 Bail. L. 431.

c. *Interference with rights of.*

1. *Absence of competition.*

What will be a violation of a ferry franchise will be determined primarily by its terms, and secondarily by the character of the acts complained of. Of course, if the franchise is not exclusive, the owner will have no ground to complain of rivals. So, complaint cannot be made of transactions occurring beyond the limits of the exclusive grant.

It is not the mere diminution of profits occasioned by a new ferry which constitutes it a nuisance to an old one, but to produce this effect the new one must be established within the range of the exclusive right of the old one, which is to be settled on proof of use in case of a prescriptive right, and by the grant where one exists. Charles River Bridge v. Warren Bridge, 7 Pick. 344.

In Newton v. Cubitt, 12 C. B. N. S. 58, which was an action for infringing a ferry franchise, the court said: The principle by which to decide whether the proximity of a

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new passage across the water to an ancient ferry is actionable, has not been clearly laid down. It seems reasonable to infer that, if the franchise of a ferry be established for facility of passage, and if the monopoly be given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water way; and it is obvious that the single landing place which sufficed for the uninhabited marsh would be utterly inadequate for several towns thronged with industrious mechanics.

In Churchman v. Tunstal, Hardr. 162, it was held that the owner of a ferry is not entitled to restrain the owner of land ¾ of a mile off from operating a ferry at such point, as to grant such relief would tend to create a monopoly. This case was, however, expressly overruled in Atty. Gen. v. Richards, 2 Anstr. 603, and in Huzzy v. Field, 4 L. J. Exch. N. S. 239, 2 Cromp. M. & R. 432, 5 Tyrw. 855, 1 Gale, 166. In the latter case Lord Abinger says that, upon another bill filed by Churchman in 1663, after the restoration, a decree was made by Lord Hale on the 18th of June, 14 Car. II., in favor of the same plaintiff, that the new ferry should be put down.

In Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773, Taney, Ch. J., in referring to the Churchman Case, stated that it was repugnant to all former cases, as well as later cases.

In Pim v. Curell, 6 Mees. & W. 260, an action for infringing a ferry, Parke B., stated that the report of Churchman v. Tunstal, in Hardr. 160, is incomplete, and that the statement of it in Huzzey v. Field, 2 Cromp. M. & R. 436, 4 L. J. Exch. N. S. 239, 5 Tyrw. 855, 1 Gale, 166, is correct; that the decision ultimately was for the plaintiff.

A ferry franchise is not infringed by one carrying people to a town near the terminus of the ferry, but at a sufficient distance from it to be of substantial importance to those having to pass to such town. Newton v. Cubitt, 12 C. B. N. S. 32. In this case the distance was 1,280 yards, and it was held that to carry persons to that point, who actually desired to go there and not to the terminus of the ferry, was not an infringement.

Where a ferryman is possessed of an exclusive ferry between certain points he cannot maintain an action against another for carrying persons across to a place near one of his termini, where it is not done fraudulently and for the purpose of avoiding the regular ferry, and the persons carried have no intention of going to the place situated at the terminus of the plaintiff's ferry. Tripp v. Frank, 4 T. R. 666.

He is not a "customer" of the established ferry who, wishing to go to a point half a mile from the terminus of the ferry, would have to get there through the marsh or hire a boat to take him there if he patronized the ferry; and the ferry franchise is not violated by one who sets him over at the desired place, although the law forbids the establishment of a competing ferry within that distance. Taylor v. Wilmington & M. R. Co. 49 N. C. (4 Jones L.) 277.

A ferry franchise is not infringed by the owner of another ferry landing a person across the river at a point from which he ultimately proceeds to the terminus of the other ferry, where it does not appear that to reach such terminus was his only object in crossing, and where there were points between the landing place and such terminus to which the passenger may have been going, although he eventually proceeded to the terminus. Huzzey v. Field, 2 Cromp. M. & R. 432, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855.

To be an infringement, the rival transportation must be across the stream in the regular way in which ferries operate, for a ferry franchise is not invaded by one maintaining a line of steamers for the transportation of freight along a river, having a landing at a place 2 miles from, but within the exclusive franchise of, the ferry, no persons being carried over the river for fee or reward. Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633; Huzzey v. Field, 2 Cromp. M. & R. 432, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191.

But rights of commerce give no authority to their possessor to invade the ferry franchise of another. Conway v. Taylor, 1 Black, 603, 17 L. ed. 191.

And equity will restrain the infringement of a ferry franchise by a vessel owner having a United States harbor license, making regular, hourly "excursions" between the same places, and soliciting persons to take his boat instead of the ferry. Midland Terminal & Ferry Co. v. Wilson, 28 N. J. Eq. 537.

2. *Carriage without compensation.*

The courts have not fully agreed as to how far carriage merely for accommodation without charging for the service would violate the ferry rights.

One line of cases holds that, to entitle an owner of a licensed ferry to maintain an action for damages from the running of another ferry within the distance prohibited by statute, it must appear that such ferry was run for fee or reward, or the promise or expectation of it, or that it was run for other than the personal use of the owner, or that of his family. Hanson v. Webb, 8 Cal. 237.

One who transports people across a stream without receiving compensation for his services does not infringe the exclusive privilege granted to another to maintain a ferry in the vicinity. Chapelle v. Wells, 4 Mart. N. S. 427.

On similar grounds, it is held that an individual has the right to transport himself over a river in his own boat, although there may be a licensed ferry at the same place, but he may not make this individual right the medium or cover of conveying travelers whose carriage legally belongs to the licensed ferryman. Weld v. Chapman, 2 Iowa, 524.

Under the statute of Arkansas in relation to ferries, which provides that, when a franchise has been granted, a similar franchise shall not be granted to another within a mile along the stream, a ferry licensee has no right to prevent citizens from using their own boats upon the stream for a mile above or below, carrying themselves, their families, employees, guests, or occasionally a friend, or occasionally lending their boats to each other; but such persons, in using the banks of the licensee for landings except at a public highway, and in crossing his lands to reach their boats, are liable as trespassers. Hunter v. Moore, 44 Ark. 184, 51 Am. Rep. 589.

It is not an infringement of an exclusive ferry privilege for a person operating a manufacturing establishment regularly to carry his property across the river on a flat boat at such times as may be convenient. Alexandria, W. & K. Ferry Co. v. Wisch, 73 Mo. 655, 39 Am. Rep. 535.

So, one crossing a river at a point where there is a ferry, in a canoe not belonging to the owner of the ferry, but landing on the other

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side by getting from the canoe into one of the ferryboats and from thence to the bank, is not liable for the rate of ferriage allowed by law. Henry v. Turner, 2 Port. (Ala.) 23.

It would seem that the question of the liability for such acts as the above would have to turn on the circumstances of the case. It probably cannot be held to be a violation of a ferry right for a neighbor to use his own skiff on the river, even though he utilizes it occasionally to reach the other shore. But such acts may easily become an abuse.

Thus, the purchase by a number of persons, of a ferryboat and landing places on each side of a river, and their exclusive use for the ferrying of such owners and their families across such river by a ferryman employed by them at a yearly salary, without carrying any other persons either for toll or free, are unlawful as against the owner of a regularly licensed ferry established within the distance from such other prohibited by law, as a combination formed manifestly for the purpose of evading the payment of tolls; and he may enjoin its use. Warren v. Tanner, 21 Ky. L. Rep. 1678, 56 S. W. 167.

And a tavern keeper who transports across a river gratuitously persons who stop at his hotel is liable in damages to the lessee of the exclusive right to keep a ferry at that point. Fenner v. Watkins, 16 La. 204.

So, an unlicensed person who, while a bridge is being repaired, operates a ferry for the accommodation of himself and others from whom he receives pay, and thereby infringes the right of one licensed to maintain a ferry until the bridge is completed, cannot urge that he keeps only a private ferry, if it was established in consequence of the bridge being broken, and would not have been used if the bridge had been passable. McInnis v. Pace, 78 Miss. 550, 29 So. 835.

3. *Bridges.*

Whether or not the erection of a bridge within the exclusive limits of a ferry franchise violates the rights of the ferryman will depend on the construction which the courts give the license,—whether or not it is exclusive of bridges, as to which see IV. b,—and on the purpose for which the bridge is intended.

A ferry franchise is not infringed by the construction of a railroad bridge connecting with a railroad at either side, and over which the railroad trains with their passengers are carried, even though it be constructed without the authority of an act of Parliament. Hopkins v. Great Northern R. Co. L. R. 2 Q. B. Div. 224, 46 L. J. Q. B. N. S. 265, 36 L. T. N. S. 898.

And a railroad bridge is not rendered an infringement of a ferry franchise by the fact that it is provided with a foot bridge for the use of which no toll is charged, and which is used to enable passengers to go to and from the railroad station, although it may be used by trespassers who are not going to the railroad station. *Ibid.*

The fact that a ferry is not actually injured by the construction of a railway toll bridge and foot way, which divert traffic from the ferry, until such traffic is actually diverted, does not prevent the injury from arising from the construction of the bridge, within the meaning of the statute entitling to compensation the owner of property injuriously affected by the construction of the railway. Queen v. Cambrian R. Co. L. R. 6 Q. B. 422, 40 L. J. Q. B. N. S. 169, 25 L. T. N. S. 84, 19 Week. Rep. 1138.

The ferry landing not being affected or obstructed by the erection of a bridge across the Ohio river, the owners of an exclusive franchise for a ferry across that river at that point are not entitled to a recovery of damages for any loss and injury sustained in consequence of the erection of such bridge. Platt v. Covington & C. Bridge Co. 8 Bush, 31.

But where a ferry is attached to the adjoining land an injury to it by the construction of a railway bridge entitles the owner to compensation as for an injury to the land. *Re* Cooling, 19 L. J. Q. B. N. S. 25, 14 Q. B. 25, 14 Jur. 128.

Although in Pennsylvania it has been held that a lawful construction of a railroad bridge over a river in such a way as to interfere with a ferry landing is not an injury to private property in the ferry franchise, for which compensation must be made. Pittsburgh & L. E. R. Co. v. Jones, 111 Pa. 204, 56 Am. Rep. 260, 2 Atl. 410.

The establishment and maintenance of a free bridge over a river within 2 miles by water of a public ferry is a violation of the spirit of a statute prohibiting the establishment of a public ferry within 2 miles by water of a ferry already established, which will be enjoined. Gates v. M'Daniel, 2 Stew. (Ala.) 211, 19 Am. Dec. 49.

One claiming a right to operate a ferry cannot recover damages of persons maintaining a toll bridge which diverts traffic from the ferry, unless it appears that at the time of the alleged injury the plaintiff was licensed to keep a ferry. Hanger v. Little Rock Junction R. Co. 52 Ark. 61, 11 S. W. 965.

The injury to a ferry for which a bridge company would be liable under its charter on building its bridge is such as it would be liable for at common law, if it invaded the ferry right without statutory authority. Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 558.

A ferry in existence and continuously operated many years before a bridge company is incorporated, is included among those entitled to compensation when injured by the erection of the bridge, notwithstanding a subsequent act of the legislature authorizing its establishment and the taking of tolls at it, as such act merely confirms prior rights and gives additional privileges. *Ibid.*

One who claims the right to operate a ferry, and who institutes an action against the owners of a toll bridge for diverting traffic from it, cannot recover, unless it appears that the defendants collected tolls without lawful authority, from persons using the toll bridge. Hanger v. Little Rock Junction R. Co. 52 Ark. 61, 11 S. W. 965.

A ferry company is not entitled to recover damages for the diversion of travel by the construction of a bridge upon its line, although it is entitled to damages or injuries to it by the placing of piers in such a way as to interfere with the passage of its boats. Riverton Ferry Co. v. McKeesport & D. Bridge Co. 1 Pa. Super. Ct. 587.

4. *Other matters.*

The violation of an exclusive ferry privilege cannot be excused because the owner did not furnish full accommodation to all who applied. Hickley v. Glidersleeve, 10 U. C. C. P. 460.

But the ground upon which the owner of an ancient ferry can claim protection against an infringing ferry is the obligation he is under to keep the ferry always in a fit state for the use of the public; hence, it was held that one operating a ferry on Sundays only, under a special license for that purpose, and being under no obligation to keep up the ferry, but being free to abandon it at any time, could not maintain an action against an infringing ferry in the

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absence of fraud. Letton v. Goodden, L. R. 2 Eq. 123, 35 L. J. Ch. N. S. 427, 14 L. T. N. S. 296, 14 Week. Rep. 554.

Where riparian owners have no right to keep a ferry so as to charge a compensation for transporting persons or property over the river, they cannot recover against one for merely transporting passengers across the river on a boat kept by defendant for that purpose. Organ v. Memphis & L. R. R. Co. 51 Ark. 235, 11 S. W. 96.

The owner of a ferry across the Ohio river cannot recover damages for a disturbance of his ferry privilege by a rival, unless he is entitled by law to the exclusive ferry privileges at that point. Owens Bros. v. Lockwood, 83 Ky. 266.

The operation of a ferry will not be enjoined at the suit of a competitor on the ground that persons crossing at such ferry might commit a trespass on complainant's property by making use of a toll road thereon without paying toll. Collins v. Sherman, 31 Miss. 679.

In Anonymous, 1 Ves. Sr. 476, the court, in determining a motion to restrain before answer the operation of an infringing ferry that was of great importance to a large city, said this is like the ferry on the Thames and the passage of boats to Gravesend, which have a sole right of carrying, yet other ferries do carry every day, and it is not held an infringement of their right.

A ferry right is infringed by the act of taking across a single person who would otherwise have gone by way of the ferry. North & South Shields Ferry Co. v. Barker, 2 Exch. 136.

A ferry right is not limited to boats exceeding a certain size or burden, so as to permit others to operate a ferry of smaller burden, by a statute declaring that if any person should use any boat exceeding a specified burden in ferrying for hire across a river, he should be subjected to a penalty, as such statute merely added accumulative remedy by way of penalty. *Ibid.*

A ferry franchise is infringed by the operation of a ferry within a short distance of its termini, and which carries people whose immediate destination is one of the termini of the licensed ferry. Jellett v. Anderson, 27 Grant Ch. (U. C.) 411.

In Norwood v. Norwood, 4 Harr. & J. 112, Hanson, Chancellor, in refusing to determine the right to an injunction to restrain the operation of a rival ferry by one tenant in common of an existing ferry, because of insufficiency of the evidence before him, considered that if two persons agree to set up at their joint expense a ferry for the accommodation of travelers on a certain road, and the ferry is accordingly set up, the setting up of another ferry by one of such persons for his own emolument within a short distance of the first ferry to accommodate the same set of travelers would be a violation of the right and interests of his partner; but if the ferry, although near by, is only for the accommodation of the travelers on another road who would not otherwise cross at the old ferry, the other owner would not be entitled to have it suppressed.

A person operating a ferry is liable for the act of his servant in landing a person at a point which infringes another ferry franchise. Huzzey v. Field, 2 Cromp. M. & R. 432, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855.

The owner of a ferry has a cause of action against one carrying passengers in the line of the ferry, whether it is done directly or indirectly. He has a right to the transportation of passengers using the way. And, if the alleged wrongdoer makes a landing place near to the ferry landing place, so as to be in substance the same, making no material difference to travelers, such wrongdoer will be liable. But where the alleged infringing ferry lands people at such a distance from the old ferry as to be of substantial importance to the passengers, it is not an infringement. Newton v. Cubitt, 12 C. B. N. S. 58.

d. Remedy for violation of right.

1. Who entitled to.

In general, it may be stated that anyone whose rights are interfered with according to the principles stated *supra*, VII. c, is entitled to relief.

Thus, the construction of a ferry without public authority, so near to a licensed one as to draw away its custom, is a nuisance for which the owner of the licensed ferry may maintain an action. Stark v. M'Gowen, 1 Nott & M'C. 387, 9 Am. Dec. 712.

But a person operating a ferry under a grant conferred by a special act of legislature, which confers no exclusive franchise or power to declare a forfeiture of the boat of another who runs a ferry without authority within the distance from his ferry prohibited under the general ferry laws, cannot avail himself of the provisions of the general ferry laws authorizing a forfeiture in such case. Gear v. Bullerdick, 34 Ill. 74.

So, consent by the owner of a ferry to the erection of a bridge within the limits of his exclusive privilege will prevent his recovering damages for injuries to his ferry right, caused by the erection of the bridge. Morey v. Orford Bridge, Smith (N. H.) 91.

And one asking to restrain a defendant from maintaining a ferry on the ground that it interferes with his exclusive privilege must recover on the strength of his own exclusive right: and it is not sufficient that the defendant has no right to maintain the infringing ferry. Londonderry Bridge Comrs. v. M'Keever, Ir. L. R. 27 Eq. 464.

So, a county is not liable for injuries to the landings and ferry right of an owner by the construction of a bridge over a stream, where the building of the bridge by the county commissioners was unauthorized and wholly outside the powers conferred on the board, because the stream formed a boundary line between that and another county, and they failed to obtain the concurrence of the commissioners of the latter county to its building as required by law. Browning v. Owen County, 44 Ind. 11.

A suit for the disturbance of an exclusive ferry privilege can be maintained only by the person in whom the grant lies. Higgins v. Hogan, 7 U. C. Q. B. 401.

The owner of an exclusive ferry privilege has a right of action against a person establishing a free ferry which takes away part of his custom, although the person establishing the free ferry receives no benefit from it, as the ground of the action is the injury which the owner of the privilege sustains, he having assumed the burdens attached to the privilege. Long v. Beard, 7 N. C. (3 Murph.) 57.

Where one operating a ferry on Sundays only, under a license authorizing him so to do, is under no obligation to keep up the ferry, being free to abandon it at any time, his right does not stand upon the same footing as an ancient ferry, and he cannot maintain an action for infringing his right, although the effect of the infringing ferry is to divert traffic. Letton v. Goodden, L. R. 2 Eq. 123, 35 L. J. Ch. N. S. 427, 14 L. T. N. S. 296, 14 Week. Rep. 554.

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In Blissett v. Hart, Willes Rep. 508, it was held that, in an action by the owner of a ferry against a person erecting an infringing ferry, the plaintiff need not allege that he was seised in fee, his possession being sufficient to entitle him to maintain the action; and that he need not set forth in his declaration that he keeps boats and ferrymen sufficient to carry passengers. The reason given by the court for its opinion did not appear in the report of the case, but in a note appended to it the reporter gave the following extract from Mr. Justice Abney's note book: "By the court, a ferry is *publici juris*. It is a franchise that no one can erect without a license from the Crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a license the Crown has a remedy by quo warranto, and the former grantee has a remedy by action. But what profits it yielded, and what repair it was in, were proper for the consideration of the jury to found their damages upon."

A ferry owner has a right of action against one who carries his customers between points served by his ferry, under a grant which forbids any other person "for fee or reward, contrary to the intent and meaning of" the act, to set over any person within the limit of his exclusive franchise. Taylor v. Wilmington & M. R. Co. 49 N. C. (4 Jones L.) 277.

One tenant in common of a ferry franchise, in sole possession thereof, may maintain an action to protect it from injury or destruction by the operation of another ferry within 1 mile thereof contrary to statute. Fortain v. Smith, 114 Cal. 494, 46 Pac. 381.

An owner of a ferry is in possession of it, so as to entitle him to maintain an action against a person infringing his right, where, after having demised it to another by parol at a certain annual rental, he, finding it unprofitable, proposes to become the servant of the owner and to account to him for all the money received from passengers upon being allowed fixed daily wages, which is done. Peter v. Kendal, 6 Barn. & C. 703.

The fact that the owner of a ferry franchise had abused it by neglecting his duties will not deprive him of an action against another for infringing his franchise, as his neglect can be taken advantage of only by a direct proceeding by the Crown. *Ibid.*

In an action by the owner of a ferry for disturbance of his franchise he need not produce a grant from the Crown, where he proves that he has been in possession of and used the ferry for such a time as will raise a presumption of its having been originally founded on a grant. In this case he had been in possession for thirty-five years, which the court held was sufficient to raise such a presumption. Trotter v. Harris, 2 Younge & J. 285.

No recovery can be had for the infringement of a ferry franchise during the time when the plaintiff had no license. Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809.

The widow and children, who have continued in possession and the operation of a ferry since the death of its owner, have such a joint interest as entitles them to maintain proceedings for an award against a bridge company required, on constructing its bridge, to pay damages to all ferry owners injured thereby. Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 558.

When one owns a state franchise from one shore for a ferry crossing a river bounding different states, which he uses and enjoys, and can only use and enjoy, by compact with the owner of a like franchise from the other state on the opposite shore, each franchise being independent of the other, it is not necessary that the owner of the foreign franchise be joined with him in proceedings to recover the value of this franchise destroyed by the building of a bridge in the locality. Columbia Delaware Bridge Co. v. Geisse, 38 N. J. L. 39, Affirmed in 38 N. J. L. 580.

A licensee of the right to keep a ferry is not entitled to injunctive relief against another who is operating upon the same route, where he has not complied with the conditions of his license, but has neglected to keep and attend the ferry, thus rendering another a public necessity. Willard v. Forsythe, 2 Mich. N. P. 100.

A corporation empowered by statute to establish and work a steam ferry cannot restrain a person who, without any title, has established a ferry which interferes with the profits of its ferry, unless it, like the proprietors of ancient ferries, is under obligation to maintain the ferry. Londonderry Bridge Comrs. v. M'Keever, Ir. L. R. 27 Eq. 464.

The purchaser of a ferry franchise cannot maintain an action enjoining the establishment of another ferry at the same point, where he is operating his ferry without having obtained leave of court to make the purchase, or having filed his bond with surety in lieu of that of the former owner, as is required under the ferry laws of Kentucky. Davis v. Connolly, 21 Ky. L. Rep. 1459, 55 S. W. 691.

In a suit to restrain defendant from maintaining a ferry, an injunction will not be granted where the plaintiff does not show an exclusive ferry privilege, but only alleges that he is entitled to a ferry privilege, and has kept for several years, and is keeping, a ferry at the place where the defendant has his ferry, and that he owns the land on one side of the river, on which is a landing where both he and the defendant land their ferry boats. Butt v. Colbert, 24 Tex. 355.

A bill in equity cannot be maintained by one tenant in common against a purchaser from the administrator of the other cotenant of his interest in the land, for an accounting for a share of the proceeds of a disused ferry of the deceased cotenant which the purchaser had reestablished in opposition to a ferry which had been run by such cotenants as partners, where the surviving cotenant declined to recognize the purchaser's title to a moiety of the land, and refused to take him into partnership, as he had the right to enter upon the land and enjoy the same as his predecessor had done. Spann v. Nance, 32 Ala. 527.

The lessee of a ferry franchise is not entitled to relief by injunction against the operation of another ferry within a short distance thereof, in the absence of any proof of his lease, or of the corporate character and right of his lessors, who described themselves as certain commissioners to whom the grant of the franchise appears, by the record of the court of roads and revenues, to have been made. Carter v. Garrett, 13 Ala. 728.

The owner of a ferry, who has resorted to unfair means to divert travel from the ferry and tollgate of another on one side of a river, will not be granted an injunction to restrain interference by such tollgate owner with a private way from his ferry to a public road on the other side of the river on which the tollgate is located, by the straightening of the public road adopted by the overseer of the road and the building of a fence on the land of the tollgate owner so as to cut off the private way, which had not been established under the

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statutory provisions regulating such ways. Hill v. Averett, 27 Ala. 484.

To entitle the owner of an exclusive ferry franchise granted by the legislature, to an injunction to restrain the operation of a rival ferry within the limits of his grant, he must have perfected his right by fulfilling all the obligations imposed upon him by the act granting the franchise as a condition of his right thereto, and must have placed himself in a condition to furnish to the public the facilities for transit which the franchise was designed to secure, there being an implied obligation imposed upon him, by his acceptance of the grant, to furnish such facilities. Walker v. Armstrong, 2 Kan. 198.

The grantee of a ferry privilege is entitled to an injunction against one who, having no license, undertakes to operate another ferry in competition with that which is licensed; and it is not necessary that the grant of the ferry privilege should exclude the power to grant a license for another ferry, but it is sufficient that no such second license has in fact been granted. Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

An injunction will not be granted, at the instance of the owner of a ferry franchise, to restrain the operation of another ferry which has become a public necessity by reason of the former's inattention to business and gross neglect warranting the forfeiture of his rights, even though the competition of the other ferry may have caused such neglect, as that is no excuse therefor. Ferrel v. Woodward, 20 Wis. 459.

A license to maintain a ferry confers an exclusive right, subject only to the establishment by the board of supervisors of such other ferries as the public convenience may require; and the licensee is entitled to injunctive relief and damages against one who infringes his right. McInnis v. Pace, 78 Miss. 550, 29 So. 835.

2. *Action at law.*

There is no doubt but that one who infringes a ferry right is liable for the injury thereby inflicted on the owner, and recovery may be had in a common-law action on the case.

An action lies against one who sets up a ferry to the injury of an existing one. 22 Hen. VI. 14, pl. 23.

But if the public convenience requires a new passage the proximity to the old ferry is not actionable. Newton v. Cubitt, 12 C. B. N. S. 58.

In Huzzey v. Field, 2 Cromp. M. & R. 439, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855, it is said by Lord Abinger that, as early as in the year book 22 Hen. VI., 146, it was laid down by Paston that if one sets up a ferry upon the same river as an ancient ferry, and near it, so that its profits are impaired, the owner will have an action against him on the case, and that Newton says the case of a ferry differs from that of a mill. We are bound to sustain a ferry, and to serve and repair it in ease of the common people; and that this proposition is quoted in 2 Rolle Abr. 140 (G), pl. 4, Comyns, Digest, *Piscary*, B, and *Action on the case for a nuisance*, and in most of the cases in which the rights of a ferry have come in question. He further states that the authorities appear to be clear, that, if a new ferry be set up without the King's license, to the prejudice of the old one, an action will lie, and there is no case which has the appearance of being to the contrary except that of Tripp v. Frank, 4 T. R. 666; these old authorities proceeding upon the ground (1) that the grant of a franchise is good in law, being for a sufficient consideration to the subject, who, as he receives compensation, may have by the grant of the Crown a corresponding obligation imposed upon him in return for the benefit received; and (2) that, if another, without legal authority, interrupts the grantee in the exercise of his franchise by withdrawing the profit of passengers which he would otherwise have had, and which he has in a manner purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury.

The owner of a lawfully established ferry may maintain an action for damages against the owner of an unlicensed ferry operating across the same stream within the distance from such other ferry prohibited by law. Owens v. Roberts, 6 Bush, 608.

The question of the effect of the fixing of a penalty for violation of the right has given the courts some trouble.

In Miles v. Craig, 3 La. Ann. 635, it was held that, in the absence of express legislative authority, a police jury cannot delegate to the lessee of a ferry the right to enforce in his own name penalties incurred for violating the exclusive ferry privilege leased.

But in Almy v. Harris, 5 Johns. 175, it was held that a person having a right of ferry granted under the statute for the regulation of ferries cannot maintain an action on the case for disturbance of his right, but his remedy is limited to suit for the penalty given by statute.

That the running of a ferry without license is made a misdemeanor does not prevent a suit for the damages thereby inflicted by a violation of an exclusive ferry franchise. Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809.

A limited right which may be protected by indictment, and not an exclusive franchise for interference with which a civil action may be maintained, is created by a statute making the running of a ferry for compensation without a license a misdemeanor punishable by fine, and providing that no ferry or toll bridge shall be established within 1 mile, either above or below a regularly established ferry or toll bridge, unless it be required by public convenience. The court says further, however, that the party aggrieved may resort to a court of chancery for relief. Ward v. Severance, 7 Cal. 126.

Although a licensed owner of a ferry in Kentucky may bring an action for damages against any person encroaching upon his rights, he cannot maintain such an action under the general ferry statutes of that state, unless such encroacher is also a licensed ferry owner, as such statutes are intended only to protect the licensed owner of one ferry against the encroachments of a licensed rival in his business. Lowry v. Dixon, 12 Ky. L. Rep. 466.

An act prescribing penalties for carrying for hire persons or goods across a river where an established ferry is kept, and which only purports to give additional remedies to the common-law remedy for the infringement of a ferry, is not exclusive, and the common-law remedy may be enforced. Gibbes v. Beaufort, 20 S. C. 213.

By the provision of the ferry laws of Illinois declaring that a person running a ferry within 3 miles of an established ferry, without authority, is liable to forfeit his boat to the owner of such established ferry, the legislature did not intend the forfeiture should be declared by the party injured; that must be done by some judicial proceeding, and, when done, the proprietor of the established ferry may take possession of the boat, without which the tak-

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ing of such boat is wrongful and tortious. Gear v. Bullerdick, 34 Ill. 74.

It is not the mere license to keep a ferry which invests the person licensed with the right to seize the boats of another run at or near such ferry, as provided by the ferry laws of Illinois, but such right matures only upon his exercising his privilege conferred by the license, by establishing a ferry and putting it into operation for such purpose, doing every act required by law. Lombard v. Cheever, 8 Ill. 469.

One tenant in common of a ferry may recover his share of the income of the ferry from his cotenant, who has taken exclusive possession thereof. Puckett v. Smith, 5 Strobh. L. 26, 53 Am. Dec. 686.

But where one of two tenants in common of land on which a ferry may be kept obtains a license and keeps a ferry, without interfering with the rights of his cotenants to do the same thing, he is not bound to account to them for the profits received. Ragan v. McCoy, 29 Mo. 367.

A writ of forcible entry and detainer will not lie for forcibly taking possession of a ferry and the banks and shores of the river, where the party so taking possession has a right of ferry established. Rees v. Lawless, Litt. Sel. Cas. 184, 12 Am. Dec. 295.

But it seems that one who is in the actual occupation of a ferry, though without license, can sustain an action against another who dispossesses him without authority. Ogden v. Lund, 11 Tex. 688.

3. *Equitable remedy.*

The remedy at law is not as prompt and effective as an equitable remedy would be, and suitors, therefore, are prone to bring their suits in equity if that court will take jurisdiction. There has been some disinclination on the part of equity courts to entertain jurisdiction, but there can be no question that the case is within such jurisdiction if it presents any of the well-recognized grounds therefor. So far as the remedy depends upon the right of the complainant to maintain the suit, the cases will be found under VII. d, 1, *supra*.

The right to a ferry privilege is a franchise, and courts of equity will protect the person in possession and entitled thereto from repeated disturbance by enjoining the disturber. Hazelip v. Lindsey, 93 Ky. 14, 18 S. W. 832.

A person legally licensed to operate a ferry is entitled to an injunction against persons operating one without a legal license, to his injury, although his right is not exclusive. Green v. Ivey (Fla.) 33 So. 711.

Injunction is the proper remedy to employ when one, without authority of law, is operating a ferry to the injury of another who is the owner of a ferry franchise. Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

But an action for damages for injuries to a ferry franchise, caused by the erection of a near-by bridge, is a civil case involving unliquidated damages, and therefore outside the jurisdiction of a chancery court. Rhea v. Hooper, 5 Lea, 390.

A bill in chancery does not lie to be quieted in the possession of a ferry operated by a rope, as the rope is an obstruction to navigation, and one claiming such a right must first establish it at law. Hilton v. Scarborough, 4 Vin. Abr. 425.

A ferry franchise is property, and for an interruption of his rights the owner thereof is entitled to an injunction against the offending party when the injury is of a continuous nature, and is committed under a claim which indicates a continuance or frequent and constant repetition of it. Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884, Affirmed in 110 Mo. 557, 19 S. W. 809.

The only one having a right to take tolls for ferriage to and from a certain city may enjoin an interference with his rights, although the city had no power to grant an exclusive franchise. Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.

An injunction will be granted at the suit of the owner of a ferry franchise to restrain interference therewith by the operation of another ferry by one having no license therefor, where he has an exclusive right to the franchise by reason of having substantially complied with part of the statutory requirements at the time of his application, and with the requirements as to approval by the court and payment of a fee to the treasurer as soon as there were a court and treasurer. Drew v. Gant, 1 Or. 197.

The owner of an exclusive ferry is entitled to an injunction restraining the operation of an interfering ferry, where he is unable to obtain proofs showing the extent of his loss of profits. Long v. Beard, 4 N. C. (Term Rep.) 256, 6 N. C. (2 Murph.) 337.

Where, in an action to restrain the operation of an infringing ferry, it becomes necessary to determine the legal rights of the parties, the court will not restrict the plaintiff to his action at law where it is inadequate; but where, by affidavits, the legal issue has been plainly presented to the court, it will direct that issue to be tried, although the answer has not been served. Cory v. Yarmouth & N. R. Co. 3 Hare, 593.

Where the erection of a bridge will damage a ferry, a court of equity has jurisdiction to restrain the injury to the ferry as taking private property for public use without just compensation, even though an action at law will lie for the recovery of damages after the property has been taken or damaged. Mason v. Harper's Ferry Bridge Co. 17 W. Va. 396.

Injunction refused.

A ferryman who is authorized by his license to keep a certain kind of ferry at a point designated, the license to extend 2 miles above and 2 miles below the point, when the license does not give him the exclusive privilege, may not have the conveyance of passengers across the river by another party in another kind of boat within the 2-mile limit enjoined, when his petition does not aver that the defendant did not have a license or that he carried passengers across for pay. McEwen v. Taylor, 4 G. Greene, 532.

The owner of a ferry is not entitled to an injunction restraining the operation of a free ferry on the ground that it will interfere with his profits, as he has an adequate remedy at law to recover damages. Long v. Merrill, 4 N. C. (Term Rep.) 112. (Later the injunction was granted, the plaintiff being unable to prove the extent of his lost profits. See 4 N. C. [Term. Rep.] p. 256.)

The court will not grant an injunction restraining the operation of an infringing ferry, pending the trial of the legal right to operate it, where accounts can be kept of the number of people carried and the measure of damage approximately estimated so that no irreparable mischief can be done by a continuance of the operation of the ferry. Cory v. Yarmouth & N. R. Co. 3 Hare, 593.

A court will not enjoin the construction of a ferry for which a franchise has been taken

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out, because it is to be placed so near the ferry of another that it will render his unprofitable, or because there is no public necessity for it. Hudspeth v. Hall, 113 Ga. 4, 38 S. E. 358.

An injunction will not be granted to restrain the alleged infringement of the complainant's statutory right to exclusive ferry privileges, unless his right is clear and without doubt, his possession actual, and his legal title not put in doubt. Minturn v. Larue, 1 McAll. 370, Fed. Cas. No. 9,646.

An injunction will not be granted to restrain a ferryman from interfering with the operation of ferryboats maintained by a railroad company authorised to operate them, but which had contracted to use only the public ferry of the defendant; but the parties will be left to their remedy at law. Texas & P. R. Co. v. Baton Rouge, 36 Fed. 845.

Under the statutes of Kentucky, the only remedy against an erroneous order of a county court establishing a ferry is by an appeal, and no power is conferred upon the circuit court to enjoin and restrain, by an independent action, the exercise of a ferry franchise thus granted. Stahl v. Brown, 84 Ky. 325, 1 S. W. 540.

Where different persons, not in combination, land their boats upon a ferry landing, and are liable in trespass, equity will not interfere by injunction to prevent a multiplicity of suits, where it appears that the damage by the trespass is not real, and the landing of the boats does not amount to a nuisance. Hunter v. Moore, 44 Ark. 184, 51 Am. Rep. 589.

Although the plaintiff's right to the sole use of a ferry had been decreed, the court, in a subsequent suit to restrain others from using an infringing ferry, refused to grant an injunction before answer, where the operation of the ferry was of great consequence to the city of London, and the plaintiffs had not shown that they had kept up sufficient ferryboats. Anonymous, 1 Ves. Sr. 476.

In an action by the owner of an exclusive ferry franchise against a bridge company incorporated under a general law, to restrain the corporation from erecting a bridge to the injury of the plaintiff, it appeared that no legislation had prescribed the manner in which the bridge company could acquire the legal right to damage the franchise of the plaintiff; and it was held that, although the plaintiff had the right to restrain the defendant from constructing and operating its bridge until compensation should be paid or secured to the plaintiff, as it appeared that the bridge company had expended much money, equity would award an issue *quantum damnificatus* to assess the damage to the plaintiff's ferry franchise by the erection and use for public travel of the toll bridge of the defendant and would decree that, after the damage is ascertained, the injunction shall continue in force until the damage is paid, but when paid the injunction shall be wholly dissolved. Mason v. Harper's Ferry Bridge Co. 17 W. Va. 396.

4. *Defenses.*

The owner of a ferry franchise is not deprived of his right to an injunction to restrain interference therewith by the operation of another ferry under an illegal license, by the expiration of his license due to the incompetency or failure of the supervisors to grant a renewal, to which he is entitled under the statute, as his privilege cannot be defeated by their incompetency or failure to act in the premises. Chard v. Stone, 7 Cal. 117.

In an action against a railroad company for injury to the land and a ferry right appurtenant thereto, the fact that the company had employed skilful engineers, and had done no wilful or unnecessary damage, does not relieve it from liability for the damages actually done. New Albany & S. R. Co. v. Huff, 19 Ind. 315.

The fact that one claiming a ferry right, and operating under it, has not paid license regularly, is not available as a defense to one disturbing such person in its enjoyment, or destroying or injuring the same. *Ibid.*

A bridge company required by its charter to pay damages to a ferry owner injured by the construction of its bridge is not relieved from such payment because the act establishing the ferry was not passed until after its charter, although the ferry had existed long prior thereto. Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 558.

The validity of a ferry license cannot be assailed in a proceeding to enjoin one set up in opposition or interference, where it was granted by the proper court over some place within its jurisdiction, and a proper bond was filed. Collins v. Ewing, 51 Ala. 102.

The legality of a grant of a ferry franchise from the proper authorities cannot be collaterally attacked in an action on the case by the owner of another ferry franchise for a disturbance of his ferry. Connor v. Paxson, 1 Blackf. 168.

The defense that a ferry company is operating under a franchise that was not to take effect until another still in force has expired, or that the franchise has been forfeited, cannot be set up in an action against another company for infringing such franchise, as these are questions that can only be raised by the grantor of the franchise. Capital City Ferry Co. v. Cole & C. Transp. Co. 51 Mo. App. 228.

e. *Damages.*

A person who invades another's ferry franchise is liable for any injury he causes to the owner of the franchise. New York v. Starin, 106 N. Y. 1, 12 N. E. 631.

In determining the damages resulting to a ferry from constructing a bridge in its locality, it is proper to show the receipts from tolls in preceding years, and also the rates of toll fixed by public authorities even before the legislative franchise was granted, as bearing on the value of the ferry right, and as the official estimate of what tolls were reasonable. Columbia Delaware Bridge Co. v. Geisse, 38 N. J. L. 39.

One having, by franchise, the exclusive right to maintain a ferry may have damages against one who operates an unlicensed ferry within the forbidden distance, and loss of tolls is not so remote and uncertain a measure of damages as to afford no basis for an action. Blackwood v. Tanner, 23 Ky. L. Rep. 1919, 66 S. W. 560.

The act of March 7, 1839, authorizing the appraisal of damages to ferry owners injured by a Delaware river bridge, to be paid by the bridge company, provides for the absolute extinguishment of the ferry; and prospective, as well as immediate, damages are to be included; and in determining these the leases and account books of ferry receipts are properly taken into consideration. Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 474.

Diminution of the income of a ferry by the diversion of custom and travel which the building of a bridge near by would cause cannot be taken into consideration as proper incidental and collateral damages, in assessing the value of land taken for such bridge, where no part of the ferry landing is taken, and the

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construction of such bridge will interpose no physical obstruction to the enjoyment of the ferry franchise. Richmond & L. Turnp. Road Co. v. Rogers, 1 Duv. 135.

A bridge company is liable for loss of earnings to a ferry so far as they result from taking its earning power; but it is not liable for losses from business competition, so that a ferry company may recover earnings lost by obstruction of the landing during the construction of the bridge. Riverton Ferry Co. v. McKeesport & D. Bridge Co. 179 Pa. 466, 36 Atl. 186.

Upon the trial of an issue *quantum damnificatus* to ascertain the damage to a ferry franchise by the construction and operation of a bridge, the jury may consider, for the purpose of ascertaining the damage, the amount of travel and the revenues derived from the exercise of the ferry franchise while the ferry proprietor was landing his boat on the land of another, as the trespass in such a case is a matter between the landowner and the ferryman; but the jury should also consider, in estimating the damage, the fact that there might not have been so much travel attracted to the ferry if the ferryman had not used the land of another as a landing. Mason v. Harper's Ferry Bridge Co. 20 W. Va. 223.

Upon the trial of an issue *quantum damnificatus* to ascertain the amount of damages sustained by a ferry franchise by the operation and erection of a toll bridge, a jury should regard the franchise as permanent, and, in estimating the damage, should not take into consideration the fact that the legislature may repeal the law creating the exclusive privilege of transportation by the ferry owner across the river. *Ibid.*

Upon the trial of an issue *quantum damnificatus* to ascertain the damage to a ferry franchise by the construction and operation of a bridge, where it appears that the landings to a ferry are not convenient or safe for the purposes of travel, the ferry owner is entitled to the injury resulting to his franchise by the erection of the bridge, less the amount of the cost of making the ferry landing safe and convenient. *Ibid.*

A railroad company is liable for consequential damages sustained by a ferry owner by the erection of the embankments, bridges, etc., of the railroad beyond the line of his land. New Albany & S. R. Co. v. Huff, 19 Ind. 315.

A ferry company having a landing at the end of a highway can recover such damages as are attributable to the obstruction of their landing by a bridge approach, but not for loss of business because of a greatly improved method of crossing the river. Riverton Ferry Co. v. McKeesport & D. Bridge Co. 20 Pa. Co. Ct. 604.

The rules governing the admission of evidence in courts do not apply to a proceeding before the freeholders to appraise damages to a ferry caused by the erection of a bridge; they have a right, not only to view the premises and property, but to determine what information they need, and also how and where to obtain it as a basis for award. Columbia Delaware Bridge Co. v. Geisse, 36 N. J. L. 537, Affirming 35 N. J. L. 474.

VIII. *Extinguishment.*

a. *By abandonment.*

A ferry franchise must be held to be abandoned after forty years' omission to furnish the public with the service due from the owner. Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

A ferry franchise may be lost by nonuser; but, under the provisions of the Georgia Code, this dates only from the judgment of the court declaring the forfeiture. Greer v. Haugabook, 47 Ga. 282.

The erection of a bridge on the site of a ferry will extinguish the rights of the ferry as such. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773.

Long delay in providing accommodations for ferrying wagons is not evidence of bad faith on the part of one having a ferry franchise, if they were provided as soon as traffic justified, suitable accommodations for passengers having been provided from the first. Douglass's Appeal, 118 Pa. 65, 12 Atl. 834.

A ferry company is not chargeable with nonuser of its franchise because no ferrying is done when the stream is frozen over, it then submitting to *vis major*. Bridgewater Ferry Co. v. Sharon Bridge Co. 145 Pa. 404, 22 Atl. 1030.

Equity will not oust the owners of a ferry franchise from its exercise when the conditions of its grant were violated by its nonuser during a time which expired five years before the bringing of the quo warranto. The delay would of itself be a reason for at least hesitating to interfere with the franchise. Com. v. Hulings, 129 Pa. 317, 18 Atl. 138.

Abandonment of the operation of a ferry does not extinguish the other rights of grantees of the use of streets for wharves and landings and to collect and receive the income therefrom, where they did not surrender possession, and the right abandoned by them they were not, by the grant, required to exercise. Cincinnati v. Covington & C. Bridge Co. 20 Ohio C. C. 396.

The right to run a ferry established and for many years maintained, when the legislature passed an act establishing it and authorizing such tolls as the freeholders might prescribe, is not lost, or to be deemed abandoned, merely because no application was ever made to the freeholders to fix the rates of tolls. Columbia & D. Bridge Co. v. Geise, 34 N. J. L. 268.

Equity cannot aid the founder of a town who reserves the ferry rights in his deeds to establish them against grantees of the town after he has permitted the grantees to expend money in establishing the ferry, and enjoy the rights for a period of nearly forty years. Bowman v. Wathen, 1 How. 189, 11 L. ed. 97.

All rights under a franchise for the operation of a ferry and construction of wharves in connection therewith, including the right to the use and occupation of land for that purpose, extending from the line of high tide to a point below low tide, are lost under a statute declaring that all rights granted shall become forfeited to the state on failure to commence and complete the wharves and establish the ferry within a specified time, on failure to comply with the terms thereof, no action being necessary to enforce the same. Upham v. Hosking, 62 Cal. 250.

The owner of a ferry franchise, who voluntarily surrenders the same upon the enactment and acceptance of a charter for the maintenance of a toll bridge and the construction thereof, and who subsequently becomes sole owner of such bridge charter, cannot claim any privileges, benefits, or powers beyond such charter, which gives no exclusive right, by virtue of his former ownership of the ferry right, as against the constructors of another bridge interfering with the profitableness of his toll bridge. Janesville Bridge Co. v. Stoughton, 1 Pinney (Wis.) 667.

The forfeiture of a ferry franchise, by reason of unreasonable delay in putting the same

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in use, will not be excused by the death of the grantee soon after the grant and the disability of his heir, where no exception in favor of such disability is contained in the grant. Clarke v. Calloway, Sneed (Ky.) 46, 2 Am. Dec. 706.

The purchaser of a ferry, the right to use which has been lost by nonuser, acquires no right to its use thereby. Jeffersonville v. The John Shallcross, 35 Ind. 19.

A police jury having control of ferries, which permits one to be maintained as a matter of convenience at a point from ¼ to ½ mile higher up the river than designated by the grant, cannot, by reason of that fact, claim a forfeiture of the grant on the ground of nonuser. Davis v. Police Jury, 1 La. Ann. 288.

Where it appears that one who owns both banks of a river had operated a ferry under a proper license, but failed to procure a license and to operate the ferry for twenty years, during the whole of which period another, who owned the river banks farther up the stream, operated a ferry near the same place, which was put to the same use, being the crossing place for the same road, the prior ferry owner will be held to have relinquished his right to operate the ferry. Brearly v. Norris, 23 Ark. 514.

The right of a town to operate a ferry under a grant permitting the exercise of such privilege during the pleasure of the legislature is revoked upon the acceptance, by commissioners appointed for that purpose, of a bridge constructed under a charter providing that whenever the bridge company shall have repaired its bridge and raised the causeway, to the acceptance of the commissioners, the ferries established across the river shall be discontinued. Hartford Bridge Co. v. East Hartford, 16 Conn. 149, Reaffirmed in 17 Conn. 79.

The failure of a town to operate a ferry for a long period—in this case eighteen years—raises a legal presumption of an abandonment of the privilege. *Ibid.*

Mere failure on the part of the state for twenty years to take steps to compel a railroad company to comply with its duty to operate a ferry does not show such acquiescence on the part of the state in the abandonment of the ferry as to prevent the legislature from requiring its operation. Brownell v. Old Colony R. Co. 164 Mass. 29, 29 L. R. A. 169, 41 N. E. 107.

Neglect of the owner of a ferry across the Ohio river properly to attend to and keep up the same, or the leasing thereof to the holder of a ferry on the opposite side, does not operate as a forfeiture of his franchise, or authorize the court to treat it as a nullity, without first summoning him to show cause, and duly annulling the same by order of court, as provided by statute. Cotton v. Houston, 4 T. B. Mon. 288; Maysville v. Boon, 2 J. J. Marsh. 224.

b. *By other means.*

A ferry may be taken by power of eminent domain, for the purpose of establishing a bridge, upon making due compensation. Charles River Bridge v. Warren Bridge, 7 Pick. 344.

The state may, in the exercise of its right of eminent domain, appropriate a ferry franchise to the public use upon payment of its value to the owner, but the power to exercise such right has not been granted by the legislature to the board of supervisors. Leake County v. McFadden, 57 Miss. 618.

The franchises of a ferry company and of a toll-bridge company may be taken under the power of eminent domain for the purpose of building a bridge. Crosby v. Hanover, 36 N. H. 404.

A court of equity may cancel a lease of a ferry for failure to comply with its terms. Phillips v. Bloomington, 1 G. Greene, 498.

A lease of a ferry privilege during pleasure of the Crown is revoked by a subsequent grant of a precisely similar lease to another. Reg. v. Davenport, 16 U. C. Q. B. 411.

A grant of a ferry franchise to a town may be repealed without conflicting with the provisions of the United States Constitution forbidding the impairment of the obligation of contracts. East Hartford v. Hartford Bridge Co. 10 How. 511, 13 L. ed. 518. The court says the legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across a river, over a highway up and down the river. From this standpoint and relation between these parties, and from the subject-matter of the action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts.

But a municipality which has established ferries under charter authority has vested rights therein which cannot be taken away by the legislature. Benson v. New York, 10 Barb. 223.

The grant, without consideration, of a ferry franchise, is a license revocable at the will of the legislature. Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29.

The legislature may not repeal an act conferring a ferry franchise, in which no right of alteration or repeal is reserved; the conferring of the franchise is a contract, and a statute withdrawing it is in violation of the Constitution because an impairment of the obligation of a contract. McRoberts v. Washburne, 10 Minn. 23, Gil. 8.

But the legislature may alter a ferry charter so as to destroy its exclusiveness in a certain length of shore, where it has reserved the right to do so in the charter itself. Perrin v. Oliver, 1 Minn. 202, Gil. 176.

In Mississippi a ferry is not a franchise which may not be revoked except by forfeiture, nor taken for public use except under the right of eminent domain; but a privilege or license is conferred, which, though exclusive while enjoyed, is revocable where the necessity of the public requires it. There is no contract between the public and licensee, and no property right. Sullivan v. Lafayette County, 58 Miss. 790.

A ferry franchise which imposes no obligations on the franchises to accept or retain the franchise, or to conduct the ferry, which does not expressly provide that it shall have the force of a contract, and which requires no large expenditure, does not amount to a contract so that it may not be repealed by the legislature before the expiration of its term. Chapin v. Crusen, 31 Wis. 209.

An injunction will be granted, at the instance of the owner of a ferry charter, to restrain the laying out of a highway through his premises which will interfere with his ferry privileges, and also with the use of such premises as a wood and lumber yard in connection with a wharf built by him for the purpose of supplying boats, contrary to a statute prohibiting the laying out of a public or private road through fixtures or erections used for the purposes of trade, without the owner's consent. Flanders v. Wood, 24 Wis. 572.

An act of legislature requiring the school commissioners to sell certain lots belonging to school trustees of a township, from which the trustees had established, under a regularly au-

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thorized license, a ferry across a river on which the lots bordered, and providing that the purchaser thereof at public auction might forever have the ferry privileges pertaining thereto, provided he should within a stated time build a highway leading through bottom land to and from the ferry, above high-water mark, is not unconstitutional and void, although its effect was to deprive such trustees of their ferry franchise, and for which they received no compensation at the sale because of the condition imposed for its continuance, although it is not claimed that they did not receive full value for the lots independent of the ferry franchises. Ferry franchises are not an incident to the ownership of land, and, when granted, as in this case, to a public corporation, may be revoked by the legislature at pleasure, so long as such revocation does not devest their property of the uses and objects for which it was given or purchased. Trustees of Schools v. Tatman, 13 Ill. 27.

Forfeiture of a ferry franchise can only be decreed in a direct proceeding, and cannot be determined in an action of tort, where it is incidentally sought to be shown that a ferry was operated without legal authority. Billings v. Breinig, 45 Mich. 65, 7 N. W. 722.

A municipal corporation which has leased a ferry to a railroad company cannot forfeit the franchise because the railroad carries passengers across the ferry and some distance along its road for the same fare that it charges for merely crossing the ferry. Staten Island Rapid Transit R. Co. v. New York, 119 N. Y. 96, 23 N. E. 175.

The provisions of the statute regulating the establishment of ferries in Kentucky, authorizing the annulment of a ferry franchise, must be strictly pursued, and the summons or order authorizing the same, commanding the grantee to appear and show cause why such franchise shall not be annulled, must specifically state the nature of the complaint, which, under such statute, must be one of two causes, —failure for six months after a franchise is granted to provide boats and hands, or the fact that such ferry has been wholly disused and unfrequented for a period of two years. Brown v. Givens, 1 Dana, 259.

A ferry franchise cannot be annulled by reason of nonuser or otherwise, except upon notice to the owner thereof, and by an appropriate judicial proceeding. Brown v. Given, 4 J. J. Marsh, 28.

A failure of the court to give notice to the holder of an exclusive ferry franchise of the proceeding to revoke the franchise renders void the judgment revoking it, and his appearance in court to offer to renew his bond is not such an appearance as makes notice unnecessary. Combs v. Sewell, 22 Ky. L. Rep. 1026, 59 S. W. 526.

An order granting a ferry franchise across the Ohio river will not be set aside as being in violation of the provisions of the law prohibiting (except in certain cases) the establishment on the Ohio river of a ferry within less than 1 mile above or below any other ferry previously established, unless it is established by competent evidence that such proposed ferry is within the prohibited distance of another previously established. Watts v. Horsley, 8 Bibb, 374.

The failure which will warrant the forfeiture of a ferry franchise made exclusive so long as the grantee affords facilities for crossing the stream must be a persistent and general course of conduct, and not be limited to special days or acts. Com. *ex rel.* Hensel v. Sturtevant, 182 Pa. 323, 37 Atl. 916.

In a proceeding under a statute authorizing the revocation of ferry franchises for certain causes, the record must show the existence of one or more of those causes, and, in the absence of such showing, no presumption as to the legality of the revocation will be indulged in by the court. Martin v. McKinney, Sneed (Ky.) 321.

An act of legislature revoking the exclusive ferry franchise previously granted a certain ferry, and authorizing the counties concerned to establish ferries within the designated distance on that river the same as though the exclusive right had never been granted, is a special act, and therefore within the constitutional provision prohibiting the legislature from chartering or licensing ferries or toll bridges by local or special laws. Frye v. Partridge, 82 Ill. 267.

A ferry franchise cannot be revoked on the ground that the original grantee has left the state without renewing his bond as required by law, without personal notice to him to renew his bond, where the former statute permitting revocation of a ferry license without notice for failure to renew the bond as required by law has been superseded by a statute expressly requiring ten days' notice. Garrett v. Ricketts, 9 Ala. 529.

Where a turnpike company is incorporated under a general incorporation act, and a right to maintain a ferry is granted merely as an incident to the turnpike in order to facilitate travel thereon, the forfeiture of the turnpike franchise carries with it the privilege of maintaining the ferry. Darnell v. State, 48 Ark. 321, 3 S. W. 365.

Where the legislature grants a ferry franchise, and in the same act imposes on the grantee certain duties, and reserves the power to repeal the act in case the grantee fails to perform those duties, it may, in case he does so fail, repeal the act without a previous judicial determination that he had so failed. Whether he had failed so that the repeal was effectual is a question for the courts. Myrick v. Brawley, 33 Minn. 377, 23 N. W. 549.

Although a ferry franchise is held subject to the right of the county court to regulate the toll, it is a property of which the owner cannot be deprived without compensation. Chadwick v. Haverhill Bridge, 2 Dane, Abr. 686.

A ferry right based upon a reservation in a deed is not maintainable as against a ferry adverse to such reserved right and licensed in the same year the deed was made, and which has been continuously operated for thirty-six years prior to the filing of the complainant's bill. Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740. H. P. F.

R. H. FREER *et al.*

v.

Thomas E. DAVIS *et al.*

(.....W. Va.....)

***1. A court of equity has no jurisdiction to settle the title and boundary**

*Headnotes by POFFENBARGER, J.

NOTE.—For a case in this series holding that where equity has jurisdiction to enjoin wrongful act it will go on to give full relief, though in so doing it be necessary to decide between two adverse titles, see Bettman v. Harness (W. Va.) 36 L. R. A. 566.

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of lands between adverse claimants when the plaintiff has no equity against the party claiming adversely to him. In so far as point 1 of the syllabus in *Bettman* v. *Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271, conflicts with this proposition, the same is disapproved.

2. **Where irreparable mischief is being done or threatened** to real estate, going to the destruction of the substance of the estate, such as the extraction of oil and gas, and the title to the land is in dispute, the parties claiming under hostile titles, a court of equity will enjoin the trespass and preserve the property and rights of the parties pending the determination, in a court of law, of the question of title; and this although no action at law has been instituted, if it appears from the bill that the complainant intends immediately to put the question of title into a course of judicial determination and prosecute it diligently.

3. **As consent cannot confer jurisdiction**, a plaintiff, upon whose bill there is a final decree and adjudication against him upon the matters set up in the bill, is not estopped to assert, upon appeal, that the court to which he resorted had no jurisdiction of the subject-matter.

4. **In such case**, although the decree will be reversed at the instance of the plaintiff, the costs in the appellate court will be awarded against him.

(January 14, 1903.)

CROSS-APPEALS from decrees of the Circuit Court for Ritchie County in a suit brought to quiet title to a tract of land and to enjoin defendants from extracting oil or gas therefrom; the defendants appealing from an order appointing a temporary receiver, and plaintiffs appealing from the dismissal of their bill. *Reversed on plaintiffs' appeal.*

The facts are stated in the opinions.

Messrs. **V. B. Archer** and **William Beard**, for plaintiffs:

Where a party is in the peaceable possession of land, and his land is entered upon and he is ousted, by one not having title to, or authority to enter upon, the land, the party so ousted may recover the premises in ejectment upon his possession merely, and his right to do so cannot be defeated by the defendant showing that there is, or may be, an outstanding title in a third person.

Tapscott v. *Cobbs*, 11 Gratt. 172; Hutchinson, Land Titles, p. 257.

Natural or reputed boundaries, or lines of marked trees, ought to be established, in preference to mere course and distance, or to mistaken descriptions in surveys or conveyances.

Dogan v. *Seekright*, 4 Hen. & M. 125.

Defendants have not connected themselves with the title in the grant to Cox and Ramsey.

Walton v. *Hale*, 9 Gratt. 194.

The power to appoint a receiver, when one is necessary for the preservation of the property rights of the litigants pending an injunction suit, is incident to the power to grant an injunction.

Bettman v. *Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271; *Moore* v. *Jennings*, 47 W. Va. 181, 34 S. E. 793; *Penn* v. *Whitehead*, 12 Gratt. 74.

Mr. **Sherman Robinson**, also for plaintiffs:

A court of equity has jurisdiction of this case.

Bettman v. *Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271; *Moore* v. *Jennings*, 47 W. Va. 181, 34 S. E. 793.

Petroleum or mineral oil in place is as much a part of the realty as timber, coal, iron ore, or salt water, and trespass to them, or either of them, is trespass to the land.

Williamson v. *Jones*, 39 W. Va. 231, 25 L. R. A. 222, 19 S. E. 436; *State* v. *South Penn Oil Co.* 42 W. Va. 80, 24 S. E. 688; *Tufts* v. *Copen*, 37 W. Va. 623, 16 S. E. 793; *Moore* v. *Jennings*, 47 W. Va. 181, 34 S. E. 793; *Trees* v. *Eclipse Oil Co.* 47 W. Va. 107, 34 S. E. 933.

The school-land proceeding was a judicial one in the nature of a proceeding against the land itself, and, when completed by sale, is prima facie evidence of forfeiture against all persons.

Holly River Coal Co. v. *Howell*, 36 W. Va. 489, 15 S. E. 214; Black, Judgm. chap. 20, § 792; *Mankin* v. *Chandler*, 2 Brock. 125, Fed. Cas. No. 9,030; *Wiant* v. *Hays*, 38 W. Va. 681, 23 L. R. A. 82, 18 S. E. 807.

When a conveyance of land, made by a special commissioner, under a sale, under a decree of a court, is offered in evidence to pass title, it must be accompanied by either the whole record of the case, or enough to show that the parties holding title, affected by the deed, and also the land itself, were before the court, and that it was decreed to be sold, and was sold, and the sale confirmed by the court, and that authority was given by the decree to the commissioner to make the conveyance.

Wilson v. *Braden*, 48 W. Va. 196, 36 S. E. 367; *Waggoner* v. *Wolf*, 28 W. Va. 820; *Walton* v. *Hale*, 9 Gratt. 198.

Before defendants can claim that they have connected themselves with the commonwealth, they must file the authority for making the deed under which they claim.

Where a party recognizes a line between two tracts of land, the party being an adverse claimant, even though the line is through the woods by cutting timber up to it, it is such a recognition of such line as will establish the same as between two opposite claimants for the same tract of land.

Gwynn v. *Schwartz*, 32 W. Va. 487, 9 S. E. 880.

If the defendants ever had any title to this land, it was forfeited to the state for the nonentry and nonpayment of taxes thereon for more than five successive years, and such forfeiture has inured to the benefit of the plaintiffs.

W. Va. Const. 1899, art. 13, § 3; *State* v. *Swann*, 46 W. Va. 128, 33 S. E. 89; *Holly River Coal Co.* v. *Howell*, 36 W. Va. 489, 15 S. E. 214.

Mr. **Edwin Maxwell**, for defendants:

Equity will not entertain a bill to remove

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a cloud upon title, unless plaintiff is in actual possession.

Moore v. *McNutt*, 41 W. Va. 695, 24 S. E. 682; *Clayton* v. *Barr*, 34 W. Va. 290, 12 S. E. 704; *Carrington* v. *Otis*, 4 Gratt. 235; *Christian* v. *Vance*, 41 W. Va. 757, 24 S. E. 596; *Lamb* v. *Cecil*, 28 W. Va. 653; *Cresap* v. *Kemble*, 26 W. Va. 603; *Van Dorn* v. *Lewis County Ct.* 38 W. Va. 267, 18 S. E. 579.

A court of equity has no jurisdiction to settle the title and boundaries of land, when the plaintiff has no equity against the party who is holding the same.

Burns v. *Mearns*, 44 W. Va. 744, 30 S. E. 112; *Lazzell* v. *Garlow*, 44 W. Va. 466, 30 S. E. 171; *Watson* v. *Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Cresap* v. *Kemble*, 26 W. Va. 603; *Schoonover* v. *Bright*, 24 W. Va. 698.

It is not unlawful for defendants to extract oil from the premises of which they are in possession. To do so gives the plaintiffs no equity against them.

Bettman v. *Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271; *Williamson* v. *Jones*, 39 W. Va. 258, 25 L. R. A. 222, 19 S. E. 436, 43 W. Va. 562, 38 L. R. A. 694, 27 S. E. 410.

In order to obtain the appointment of a receiver, the plaintiff must show, first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim.

20 Am. & Eng. Enc. Law, p. 19; *Kanawha Coal Co.* v. *Ballard & W. Coal Co.* 43 W. Va. 722, 29 S. E. 514.

The plaintiffs must recover on the strength of their own title, and not on the weakness of the title of the defendants.

Suttle v. *Richmond, F. & P. R. Co.* 76 Va. 289; Tucker, 176; Tyler, Ejectment, 72; Hutchinson, Land Titles, 257; *Witten* v. *St. Clair*, 27 W. Va. 770; *Bradley* v. *Ewart*, 18 W. Va. 598; *Tapscott* v. *Cobbs*, 11 Gratt. 172.

Plaintiffs claim title to this land as waste and unappropriated land, sold by the commissioner of school lands. They got nothing by this purchase, as there was then no title in the state.

McClure v. *Mauperture*, 29 W. Va. 643, 2 S. E. 761; *Holly River Coal Co.* v. *Howell*, 36 W. Va. 490, 15 S. E. 214.

The proceedings are neither *in rem* nor *in personam*.

Auvil v. *Iaeger*, 24 W. Va. 585; *McClure* v. *Maitland*, 24 W. Va. 561.

Courts do not favor a forfeiture, and require strict proof of the act or omission upon which it is claimed.

Townshend v. *Shaffer*, 30 W. Va. 176, 3 S. E. 586.

Plaintiffs, to take title of the state, must bring themselves within one of the three classes of persons named in § 3 of art. 13 of the Constitution, which they wholly fail to do.

Yokum v. *Fickey*, 37 W. Va. 763, 17 S. E. 318.

Messrs. **C. W. Lynch** and **Davis & Davis**, also for defendants:

Maxwell & Rogers are but trustees for the heirs at law of Cyrus Ross, and grantees of said heirs, so that an entry in the name of "Cyrus Ross's Heirs," and payment of taxes by them, would inure to the benefit of Maxwell & Rogers, trustees.

Hall v. *Hall*, 27 W. Va. 481; *Sturm* v. *Fleming*, 26 W. Va. 59; *Lynch* v. *Andrews*, 25 W. Va. 757; *Simpson* v. *Edmiston*, 23 W. Va. 675.

There is no such strict proof of forfeiture as the law requires.

Townshend v. *Shaffer*, 30 W. Va. 176, 3 S. E. 586; Blackwell, Tax Titles, p. 459.

The burden of proving a forfeiture is upon the party claiming under the same.

Randolph v. *Adams*, 2 W. Va. 519.

Proceedings under the Acts of 1882 to sell school lands by the commissioner are in the nature of a chancery suit, and do not bind those not made parties to it.

Cecil v. *Clark*, 44 W. Va. 680, 30 S. E. 216.

Where the defendant in ejectment is a stranger to the suit in which the premises are decreed to be sold or conveyed, the general rule is that the whole record must be produced to make it a link in the chain of title, or at least enough to identify the land.

Hutchinson, Land Titles, § 504; *Waggoner* v. *Wolf*, 28 W. Va. 820.

The true owner not in default is not affected or bound by the proceedings.

Cecil v. *Clark*, 44 W. Va. 680, 30 S. E. 216; *Twiggs* v. *Chevallie*, 4 W. Va. 485.

Only parties to a deed, or those in privity with them, can take advantage of any estoppel arising therefrom.

7 Am. & Eng. Enc. Law, p. 4.

Mr. **Homer Adams** also for defendants.

Poffenbarger, J., delivered the opinion of the court:

This is a suit in equity brought by R. H. Freer and others against Thomas E. Davis and others in the circuit court of Ritchie county for the purpose of recovering the title and possession of a tract of real estate containing about 58 acres. As ground of equitable jurisdiction, it is shown that W. J. Shields, one of the plaintiffs, under whom all the others claim, had been in possession of the land, claiming under certain deeds, and those under whom he claimed had taken some timber off of it, and he had cultivated a small portion of the land in oats one year. Plaintiffs had also sent a man on the land to get out timber for an oil derrick. While he was so engaged, some of the defendants came upon the land and notified him that they claimed it, threatened to have him arrested for trespassing, and finally told him that if he did not leave the land they would put him off by force, and then he went. Thereafter the defendants and their agents took possession of the land, and began the work of developing it for oil and gas. They erected a derrick on the land very near the line, but, after notice from the plaintiffs, they moved it just over the line; but their

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engine house seems to have been left on the land. The bill further alleges that the defendants had entered into and upon said premises, and were erecting a derrick and rig thereon preparatory to drilling and operating the premises for oil and gas, and were about to bore for, and take from said premises, oil and gas. It was further shown that other wells had been drilled on adjacent lands, and so near as to drain the premises in question of the oil. The prayer of the bill was that the defendants, and each of them, their agents, etc., might be enjoined and restrained from erecting derricks or other machinery on the land, and from removing oil and gas therefrom, and that a receiver be appointed to take charge of the premises and operate the same under the direction of the court.

It is alleged in the bill that in the year 188—, the land had been reported to the commissioner of school lands as 30 acres of waste and unappropriated land, and upon survey it was found to contain 58 acres. The commissioner brought a suit to sell the land, and, under a decree dated October 28, 1885, it was sold on February 15, 1886, to C. H. Gibboney, and the sale was confirmed and a deed made to him on the 24th day of February, 1886. Gibboney conveyed a portion of it to C. L. Latoriere, and Latoriere conveyed a portion to W. J. Shields. Latoriere then conveyed on December 9, 1892, the balance of his interest to C. H. Gibboney. This portion seems to have been 28 acres, and it was sold for nonpayment of taxes for the years 1893 and 1894, and Shields purchased it, and W. R. Meservie, clerk of the county court of said county, conveyed it to him by deed dated April 6, 1898. Thus Shields became the owner of all of it, and from him, directly or indirectly, the other plaintiffs derive their title and interest by conveyances and a lease for oil and gas purposes.

The defendants deduce their title as follows, as appears from the answer of Edwin Maxwell, trustee: Isaac Cox and John Ramsey, assignees of Thomas Proctor, were the patentees of 10,000 acres of land, under a patent from the commonwealth of Virginia, dated March 20, 1786. This land was forfeited for nonpayment of taxes, and, under a decree of the superior court of Wood county, made at the April term, 1841, it was sold. Before sale, however, it was divided into lots, and lot No. 1, containing 1,949½ acres, was conveyed to Cyrus Ross by Commissioners P. G. Van Winkle and M. Chapman. Ross died in 1872, and, for the purpose of settling his estate, the land was conveyed to Edwin Maxwell and John I. Rogers, trustees. They conveyed to certain of the Ross heirs something over 1,300 acres, estimated to be worth $10,000, in part satisfaction of $12,000 which it was agreed that they should have out of the estate. Whatever land remained, after this transaction, stood in the name of Rogers and Maxwell, trustees. Rogers having died, it stands in the name of Edwin Maxwell, surviving trustee. Claiming that the land in controversy belongs to the Ross estate, and denying that the heirs of said estate have ever been out of possession of it, Maxwell, trustee, leased it to his codefendants for the purpose of oil and gas development. The defendants insist, and have taken much evidence to prove, that the land is within the 1,949½-acre survey, and that the representatives of the Ross estate have never, in any way, relinquished their claim to it, nor admitted that it was waste and unappropriated land. They also claim to have paid the taxes on it. On the other hand, it was insisted by the plaintiffs that the defendants have never asserted any claim to it nor exercised any dominion over it.

From this statement it is clear that the plaintiffs on the one hand, and the defendants on the other, are claiming under adverse and hostile titles, and that there is no equity or privity of any kind existing between them. In other words, the object of the bill is to recover the possession and title of the tract of land, which is admitted to be in the possession of the defendants. It is urged here that the case of *Bettman* v. *Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271, is authority for a proceeding of this kind, and it is boldly stated that there is jurisdiction in equity for this purpose. But the *Bettman-Harness Case* involves a far different state of facts. That was a contest primarily between lessees claiming under different leases made by the same lessor. It involved nothing more than the right of taking the oil. The title to no real estate was involved, except in so far as the oil itself was real estate. Harness had leased to Watson, who had assigned the lease to Bettman. Afterwards, Harness leased the same land to Finnigan, who entered upon the land and began boring a well. Then Bettman brought a suit in equity, and enjoined Finnigan from operations under the second lease, making Harness a party to the bill. That case did not involve the settlement of hostile titles, as this one does. By construing the lease or contract between Harness and Bettman, it was found that it had expired, and that Bettman had no title nor shadow of claim to the oil. The construction of that contract was a matter for the court, and not for the determination of a jury. Here, we have questions of boundary and location and possession, and numerous other matters of fact which make the case one for trial by jury. Moreover, in the *Bettman-Harness Case*, while the title to the oil may be said to have been involved, yet at the time the injunction was awarded no oil had been discovered, and the matter actually involved was a mere right of exploration, which might or might not result in the finding of oil. The title to the land was in Harness, and wholly undisputed. The only question was, Which lease gave the right to explore and take the oil? Here, the title to the oil depends upon the title to the land, and that is in dispute. The defendants are in possession and the plaintiffs are out. "Equity has no jurisdiction, upon the sole ground of removal of cloud from title, to

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try conflicting titles to lands, at the suit of one holding either legal or equitable title, the adverse claimant being in actual possession." *Davis* v. *Settle*, 43 W. Va. 17, 26 S. E. 557. That was a suit for partition, and in such suit equity has jurisdiction to pass on questions of law touching the legal title of one claiming to share in the partition and the interest he claims, if his interest be such as, if valid, will make him a co-owner in the common subject with the plaintiff as holding under the same right or title under which the partition is to be made. But it is held in that case that the court is not authorized in such suit to pass on the title of a stranger claiming under a different title, adverse to the title under which the partition is to be made. It is further there held that, "in matters of such nature as give right to trial by jury under the Constitution, the legislature cannot give equity jurisdiction over them, and deprive the party of right of trial by jury against his protest." In *Miller* v. *Morrison*, 47 W. Va. 664, 35 S. E. 905, this question is discussed, and the doctrine of *Davis* v. *Settle* approved. See also *Cresap* v. *Kemble*, 26 W. Va. 603; *Bright* v. *Knight*, 35 W. Va. 40, 13 S. E. 63. "A court of equity has no jurisdiction to settle the title and bounds of lands between adverse claimants, unless the plaintiff has some equity against the party claiming adversely to him." *Lange* v. *Jones*, 5 Leigh, 192.

There is but one general proposition laid down in the books upon which it can be contended that, in a case like this, a court of equity may try and determine the question of title. That is the familiar maxim that, when a court of equity has taken jurisdiction for one purpose, it will go on and do complete justice between the parties, even to the extent of determining legal rights. But this principle is not of universal application, even if it be conceded that jurisdiction, as here used, includes jurisdiction by injunction to restrain a trespass, which is doubtful, to say the least, inasmuch as the law writers term it mere ancillary jurisdiction. Story, Eq. Jur. § 862; Pom. Eq. Jur. § 171. This maxim and principle seems to have grown out of the equitable jurisdiction for purposes of discovery, as will be seen from an examination of §§ 64*k* to 74 of Story, Eq. Jur. In § 64*k* it is said: "In many cases it has been held that, where a party has a just title to come into equity for a discovery, and obtains it, the court will go on, to give him the proper relief; and not turn him round to the expenses and inconveniences of a double suit at law. The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief." Discovery seems to be the basis of this whole doctrine. Where the bill is for both discovery and relief, the discovery, to give jurisdiction, must be necessary. That being true, the primary or main purpose of the bill is the assertion of an equitable right. The most familiar instances of the determination by courts of equity of legal rights, after having taken jurisdiction upon some equitable ground, are cases of fraud, accident, mistake, and account, all of which, under certain circumstances, are matters of concurrent jurisdiction, and, in almost every instance of that kind, discovery is necessary to the doing of complete justice. Mr. Story concludes his discussion of the subject by saying, at § 73: "In the present state of the authorities, however, little more can be absolutely affirmed than these propositions: First, that in bills of discovery, seeking relief, if any part of the relief sought be of an equitable nature, the court will retain the bill for complete relief; secondly, that in matters of account, fraud, mistake, and accident, the jurisdiction for relief will generally, but not universally, be retained and favored; and, thirdly, that in cases where the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, the jurisdiction will either be declined, or, if retained, will be so, subject to a trial at law." At § 72, this author further says: "This doctrine, however, though generally true, is not to be deemed of universal application. To justify a court of equity in granting relief, as consequent upon discovery, in cases of this sort, it seems necessary that the relief should be of such a nature as a court of equity may properly grant in the ordinary exercise of its authority. If, therefore, the proper relief be by an award of damages, which can alone be ascertained by a jury, there may be a strong reason for declining the exercise of the jurisdiction, since it is the appropriate function of a court of law to superintend such trials. And in many other cases where a question arises, purely of matters of fact, fit to be tried by a jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be altogether declined; or, at all events, that, if the bill is retained, a trial at law should be directed by the court, and relief granted, or withheld, according to the final issue of the trial." From this it is apparent that, even when equity jurisdiction attaches for the purpose of discovery, there are exceptions to the rule that the court will go on and determine all questions in the cause, without regard to whether they be legal or equitable. And the decisive test seems to be the necessity of a trial by jury of disputed questions of fact necessary to the ascertainment of the legal right involved. As discovery belongs to the general jurisdiction of equity, and the jurisdiction by injunction is rather special in its nature and scope, it would be unreasonable to say that the presentation of the necessity of a trial by jury will stop the progress of the cause when jurisdiction rests upon discovery, but will not do so when jurisdiction attaches, because of the necessity of interference by injunction to prevent irreparable injury, pending a determination of the primary right involved. There are cases in which it is said that, although the only equitable ground of jurisdiction was the necessity of the exercise of

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the restraining power of the court by injunction, equity went on and passed upon the legal rights of the litigants, but in every instance the case was one of accident, fraud, mistake, or account, belonging to the general concurrent jurisdiction of equity; and in no case has any court proceeded so far as to hold that, having taken jurisdiction to restrain a trespass to real estate, it would go on and determine the legal title to the land, when that was in dispute and a trial by jury was necessary, by reason of controverted matters of fact, such as possession, boundary, and location. On the other hand, there is an abundance of authority holding the contrary doctrine. The only case in which the proposition is asserted is that of *Bettman* v. *Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271. In the first point of the syllabus of that case it is asserted, but it undoubtedly occurred by inadvertence. The decision of that question in that case was wholly unnecessary. As has been shown, there was no question of title in that case to be decided, nor any necessity for a trial by jury.

Turning now to another line of investigation, it is found that, until recent years, courts of equity would not restrain a trespass of any kind upon real estate in any case wherein it appeared from the pleadings that there was controversy about the title to the land. Such controversy immediately put the case out of the court, for the reason that it belonged to the jurisdiction of the law courts. In *Erhardt* v. *Boaro*, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 565, Mr. Justice Field says that Lord Eldon is reported, in *Pillsworth* v. *Hopton*, 6 Ves. Jr. 51, to have said in 1801 that he remembered being told in early life from the bench, "that, if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." Waste is in the nature of a trespass, it being an injury to real estate, but it is always committed by a tenant or some person whose estate or interest in the land is in privity with that of the complaining party, and courts of equity have always interposed by injunction to prevent it. In such case there is no dispute about the title. The jurisdiction to prevent trespass to real estate by a stranger or person claiming to hold an adverse title finally grew out of the jurisdiction to prevent waste, trespass and waste both being injuries to the freehold, and differing only in respect to the title of the person doing the injury. 10 Am. & Eng. Enc. Law, p. 876; High, Inj. 730. The ancient rule of noninterference by courts of equity with trespass to real estate, the title to which is in dispute, has been relaxed, but to what extent? Only to the extent that courts of equity, when the injury is such as tends to the destruction of the property, and is, therefore, irreparable, and justice requires that the act of trespass be prevented until the title can be determined in a court of law, will so prevent it by injunction. That is the limit set by the authorities. In *Erhardt* v. *Boaro*, 113 U. S. 538, 28 L. ed. 1117, 5 Sup. Ct. Rep. 566, Mr. Justice Field, speaking of the old rule, says: "This doctrine has been greatly modified in modern times, and it is now of common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title." High, Inj. § 732, says: "The jurisdiction in restraint of trespass to mines is not an original jurisdiction of equity, under which the court would be justified in trying the title to the mines themselves, and the party aggrieved must, therefore, first establish his title at law, or show satisfactory reason for not doing so." 10 Am. & Eng. Enc. Law, p. 880, says: "If the title of the plaintiff is in dispute, an injunction will not be granted previous to the determination of the legal rights of the parties, unless the act about to be committed by the defendant is of such a nature that, should the right to commit it be decided against him, the consequences of its commission would be irreparable." Spelling, Inj. § 20, says: "To justify granting a preliminary injunction, the plaintiff's right must be certain as to the law and the facts." In § 21, the same book says: "It follows, as corollary to the leading proposition of the preceding section, that, where plaintiff seeks equitable relief by way of injunction in aid of the legal right, the court will not, unless such right is clear, declare the legal right and grant a perpetual injunction founded on such declaration, but will require the question to be tried at law." The same author says, at § 333, under the head of "Protection of Riparian and Water Rights:" "In these, as in other cases, courts of equity will refuse to assume jurisdiction to try and determine legal questions which are controverted." At § 181, he says: "Upon an application for an injunction affecting the title to real estate, the proper office of the court is not to ascertain the legal existence of a right, but solely to protect the property until that right can be determined by the tribunal to which it properly belongs." This was no doubt taken from the opinion of Lord Chancellor Cottenham, in *Harman* v. *Jones*, 1 Craig & P. 301, where it is further said: "It is a fundamental error in an order of this kind to assume finally to dispose of legal rights, and not to confine itself to protecting the property pending the adjudication of those rights by a court of law. I can sustain the injunction only upon the terms of its being accompanied by some provision for putting the question immediately into a course of legal investigation." This is quoted and approved in *Clayton* v. *Shoemaker*, 67 Md. 216, 9 Atl. 635. A leading case is that of

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Irwin v. *Davidson*, 38 N. C. (3 Ired. Eq.) 311, in which it is held that, "when the plaintiff, seeking an injunction in such cases (mines, timber, and the like), claims to be the legal owner of the property, he must show that he has established his legal title by the judgment of a court of law, or that he is prosecuting his suit at law, and the injury, which he will sustain by the acts of the defendant before he can obtain judgment, will be irreparable, and, in the latter case, the court, in continuing the injunction, must make such order as will insure the speedy determination of the suit at law." The rule, as laid down by this court in numerous cases, is that, to warrant the interference of a court of equity to restrain a trespass on land, two conditions must coexist: First, the plaintiff's title must be undisputed, or established by legal adjudication; and, secondly, the injury complained of must be irreparable in its nature, unless there exist other grounds of equity. *Cox* v. *Douglass*, 20 W. Va. 175; *Schoonover* v. *Bright*, 24 W. Va. 698; *Watson* v. *Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Becker* v. *McGraw*, 48 W. Va. 539, 37 S. E. 532. This court has also held, in the following cases, that the existence of a controversy as to title excludes the jurisdiction of a court of equity to enjoin trespass to real estate: *Cox* v. *Douglass*, 20 W. Va. 175; *Kemble* v. *Cresap*, 26 W. Va. 603; *Watson* v. *Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Becker* v. *McGraw*, 48 W. Va. 539, 37 S. E. 532. To the same effect is *Lange* v. *Jones*, 5 Leigh, 192.

While this court has not thus far recognized the modern practice of preventing irreparable injury by trespass, pending settlement of title to the land in a court of law, the great weight of authority, both English and American, is in favor of that jurisdiction. No reason is perceived why it should not be exercised in this state as well as elsewhere. It is both just and reasonable. Great injury may result, and in most cases would necessarily result, from turning the plaintiff away and refusing him any aid. This is especially true where the trespass consists of taking timber or minerals. Actions of ejectment, as a rule, proceed slowly, and the subject-matter of the litigation would be, in many cases, virtually destroyed before a decision could be had, if the trespass were not restrained, and the property thereby preserved, during the pendency of the suit. Most of the cases in which the subject-matter has been thus impounded and protected during the litigation show that actions of ejectment had been brought and were pending. But the reason underlying the proceeding does not require the pendency of such suit. Every good purpose is subserved if the plaintiff shows his claim of title, the imminency of irreparable injury, and his intention to immediately put the question of title into a course of legal investigation and determination by an action of ejectment. Some of the cases so hold. *Gause* v. *Perkins*, 56 N. C. 177, 69 Am. Dec. 728; *Harman* v. *Jones*, 1 Craig & P. 301. Other cases bearing on the question are *Griffith* v. *Hilliard*, 64 Vt. 643, 25 Atl. 427; *Shubrick* v. *Guerard*, 2 Desauss. Eq. 616; *Green* v. *Keen*, 4 Md. 98; *Fulton* v. *Harman*, 44 Md. 251; *Kinder* v. *Jones*, 17 Ves. Jr. 110; *Piper* v. *Piper*, 38 N. J. Eq. 81; *Duvall* v. *Waters*, 1 Bland, Ch. 569, 18 Am. Dec. 350; *Johnson* v. *Hall*, 83 Ga. 281, 9 S. E. 783.

The conclusion resulting from these authorities is that the court had no jurisdiction to pronounce the decree of the 18th day of May, 1901, dismissing the bill and thereby adjudicating the question of title. The court should have sustained the demurrer, and granted leave to the plaintiffs to amend their bill. On their failure to amend, it should have dismissed the bill without prejudice or for want of jurisdiction. This would have enabled the plaintiffs to have put themselves within the jurisdiction of the court to protect the property pending an action of ejectment to try the title.

Our consultation over this case, however, has introduced another serious question. While the court had no jurisdiction to pass upon the question of title, the error in doing so was induced by the plaintiffs themselves. They brought their suit in the wrong court. Can they now complain of the action of the court in adjudicating the cause, they having requested it? To permit them to do so has the semblance of allowing them to take advantage of their own wrong. In 3 Cycl. Law & Proc. 242, it is said that, in general, the "appellant or plaintiff in error will not be permitted to take advantage of errors which he himself committed, or invited or induced the trial court to commit, or which were the natural consequences of his own neglect or misconduct." But, in respect to jurisdiction, the same book says, at the same page: "While the authorities are in conflict, the better rule would seem to be that, as consent cannot confer jurisdiction, a plaintiff against whom judgment is rendered is not estopped to assert, upon appeal or error, that the court to which he resorted had no jurisdiction of the subject-matter of the suit or of the person of the defendant." There are a few cases which seem to oppose this latter view. *Shellenbarger* v. *Biser*, 5 Neb. 195; *Lounsbury* v. *Catron*, 8 Neb. 469, 1 N. W. 447; *Bollong* v. *Schuyler Nat. Bank*, 26 Neb. 281, 3 L. R. A. 142, 41 N. W. 990. But it is undoubtedly supported by the better and more numerous authorities. See *Wildman* v. *Rider*, 23 Conn. 172, where it is held to be immaterial how the want of jurisdiction is brought to the notice of the court; *Western U. Teleg. Co.* v. *Taylor*, 84 Ga. 408, 8 L. R. A. 189, 11 S. E. 396; *Bell* v. *Fludd*, 28 S. C. 313, 5 S. E. 810; *Capron* v. *Van Noorden*, 2 Cranch, 126, 2 L. ed. 229; *United States* v. *Huckabee*, 16 Wall. 414, 21 L. ed. 457. In *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510, it is held: This court will, where no motion is made by either party, on its own motion, reverse a judgment for want of jurisdiction, not only in any case where it is shown negatively that jurisdiction does not

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exist, but even when it does not appear affirmatively that it does exist. Mr. Justice Matthews delivered the opinion of the court in that case, and in it he reviews numerous decisions of the court bearing upon the question. The following extract is deemed to be not only applicable to the question raised here, but also fairly conclusive of it: "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible, and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron* v. *Van Noorden*, 2 Cranch, 126, 2 L. ed. 229, decided in 1804, . . . on the application of the party against whom it had been rendered in the circuit court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked." In another place, he quotes the following from the dissenting opinion of Mr. Justice Curtis, in the *Dred Scott Case*, 19 How. 393, 15 L. ed. 691, concurring, however, in that part of the opinion which held that a judgment of the circuit court, upon the sufficiency of a plea in abatement denying its jurisdiction, was open for review, upon a writ of error sued out by the party in whose favor the plea had been overruled: "It is true, as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment which was for his advantage. In this we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. . . . The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the circuit court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even where it does not appear, affirmatively, that it does exist."

Nor will the authorities bear out the suggestion that, as the question is one of procedure, whether the remedy is at law or in equity, and both law and equity jurisdiction are exercised by the same court, a different rule must be applied. In *Thompson* v. *Central Ohio R. Co.* 6 Wall. 134, 18 L. ed. 765, the sole ground of want of jurisdiction was that the plaintiffs had brought their suit in equity upon a legal demand, and the court reversed the decree, and remanded the cause with directions to dismiss the bill without prejudice. Point 1 of the syllabus reads as follows: "Though, usually, where a case is not cognizable in a court of equity, the objection must be interposed in the first instance, yet, if a plain defect of jurisdiction appears at the hearing or on appeal, such court will not make a decree." See also *Barney* v. *Baltimore*, 6 Wall. 280, 18 L. ed. 825,—a very similar case. These cases do not bear directly upon the question now under discussion, but they show that the question is one of jurisdiction, and not one of mere procedure. While law and equity are administered by the same judge, he presides over two different forums, and his court of equity is as powerless to take cognizance of an action at law as if the two courts were presided over by two different judges. If the distinction between the functions and powers of courts of equity and courts of law is to be preserved, the same reasoning and the same principle must be applied here, or parties litigant, upon one pretext or another, are to be permitted to determine for themselves, by consent, conduct, or otherwise, the extent of the jurisdiction of courts of equity, and break down and destroy the barriers which have been set up for the purpose of separating the jurisdiction of courts of equity from the jurisdiction of courts of law. No man can tell either the extent to which that would be done, or enumerate the evils which might flow from it. By permitting it in this instance, the great constitutional right of trial by jury is obliterated. In reply to this, it may be said that, even in an action of ejectment, a jury may be waived by the parties. That is true, but in such case it is done deliberately, and in a regular and orderly manner. Here it is done irregularly and indirectly by the court and counsel, and probably without the plaintiffs' having been apprised of the waiver. Such waiver, in a court of law, is made in a court having jurisdiction of the cause. Here it is made indirectly in a court having no jurisdiction of the subject-matter. This distinction must be borne in mind. If the plaintiff takes his cause into a proper forum, but in an irregular manner, and errors are committed against him or in his favor, by reason of his own mistakes, negligence, or misconduct, he cannot complain. But it is illogical to say that the same result must follow when he erroneously takes his case into a court which has no jurisdic-

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tion of it,— no power to hear and determine it. He cannot confer upon the court that power which it has not. His inability to complain of his own wrong confers no additional authority upon the court. This view is strengthened by the decisions of our own court, which holds in two cases, exactly like this one, that, "if the court has no jurisdiction, it will dismiss a bill on the hearing, although there was no demurrer to the bill." *Cresap* v. *Kemble*, 26 W. Va. 603; *Watson* v. *Ferrell*, 34 W. Va. 406, 12 S. E. 724. In *Ohio River R. Co.* v. *Gibbens*, 35 W. Va. 57, 12 S. E. 1093, this court expressly held that consent of parties cannot give jurisdiction, and dismissed the bill for want of equity jurisdiction.

From these authorities it is clear that the decree of May 18, 1901, must be reversed, although the plaintiffs do not urge reversal on the ground of want of jurisdiction. They insist that the court had jurisdiction, but decided erroneously against them. They complain of the decree. But it is the duty of this court, on its own motion, to correct excess of jurisdiction on the part of the lower court. Hence, the decree of dismissal must be reversed, the demurrer to the bill sustained, leave granted to the plaintiffs to amend their bill, and the cause remanded. The discharge of the receiver and dissolution of the injunction by the final decree were proper, and in these respects only it is affirmed. An appeal was taken from an order made on the 1st day of December, 1900, appointing a receiver. From what has been said, that order was erroneous, but the error was corrected by the order of May 18, 1901, setting aside the order appointing the receiver. While the plaintiffs obtain the advantage of a reversal of the decree of May 18, 1901, they are not the parties substantially prevailing within the meaning of the statute giving cost to the party so prevailing. In *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 388, 28 L. ed. 466, 4 Sup. Ct. Rep. 515, which was almost exactly like this one, Mr. Justice Matthews said: "In the present case, the writ of error is not dismissed for want of jurisdiction in this court; on the contrary, the jurisdiction of the court is exercised in reversing the judgment for want of jurisdiction in the circuit court; and although, in a formal and nominal sense, the plaintiffs in error prevail in obtaining a reversal of a judgment against them, the cause of that reversal is their own fault in invoking a jurisdiction to which they had no right to resort, and its effect is to defeat the entire proceeding which they originated and have prosecuted. In a true and proper sense, the plaintiffs in error are the losing, and not the prevailing, party; and this court, having jurisdiction upon their writ of error so to determine, and in that determination being compelled to reverse the judgment of which, on other grounds, they complain, although denying their right to be heard for that purpose, has jurisdiction also, in order to give effect to its judgment upon the whole case against them, to do what justice and right seem to require, by awarding judgment against them for the costs that have accrued in this court." See also *The Assessor* v. *Osborne*, 9 Wall. 567, *sub nom. Gates* v. *Osborne*, 19 L. ed. 748; *Montalet* v. *Murray*, 4 Cranch, 46, 2 L. ed. 545; *Burnham* v. *Rangeley*, 2 Woodb. & M. 417, Fed. Cas. No. 2,177.

Hence, although *the decree is reversed* at the instance of the plaintiffs, the costs in this court must be decreed against them.

Brannon, J., dissenting:

The question of jurisdiction in equity in this case is difficult. There can be no question but that, at least for a temporary injunction, there was jurisdiction to restrain irreparable injury; but the court went on to decree fully on the merits of two conflicting titles to land, and did not direct an action at law, or insert in the decree a reservation of right to sue at law. There is a rule that equity will not try conflicting titles to land unless the plaintiff has some equity against the party claiming adversely; but, where it has jurisdiction to enjoin irreparable damage, can it decree in full? Does *Bettman* v. *Harness*, 42 W. Va. 433, 26 L. R. A. 566, 26 S. E. 271, go too far in saying that, having jurisdiction for injunction, equity will give full relief, though in so doing it has to pass on adverse titles? The perplexing question thus comes: Will the court make the injunction temporary or provisional; that is, retain the cause and direct the plaintiff, if not in possession, to bring an action at law to try the title, or the defendant to do so, if not in possession, and, upon the result, either dissolve or perpetuate the injunction? Or, having jurisdiction for an injunction, will it decide upon the conflicting titles? For the proposition that, when equity has lawful jurisdiction for one purpose, it will hear the case upon all matters, and give full and final relief, though in doing so it becomes necessary to pass on legal rights and establish legal rights properly triable at law, there is a world of authority. Hogg, Equity Principles, 470; 1 Barton, Ch. Pr. & Pl. 59; 1 Pom. Eq. Jur. §§ 181, 231; *Sinnett* v. *Cralle*, 4 W. Va. 600; *Hotchkiss* v. *Fitzgerald Patent Prepared Plaster Co.* 41 W. Va. 357, 23 S. E. 576; *Evans* v. *Kelley*, 49 W. Va. 181, 38 S. E. 497; *Walters* v. *Farmers' Bank*, 76 Va. 12. Does the fact that an injunction is awarded in a contest between two hostile titles to land bring the case under the above rule, and authorize the court to adjudicate the whole case? "Wherever equity has jurisdiction to grant the remedy of injunction for some special purpose, even though the injunction covers only a portion of the controversy, it may go on and decide all the issues, and make a final decree." 1 Pom. Eq. Jur. § 236. Of course, this rule does not apply where the matter is already in a law court, and equity is called upon only to enjoin damage pending that suit, because there the equity function is only ancillary, and the law court had first taken jurisdiction. Thus, we see much authority under which we could plausibly

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assert the power of equity to decree in full. Against this position, it will be said that thus a man claiming land would be deprived of right of trial by jury; but the same may be said in many other cases. Is the case of an injunction to stay trespass doing irreparable damage, where adverse titles are involved, an exception to the rule that equity, having jurisdiction for one purpose, will go on? There is much authority to say that, when equity takes jurisdiction for an injunction in a controversy not otherwise within its jurisdiction, but cognizable at law, it will only entertain that injunction until a suit can be brought and tried in a law forum. It will grant the injunction, though title to land is contested, but only a provisional one under this rule. Under this rule, when the answer comes in and denies title and sets up an adverse title, and the right to the place, or to do the act complained of, is doubtful, that stops the equity wheels until a trial at law shall settle the right. *Irwin* v. *Dixion*, 9 How. 28, 13 L. ed. 33; 2 Waterman, Trespass, § 1129; 1 Story, Eq. Jur. § 62; 1 Spelling, Inj. § 367; *Manchester Cotton Mills* v. *Manchester*, 25 Gratt. 825. It is perplexing to say which of these rules shall prevail. At one time equity would not, under any circumstances, enjoin trespass to real estate where the right was in contest between hostile titles; but long ago that rule has vanished, and given way to the rule that injunction will be granted against irreparable damage; and I concluded that equity, having thus taken jurisdiction, would decide all matters necessary to final decree. I thought the change of the rule would carry this result. To say whether an act is a wrongful trespass involves the question of which of the parties has the better title, and this is the test of the propriety of the first step by injunction, as well as the last. Does not this bring it under the law found in 12 Enc. Pl. & Pr. 164? "In order that a court of equity may act under the rule of retaining jurisdiction for full relief, the subject to be adjudicated must be something incidental to the cause of action which originally gave the court jurisdiction, or so closely connected therewith as to render its determination necessary to the final decision of the whole controversy between the parties."

But we do not find it indispensable to decide this question of the right of equity to retain jurisdiction for full relief as to cases generally, because in this particular case we may say that the circuit court did not err, as against the plaintiffs, in decreeing against them on the whole of the case, and for the following reasons: The plaintiffs chose the equity court for full relief, not merely for injunction until title could be tried at law. They set up their title in the bill, and say that the defendants claim under another title from the Ross heirs, and say that that title is bad and their own good, and place the two titles before the court for adjudication, and ask that the defendants be enjoined because their title is bad and that of the plaintiffs good, and pray that title be vested in them by decree of the court. This could only be done by decree on the merits. Now, if the decree had been against the defendants, they could raise this question of jurisdiction; but the case is different with the plaintiffs. They cannot choose the equity court, resist the demurrer of the defendants raising the question of jurisdiction, have that demurrer overruled, and thus ask the court to go on, and have the benefit of their position thus taken by having the court to give them the benefit of jurisdiction for full hearing and compel the defendants to fight them throughout; and then, when the decree is against them, take the inconsistent position that the court had no jurisdiction, but, after hearing the case on its merits, should have reserved right to compel the defendants to go through another suit in a court of law on the very same facts. Plaintiffs had the benefit of the suit to try the title, to the prejudice of the defendants in time and costs. The Supreme Court of the United States says, in *Davis* v. *Wakelee*, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. Rep. 555: "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position,—especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Whenever a party seeks the aid of a court of justice to enforce his rights, and submits his case and objections to the decision of a court, and invites it to decide upon them, and makes no objection to the jurisdiction till after the court has heard and adjudicated, he is estopped from subsequently objecting to its decision and the proceedings taken thereon. To same effect, Van Fleet, Collateral Attack, § 860.

Would it not prejudice the defendants to make them fight over again the same thing on the same facts in another suit? In *Weston* v. *Ralston*, on page 186 of 48 W. Va., and page 453, 36 S. E., will be found authorities pertinent to the subject of taking inconsistent positions in judicial proceeding. Also 11 Am. & Eng. Enc. Law, 2d ed. p. 446. In Bigelow, Estoppel. 687, is found the broad proposition that "one who, without mistake, induced by the opposite party, has taken a particular position deliberately in the course of litigation, must act consistently with it." In *Ellis* v. *White*, 61 Iowa, 644, 17 N. W. 28, one who procured a divorce, with its benefit, could not afterwards say that the court had no jurisdiction. But it may be said that such is the law only where the record is attacked collaterally; but that answer is not good, for I do not say that the record here, of its own force, operates as an estoppel by record. I am not talking about estoppel by record. I do

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not appeal to this record as such; but I say that there is an estoppel by conduct, one *in pais*. Therefore, the principle of the law above stated applies. It will be said that consent cannot give jurisdiction. I do not think that rule applies in this instance. The circuit court had jurisdiction on its law side to try title. The plaintiffs simply chose the wrong side of the court to try title. And equity has often jurisdiction to try land title as incidental to relief, and shall we go so far as to say that the parties could not waive this objection of jurisdiction? They did waive it by bringing their suit in equity. The books say that, if the title is not doubtful, equity has power to decree without a trial at law, and only where title is in doubt is such law trial proper. A finespun distinction; but it shows that equity has jurisdiction in cases of like general nature (*ejusdem generis*), and decreeing in full at most mere error of procedure, not nullity, as the case of a court not having jurisdiction under any circumstances. The court has jurisdiction of cases of that general nature, but not of the particular case under the facts. This shows that a party may be bound by his choice of the equity court. If parties are in an equity court upon what is a law demand, can they not agree that the court go on and hear the case? Parties can waive a jury trial in a law court. If they consent to waive a jury trial by bringing their suit in a court of equity, and submit their case to it, do they not effectually waive a jury right? Conflicting land title gives a jury right, I concede; but parties can waive it in that case as well as in others. In *St. Lawrence Boom & Mfg. Co.* v. *Holt*, 51 W. Va. 352, 41 S. E. 351, we held that, when a court of equity decreed in a case proper for a suit at law, the decree is not a nullity. This shows that if the court erred in this case, in decreeing in full, it was mere error, and that a party may waive mere error, though he cannot consent to jurisdiction in a court which under no circumstances could act. In short, where equity is asked to enjoin irreparable injury, all concede that it has jurisdiction for one thing, that is, injunction; and, if the title is free of doubt, it has jurisdiction to decree in full; and, if it mistakes and decrees where it should direct a law action, it is only error, and therefore a party can in advance waive this. This position is strongly sustained by 1 Pom. Eq. Jur. § 130. See *Lounsbury* v. *Catron*, 8 Neb. 469, 1 N. W. 447. *Burns* v. *Mearns*, 44 W. Va. 746, 30 S. E. 112, is against this last position; but the particular question was not considered. It has been suggested that this court, of its own motion, may refuse to try a jury case in equity; but I think this court, where it has jurisdiction, ought to pass on the rights of the parties as they were at the date of the decree in the circuit court.

PARISH FORK OIL COMPANY *et al.*, *Appts.*,
v.
BRIDGEWATER GAS COMPANY.

(51 W. Va. 583.)

*1. **An agreement whereby certain lands, in consideration of $50, are granted, demised, leased, and let for the sole and only purpose of boring,** mining, and operating for oil and gas, and laying pipes and building tanks, stations, and houses thereon to take care of the products, for the period of fifteen years, and providing that the lessee shall complete one well on the premises within one year from its date, or pay the lessor a rental of 50 cents an acre for each year the lease may remain in full force after the first year, immediately after which provision the following stipulations are written: "But it is agreed and understood that the $50, paid in cash, is to pay all rentals on this lease for the period of one year from the date hereof. It is further agreed that when the first well is completed on said premises, then all cash rentals shall cease,"—does not bind the lessee to do anything further after completing one well on the premises, and upon his abandonment of further operations upon the premises for more than eighteen months, leaving the well unprotected, so that it caved in and partially filled up, the lessor, after waiting a year or more from the date of abandonment, had the right to lease the land to another.

2. **The principal purpose and design of the parties to such a lease, clearly discernible from its terms,** being the production and marketing of the oil and gas in the land for their mutual benefit, mere discovery of oil by exploration under it vests no title to it in the lessee, but it does vest in him the right to produce and take the same in accordance with the terms and conditions of the contract. In such right the lessee will be protected, but he must proceed to exercise it with reasonable promptness and diligence.

3. **When its terms will permit it under the rules of law, an oil lease** will be so construed as to promote development and prevent delay and unproductiveness.

4. **The law recognises a distinction between the abandonment of operations under an oil lease** and an intention to abandon or surrender the lease itself. Unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others.

(March 29, 1902.)

*Headnotes by POFFENBARGER, J.

NOTE.—As to nature of interest in oil or gas lease, see Williamson v. Jones (W. Va.) 25 L. R. A. 222, and *note;* Bettman v. Harness (W. Va.) 36 L. R. A. 566; and Wilson v. Hughes (W. Va.) 39 L. R. A. 292.

As to forfeiture of oil or gas lease, see Evans v. Consumers' Gas Trust Co. (Ind.) 31 L. R. A. 673, and *note;* Woodland Oil Co. v. Crawford (Ohio) 34 L. R. A. 62; Steelsmith v. Gartlan (W. Va.) 44 L. R. A. 107; and Huggins v. Daley (C. C. App. 4th C.) 48 L. R. A. 320.

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APPEAL by the Parish Fork Oil Company and W. M. Cox from a decree of the Circuit Court for Wirt County settling the rights to certain oil territory. *Affirmed.*

The facts are stated in the opinion.

Messrs. **S. D. Turner, D. C. Casto, and Campbell, Holt, & Duncan** for appellants.

Mr. **T. A. Brown,** for appellee:

The Woodyard lease had been forfeited, and was null and void:

1. Because the lease created only an estate at will, and liable to be terminated at any time at the election of either the lessor or the lessee.

Eclipse Oil Co. v. *South Penn Oil Co.* 47 W. Va. 84, 34 S. E. 923; *Trees* v. *Eclipse Oil Co.* 47 W. Va. 107, 34 S. E. 933; 2 Bl. Com. 135; *Doe ex dem. Pidgeon* v. *Richards,* 4 Ind. 374; *Petroleum Co.* v. *Coal, Coke & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65; *Knight* v. *Indiana Coal & I. Co.* 47 Ind. 105, 17 Am. Rep. 692; *Cowan* v. *Radford Iron Co.* 83 Va. 547, 3 S. E. 120.

2. Because of abandonment.

Steelsmith v. *Gartlan,* 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978.

3. By the express terms of the contract, the lessee having completed a nonproductive well, and abandoned it, the lease providing for no further search, and no further payment of rental or commutation money, the contract was at an end.

Ibid.; Venture Oil Co. v. *Fretts,* 152 Pa. 451, 25 Atl. 732; *Plummer* v. *Hillside Coal & I. Co.* 160 Pa. 483, 28 Atl. 853; *Crawford* v. *Ritchey,* 43 W. Va. 252, 27 S. E. 220; *Conrad* v. *Morehead,* 89 N. C. 31; *Maxwell* v. *Todd,* 112 N. C. 677, 16 S. E. 926; *Hawkins* v. *Pepper,* 117 N. C. 407, 23 S. E. 434; *Munroe* v. *Armstrong,* 96 Pa. 307; *Williamson* v. *Jones,* 43 W. Va. 562, 38 L. R. A. 694, 27 S. E. 410; *Bettman* v. *Harness,* 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271.

Mr. **W. N. Miller** also for appellee.

Poffenbarger, J., delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Wirt county, made in two causes, which had been consolidated. The Parish Fork Oil Company, a copartnership, claiming under a lease of 118¼ acres of land, executed by Jacob S. Swisher to E. R. Woodyard, and dated June 4, 1894, had entered upon the land in August, 1898, and drilled a well about 200 feet deep, which was completed some time in September, 1898. The well was shot, and it was found to be a producer of oil in small quantities, the man who drilled it having taken out with the sand pump about one third of a barrel; but no tubing was put in it, and it was not pumped. In the spring of 1899, the drilling machinery belonging to one Abram Pearson, who drilled the well for the lessees under a contract, he moved all the machinery away, and the well was to all appearances abandoned. No further visible work was done upon the land by the lessees until early in June, 1900. The cash consideration mentioned in the lease was $50, and it was therein agreed and understood that said $50 was payment of the rental for one year; that is, from June 4, 1894, until June 4, 1895. The lease further provided that the lessees should "complete one well on said premises within one year, or the said E. R. Woodyard shall pay to said Jacob S. Swisher rental as hereinafter provided." A further provision as to rent was that the lessee should pay "50 cents per acre for each year that this lease may remain in force after the first year." A further stipulation as to the payment of rent is as follows: "It is further agreed that when the first well is completed on said premises then all cash rentals shall cease." Another important clause of the lease reads as follows: "It is agreed that this lease shall remain in force for the term of fifteen years from this date, and as much longer as the premises are operated for oil or gas." By its terms the lessor was to receive one eighth of all the oil produced and saved from the premises and $50 per year for the gas from every gas well on the premises, the product of which might be marketed and used off the premises. The rentals were paid in advance each year until June 4, 1899, the last payment having been made June 2, 1898. Prior to the resumption of work by the lessees, Swisher executed a subsequent lease sometime in 1899 to J. W. Bell and one Hewitt, but it was allowed to expire by reason of nonpayment of rental. Then Swisher executed another lease, covering the same land, to said Bell, who was an employee of the Bridgewater Gas Company, a Pennsylvania corporation, which lease was dated February 7, 1900, but was not recorded until some time in April, 1900. This lease was assigned to the Bridgewater Gas Company on the 1st day of August, 1900, and Bell says he took the lease for said company. Early in August, 1900, the claimants, under the two conflicting leases, undertook to begin operations on the land, each placing materials upon the ground and beginning the work of operation. This resulted in the institution of these two suits. On the 15th day of August, 1900, on a bill of the claimants under the Woodyard lease, praying a cancelation of the lease made to Bell as a cloud upon their title to the leased premises, and general relief, an injunction was awarded by Hon. G. W. Farr, judge of the fifth judicial circuit, restraining the Bridgewater Gas Company, its agents and employees, from interfering with the premises. On the 21st day of August, 1900, upon the bill of the Bridgewater Gas Company, praying a cancelation of the Woodyard lease, and an injunction against the claimants thereunder, and general relief, an injunction was granted by Hon. Reese Blizzard, judge of the sixth judicial circuit, restraining E. R. Woodyard, W. M. Cox, A. F. Dennison, and S. B. Sayre, their agents, servants, employees, and assignees, from going upon the premises, and from doing any of the acts mentioned in the bill. An amended bill was afterwards filed by the Bridgewater Gas Company, and all the bills were answered, and affidavits and depositions were taken and filed by all the parties. Hon. Lewis N.

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Tavenner, the judge of said court, being a witness in the causes, Hon. Walter Pendleton was, by agreement, selected to try them, and on the 22d day of May, 1900, the causes were consolidated and heard together, and a decree was entered dissolving the injunction awarded to the claimants under the Woodyard lease, dismissing their bill, canceling the said lease of June 4, 1894, and perpetuating the injunction granted the Bridgewater Gas Company. From this decree an appeal has been taken by the parties interested in the Woodyard lease.

The question of paramount importance is whether the lessees who drilled the well under the lease of June 4, 1894, abandoned the lease, for that question must be taken into consideration in more than one aspect of the case. Its determination necessitates a fuller statment of the facts than has been given. At the time the well was drilled the Woodyard lease was owned by S. E. Mobley, E. Jones, W. M. Cox, and E. R. Woodyard. Mr. Woodyard had retained a one-fourth interest in the lease, and the balance of it had been assigned, directly or indirectly, to the other parties, each of whom held distinct fractional interests. D. C. Mobley, the husband of S. E. Mobley, had the management and control of the operations upon the land, as agent of the owners of the lease. After the well had been drilled, shot, and cleaned out, and a showing of oil found in it, Mobley located another well, and talked of going on and drilling more wells, with the intention of connecting and operating them together by power from one plant, but that was not done. The contractor—Pearson—testifies that he was to go right on and drill another well, when notified to do so, but that there was some delay in paying him for the work he had done, and he received no notice to begin work on a new well, and his tools remained at the well during the fall and winter, and in the spring he moved them all away. It is admitted that at the time of the completion of the well there was a failure of water by reason of dry weather in that locality, but it is uncertain how long that condition existed. Shortly after the cessation of work on the lease, Mobley became interested in other business, and declined the further management of the work on the lease, and then his wife sold her interest. He and W. M. Cox testify that when he gave up the management Cox was to take charge of it. Cox took sick with pneumonia in the fall, and was unable to do anything during the greater part of the winter. In the year 1898, Cox was engaged in oil prospecting and development in Ohio, near Marietta, and he says that as soon as he became able he went over there to look after some business, and then came back to Parkersburg, and purchased machinery and supplies for the development of the Swisher land under the Woodyard lease; but before these tools and supplies were shipped he was notified by J. W. Houke that Swisher had no title to the land, and that the legal title was in him (Houke) and one T. H. Murphy, both of Parkersburg; and thereupon he abandoned the idea of resuming work on the lease until the title could be perfected, and went back to Ohio. He claims to have written from Marietta five letters to Swisher, urging him to perfect his title. These letters were dated May 10, June 17, August 12, September 17, and October 22, 1899, and addressed to Swisher at Elizabeth, West Virginia; but Swisher denies that he ever received any of them, and further says that at that time Elizabeth was not his postoffice. Cox says the letters were inclosed in return envelopes, and that none of them ever came back to him. The Swisher title was in this condition: It was perfect and undisputed as to 68½ acres of the land, and the well had been drilled on that part of it. The other 50 acres was in two tracts, one containing 21 acres and the other 29 acres. Houke and Murphy, in the year of 1881, had sold these two tracts to one Isaac Trader, executing to him a title bond. Swisher had purchased the interest of Trader, and assumed the payment to Houke and Murphy of three notes for the sum of $66.66 each, executed by Trader for purchase money. Swisher had paid off two of these notes and $70 on the principal and interest of the third one, as he contends. The only dispute as to these payments is in respect to $30, which Swisher handed to Lewis N. Tavenner on the 27th day of March, 1889, to be paid to Houke. Judge Tavenner has no recollection of handing the money to Houke, but he is satisfied that he either did that or that it was included in some of the checks which he filed. From this it is clear that nothing stood in the way of Swisher's obtaining a deed for the 50 acres of land except the payment of a very small amount of money. However, Houke says Swisher had given him, by verbal contract, in consideration of forbearance, an interest in the mineral in the land. It is also shown that Mr. Woodyard, the lessee, knew the condition of Swisher's title at the time the lease was executed. Cox's only effort to get Swisher to perfect the title was the writing of said letters. He never went to see Swisher about it, nor did Woodyard or any of his associates. In the winter of 1899 Cox was sick again for a considerable time, and it is claimed by the appellants here that all this long period of delay is excused and accounted for by these circumstances, failure of water, bad weather, Cox's sickness, and defect of title, and that they never had any intention of abandoning the lease. On the other hand, it is claimed that the appellants actually abandoned the lease, and are now setting up these matters as mere pretenses and subterfuges: and attention is directed to their long absence from the premises, the condition in which they left the well, and their permitting the machinery which was on the ground to be taken away. How long there was a lack of sufficient water to carry on the work does not appear, but there was certainly water during the winter, and it is shown by the testimony in the case that such work could be and was carried on in that part of the country during the winter. If the well was pro-

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tected in any way during the winter from the surface water and from the throwing of obstructions into it, it was only by a board laid over the top of it and held in place by a wrench or some tools. Pearson says the tools were left hanging in the well. Swisher and others say there was a board over it. When Pearson moved his machinery away, one Ash, who was assisting him, cut a wooden block and plugged the well with it, and this probably remained in it for about a year. Only two pieces of casing were put in, and these were not of sufficient length to go down far enough to prevent the well from caving, nor to shut off from the well what is called "surface water,"—water which comes into the well above the oil sand. No examination of the well seems to have been made until after these suits were brought. Swisher and Bell testify that in January, 1901, they took a line, tied a piece of cast iron to it weighing several pounds, and with that measured the depth of the well, and found that it was then only 104 or 105 feet deep, and the casting brought up with it clay or other substance, which was of the character of that which caves into an unprotected well in that locality. They also found that water stood in the well to within 12 or 13 feet of the top, and that there was but a scum of oil on it. It further appears from the testimony that the opening and cleaning out of a well in that condition is more expensive and difficult than the drilling of a new well. Other pertinent facts bearing on the intention of the lessees and the construction of the lease are that all who were concerned in the well drilled, including Swisher, thought there was oil there in paying quantities. Swisher seems to think the well was injured by shooting, but he gives no good reason for that. Mobley was present when the well was shot, and he says they found lubricating oil at 74 feet, and it was his judgment that, had they stopped there, the well would have produced one barrel a day. He says that when they went down into the second Cow Run sand and shot the well it flowed up to within 45 feet of the top.

It is suggested in the briefs for the appellees that the lease in question here is very similar to the Gartlan lease construed in *Steelsmith* v. *Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978, but in some respects they differ widely. In the Gartlan lease the consideration expressed was only $1, while here it is $50; but that is unimportant, for it is expressly agreed in the lease that the $50 is for the rent for one year. The Gartlan lease did not bind the lessee to do anything but drill one well on the premises. It contained no covenant to pay rent even for delay in putting down the well. By reason of its failure to impose any obligation on the lessee to do anything after drilling a dry hole and his abandonment of the premises, it was held that the lease created an estate at will, and the lessor had the right to lease the land to another. Here, as has been shown, there is a covenant to pay rent, and one of the pivotal questions in construing the lease is, When does that obligation cease? If it continues after an unsuccessful effort to find oil, or after it is found, but production is abandoned, it has never ended, unless on the theory of abandonment of the lease. The rent is not made payable in advance, nor is any time fixed for its payment, nor does the lease contain a clause of forfeiture. If the completion of a dry hole on the premises operates a cancelation of the obligation to pay rent under the clause, "it is further agreed that when the first well is completed on said premises, then all cash rentals shall cease," there would be an end of all obligations or covenants on the part of the lessee, for he is not bound to drill a second well by the terms of the lease. Such construction would class this lease with the Gartlan lease, and abandonment of the premises after putting down an unproductive well would end the lease. A widely different view of the legal meaning of the lease is the one taken by the lessees. It is not contended for in the argument, but, as it serves to throw light on the conduct of the parties, and affects the question of intention, so vital in determining whether there has been an abandonment of the lease, it is here given and discussed. Taking the meaning of the clause last quoted to be that the completion of a dry hole, or a well by which oil is discovered, but from which none is produced, operates an extinguishment of the obligation to pay rent, and vests in them title to the oil in the land, the lessees, after completing this well, refused to pay any more rent, and denied that any was, or would thereafter become, due. Both Cox and Woodyard insisted, after the well had been drilled, that they were not bound to pay any more rent. Soon after the 4th day of June, 1899, the date to which the rent had been paid, Swisher wrote Woodyard a letter in reference to the rent and the lease, and he says he notified him that the lease was forfeited. Woodyard admits having received a letter from Swisher, but says he does not remember its contents. He says that on another occasion, still later, he saw Woodyard, and told him that the lease was forfeited, and Woodyard insisted that under the lease he was to pay no rent after the completion of a well; and on the witness stand in this case he still insisted that he was not bound to pay any more rent, but that he was entitled to hold his lease without such payment. On the 24th day of August, 1900, Cox made Swisher a tender of the rent up to June 4, 1900, with the interest thereon, but he coupled it with a protest to the effect that no rent was due him. This position of the lessees is based upon the assumption that by drilling a well and finding oil they acquired a vested interest in the oil and gas in that tract of land. Until oil is discovered in paying quantities, the lessee acquires no title under such lease. It simply gives a right of exploration. *Steelsmith* v. *Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978; *Venture Oil Co.* v. *Fretts*, 152 Pa. 451, 25 Atl. 732; *Plummer* v. *Hillside Coal & I. Co.* 160 Pa. 483, 28 Atl. 853; *Crawford* v. *Ritchey*, 43 W. Va. 252, 27 S. E. 220. After the discovery of oil in paying

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quantities, it is held that title does vest in the lessee; but there is no case which goes so far as to announce that after mere discovery of oil the lessee, upon the assumption of a vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease, and simply hold it for speculative purposes, or to await his own pleasure as to the time of development. A well-settled principle of law is that a contract shall be construed as a whole, and in the light of the purposes and objects for the accomplishment of which it was made. Oil leases are no exception to the rule, and, as the subject-matter of the lease is peculiar in its nature, the courts have given this principle great latitude in their construction. They are executed by the lessor in the hope and with an expressed or implied condition that the land shall be developed and oil produced. When production takes place, the lease is mutually beneficial. The royalty which it is stipulated in all these leases that the landowner shall receive is generally the moving cause of the execution of the lease. If there is one principle that is asserted in *Steelsmith* v. *Gartlan* more vigorously and with more emphasis than any other it is that the lessee shall proceed to make the lease profitable to both parties, and that he shall not be permitted to tie up the land. "The 'testing' provided for was manifestly a condition upon which the lease depended. If such test showed no minerals, then the contract was at an end; if it, on the other hand, showed the presence of valuable mines, then the lessees were bound to operate them in good faith for the joint profit of themselves and the owners of the fee. Technical words are unnecessary to raise a condition. If a fair and reasonable construction of the instrument shows that a lease shall depend upon the doing or not doing something essential to the purposes of the contract, the law implies the condition." *Petroleum Co.* v. *Coal, Coke, & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65. "It would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term a considerable length of time without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice." *Conrad* v. *Morehead*, 89 N. C. 31. "Forfeiture for nondevelopment or delay is essential to private and public interest in relation to the use and alienation of property. . . . In general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee, whose lease is of no value till developed." *Munroe* v. *Armstrong*, 96 Pa. 307. "The landowner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee, who has paid no consideration, to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement." *Huggins* v. *Daley*, 48 L. R. A. 320, 40 C. C. A. 19, 99 Fed. 613. "If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner and to a reasonable extent is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments and the other sums stipulated were intended, not only to spur the operator, but to compensate Ray for the operator's delay or default." *Ray* v. *Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L. R. A. 290, 20 Atl. 1065, 1067. "If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract." *Crawford* v. *Ritchey*, 43 W. Va. 252, 27 S. E. 220. All the provisions of the contract must be effective, if possible. By its terms this lease is to be in force for the period of fifteen years from its date, and as much longer as the premises are operated for oil or gas. Another provision is that the lessor shall have one eighth of the oil produced and $50 per annum for each gas well. It is just as important to the lessor that, when discovery of oil is made, the land shall yield him his royalty, as it is that discovery shall vest in the lessee title to the balance of the oil. If the lessee shall be permitted to sit down, and refuse to produce, after discovery, the lessor loses a part of what he contracted for. The contract bears no such construction as that. What the lessee acquires by discovery is the right to produce and take the oil, paying out of it the stipulated royalty, and not title to the oil as it remains in the land without production. Hence, this provision that, when a well is completed on the premises, all cash rentals shall cease, must be taken to mean that such cash rental shall cease only when a producing well is completed and operated on the premises, or that the completion of a nonproducing well extinguishes the obligation to pay rent, and places the lease within the principle announced in *Steelsmith* v. *Gartlan*.

Which is the true construction? If the former be taken, it must be said that after the completion of this well the lessor had his right of action on the covenant to pay rent, and, as the lease contains no clause of forfeiture, all he could get during the whole period of fifteen years would be his rent of 50 cents an acre—$59.25 per year,—if the lessees should determine not to further prosecute their right of exploration. That

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would as effectually tie up the oil, and prevent production by the landowner or anybody else for a long time, as the construction which the lessees put upon the lease; but in so construing it the strict letter of the contract would be adhered to. The lessor agreed to take either the production of oil, yielding him one eighth, or a rental of 50 cents an acre for each year that the lease may remain in force after the first year. There is no provision in the lease which compels the lessee to drill a well at any particular time, and, if this provision stood alone, unqualified by any other clause of the lease, the drilling of a well might be deferred during the whole period of fifteen years, so that the lessor would receive nothing but the rent. It is useless to enter upon a discussion of the proper construction of this in view of all the other provisions of the lease had no well ever been drilled; for one has been drilled under the lease, and that makes it necessary to consider it along with the clause providing for extinguishment of the rentals. If the clause providing for the payment of rent shall be construed according to its very letter, is there any reason why the clause providing for the extinguishment of rent shall not be construed in the same way? If it be so construed, does it not mean that the completion of any well, producing or nonproducing, shall put an end to the covenant to pay rent? If the parties meant that the completion of a well to so operate should be a producing well, why did they not say so in the lease? It was a matter of great importance to each of them. Why should the court read into the lease what the parties did not put in? If it means that the completion of any well should have that effect, they contemplated a virtual cancelation of their respective rights under the lease with the completion of one well. One rule of construction is that every clause in a lease or contract shall have some effect, and it is presumed that it was inserted by the parties for some purpose. If a producing well was in the contemplation of the parties when they inserted this clause, they did a vain and useless thing in putting it in the lease. No court would so construe this lease as to compel the lessee producing oil under it to give the lessor his royalty and rental, too. The rental provision in the lease is never intended to continue after the production of oil begins. The completion of a producing well would end the obligation to pay rent, and this clause, providing for its extinguishment, would be useless in that event. In order to find any reason or purpose on the part of these parties for inserting it, it must be held to apply to a nonproducing well as well as a productive well, and thus end the obligation to pay rent in either event. But a careful inspection of all of that portion of the lease which relates to the payment of rent will show conclusively that this is the true interpretation of its meaning. It is as follows: "Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm; to bury gas lines 2 feet below the surface, when notified so to do; and pay all damages to growing crops by reason of said operations; and, further, to complete one well on said premises within one year, or the said E. R. Woodyard shall pay to said Jacob S. Swisher rental as hereinbefore provided. The consideration upon which this lease is executed is as follows: Fifty dollars cash in hand paid, the receipt of which is hereby acknowledged, and 50 cents per acre for each year that this lease may remain in force after the first year; but it is agreed and understood that the $50 paid in cash is to pay all rentals on this lease for the period of one year from the date hereof. It is further agreed that when the first well is completed on said premises then all cash rentals shall cease." Clearly, it only means to make certain the cessation of any obligation to pay rent after the completion of one well. If the word "and" be inserted between the words "hereof" and "it," it supplies what has clearly been omitted by mere inadvertence, the link which connects this clause directly with the covenant to pay rent, and makes it qualify that clause. The covenant to pay rent itself is conditional by its very terms. The lessee agrees "to complete one well on said premises within one year, or" pay rent as thereafter provided. The provision referred to is that he shall pay 50 cents per acre for each year that the lease should remain in force after the first year. This being qualified by the clause providing for the cessation of cash rentals, it simply means that the rent shall be paid for each year that the lease may remain in force after the first year, but no longer than the completion of the first well on the premises. This makes it harmonize with the undertaking to complete one well on the premises within one year, or, in lieu of completing a well within the year, pay rent. This construction not only harmonizes with the true meaning and purport of the entire provision concerning rent, and adheres to the very letter of the clause itself, but also embodies and enforces that principle of law so universally announced by the courts, as shown by the authorities hereinbefore cited and quoted, which discourages tying up and rendering unproductive the vast fields of mineral wealth, construes every contract and lease as to both lessor and lessee so as to best promote production, development, and progress, and frowns upon every attempt to evade it as being in contravention of both good morals and public policy.

Under this construction it may be said that, had the lessees found this well, upon its completion, to be a dry hole, they could not have gone on and drilled another, and continued their exploration for oil, without making a new lease or contract. That is a question which neither this court nor any other has ever been called upon to decide. How far the equitable principles which the courts apply in all cases involving rights under oil leases might be applied for the relief of one who is prosecuting his search in good faith and with diligence and at great ex-

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pense, remains to be seen when such a case shall present itself. Such was not the case of *Steelsmith* v. *Gartlan*, nor is it true of this case. It is by no means conclusive of the question of abandonment that the lessees insisted that their lease was not forfeited, that there were some circumstances which rendered it inconvenient for them to continue the work of exploration, and that Cox made some effort to have the alleged defective title of Swisher perfected. All this is consistent with the intention to continue the work of exploration, but it is equally consistent with the intention merely to endeavor to hold onto the lease without doing any work under it,—a thing which the policy of the law does not permit unless the right to do so is absolutely fixed and secured by the terms of the contract; and even then it is not always permitted. In *Huggins* v. *Daley*, 48 L. R. A. 320, 40 C. C. A. 12, 99 Fed. 606, an illiterate farmer leased his land for the term of five years, and the lease contained this clause: "Provided, however, that a well shall be commenced upon the above-described premises within thirty, and completed within ninety, days from the date hereof; and, in case of failure to commence and complete said well as aforesaid, the lessee shall pay to the lessor a forfeiture of $50." Of this lease the court said: "The proof is clear that he never intended to drill the well within the time stipulated. This proviso was written by the lessee evidently for purposes of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was 'keeping the word of promise to the ear and breaking it to the hope;' skilfully turning it into a mere speculative lease binding the lessor and leaving himself free. It would be unconscionable to hold the lessor bound." These excuses and pretenses of the lessees must be taken in connection with the other facts disclosed by the evidence in determining whether they had laid aside their purpose to go on in good faith and diligence to develop that land, and were simply making such pretense of preparation so to do as would enable them to say that they still entertained such purpose, or were actually using diligence, and doing what it was reasonably and fairly in their power to do to render the lease productive. Having drilled a well, which, according to their own representation, would have produced oil in paying quantities, if protected, they allowed it to fill up, and become absolutely worthless, according to the uncontradicted testimony in this case. This undoubtedly shows an abandonment of the purpose expressed by Mobley to drill other wells to be connected with this one, and all operated by the same power. It is further shown by the fact that Pearson, whom he intended to employ to do that work, was never requested to begin it, but was allowed to move his machinery away, leaving nothing except a mere hole in the ground to indicate that anything had been done upon the premises. While a lack of water may have delayed the work of cleaning out the well, putting in the tubing, and pumping it, no attempt is made to show any reason for the failure to put in sufficient casing and otherwise protect the well from caving in and becoming filled up with obstructions. After leaving the premises in the fall of 1898, Mobley never returned. Cox never came upon the land, nor sent anybody else to it, until in April, 1900, —very nearly the date on which the lease executed to Bell was recorded. At that time development and exploration for oil, which had not been active in that community for some time, were resumed, and there was considerable excitement. These circumstances, no doubt, had much to do with the effort on the part of Cox to resume work on the lease. But that effort came long after the time when they should have been at work on the land, or doing something to evidence a purpose to devolop it, and long after the occurrences which conclusively show an intent on their part to abandon the lease. The theory that the lessees, for a long time after the completion of the well, had no intention to go on with the work, but were simply trying to hold the lease without doing anything under it, finds strong support in the meaning which they put upon the lease. Under their misconception of it they claimed the right to hold it, and take their own time in which to develop the land. Prompt and vigorous work on a new well after abandoning the one put down, being in possession of the premises under a lease, which, by its own terms, had no binding force upon either party after the completion of one well, might have entitled them to stand upon the equity of the case; but certainly they are not entitled to do so after having delayed action for more than eighteen months, under circumstances which strongly indicate an intention to indefinitely abandon further work on the premises.

These views result in the affirmance of the decree.

Rehearing denied.

ALABAMA SUPREME COURT.

Ex parte Mayor, etc., of BIRMINGHAM.

(134 Ala. 609.)

A court may prevent the use, during court hours, of a pavement newly laid in the adjoining street, in such a way that the noise of the traffic thereon interrupts the business of the court, both under its common-law powers, and under a statute giving it power to preserve order so near to it as is necessary to prevent interruption, disturbance, or hindrance to its proceedings.

(November 18, 1902.)

NOTE.—As to power of judge to prevent travel in front of courthouse during hours when court is sitting, see also, in this series, Belvin v. Richmond (Va.) 1 L. R. A. 807.

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APPLICATION for a writ of mandamus to compel the judge of the Circuit Court for Jefferson County to revoke an order closing a public highway. *Dismissed.*

The facts are stated in the opinion.

Mr. **E. D. Smith**, for petitioner:

The control of the streets, so far as obstructing the same is concerned, is vested in the legislature.

Mobile v. *Louisville & N. R. Co.* 124 Ala. 132, 26 So. 902; *State* v. *Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Costello* v. *State*, 108 Ala. 45, 35 L. R. A. 303, 18 So. 820.

Any obstruction of a public thoroughfare in a city is declared a public nuisance indictable at law.

Costello v. *State*, 108 Ala. 45, 35 L. R. A. 303, 18 So. 820.

It is the duty of the city to abate any such nuisance.

Birmingham v. *Tayloe*, 105 Ala. 170, 16 So. 576; *Webb* v. *Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289, 87 Ala. 659, 6 So. 408.

It can hardly be said that the city, in exercising its legitimate governmental functions in paving a street, is maintaining a nuisance. This action is authorized by the legislature, and consequently cannot be, technically, in law a nuisance.

16 Am. & Eng. Enc. Law, p. 1000; *Owen* v. *Phillips*, 73 Ind. 284; *Easton* v. *Neff*, 102 Pa. 474, 48 Am. Rep. 213; *Child* v. *Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Mills* v. *Brooklyn*, 32 N. Y. 489; *North Vernon* v. *Voegler*, 103 Ind. 314, 2 N. E. 821.

Messrs. **John P. Tillman** and **James Weatherly**, for respondent:

The judge has both the inherent and the statutory power to prevent or abate any interruption, disturbance, or hindrance of the proceedings of his court.

Belvin v. *Richmond*, 85 Va. 574, 1 L. R. A. 807, 8 S. E. 378; *New Orleans* v. *Bell*, 14 La. Ann. 210.

If the power exists in the circuit judge to issue such an order in some case in order to protect his court, the manner in which, and the circumstances under which, the power shall be exercised, involves a judgment or discretion, which cannot be controlled by mandamus.

Taylor v. *Kolb*, 100 Ala. 606, 13 So. 779.

The very fact that the propriety of the order cannot be ascertained except by evidence *aliunde*, and the exercise of judgment upon that evidence, conclusively resolves that the question is of a judicial character, not purely ministerial, and, hence, that mandamus will not lie.

Ibid.; *Leigh* v. *State*, 69 Ala. 266; *State ex rel. Harmon* v. *Hamil*, 97 Ala. 107, 11 So. 892.

That the respondent had the inherent power in a proper case to require the custodians of the courthouse to furnish him with another room for holding his court, cannot affect the questions involved in this proceeding.

Vigo County v. *Stout*, 136 Ind. 53, 22 L. R. A. 398, 35 N. E. 683.

Although the party applying for mandamus has a clear legal right which has been violated, and it is conceded that his remedy is mandamus, the court will not interfere in a case involving in a collateral manner the right of parties who have no opportunity of defending their interest.

Ex parte Du Bose, 54 Ala. 278; *Taylor* v. *Kolb*, 100 Ala. 606, 13 So. 779.

Haralson, J., delivered the opinion of the court:

The charter of Birmingham bestows on the mayor and aldermen power "to establish streets, avenues, and alleys, and regulate and control the paving and curbing of streets and sidewalks, and the giving of the grade thereof." Acts 1882–83, p. 312. This statute does not prescribe the kind of paving to be put down in any instance, but leaves it discretionary with the mayor and aldermen as to the paving of any particular street and the material with which it shall be paved. This power is not absolute, but is one to be exercised for the public good, having regard to established conditions. The maxim *Sic utere tuo ut alienum non lædas*, is applicable in such case.

It is shown by the petition, paragraph 5, "that prior to June 2, 1902, your petitioner (the mayor and aldermen), as authorized by its charter, caused said Twenty-First street, from First avenue to Eighth avenue, north, to be paved with vitrified brick, which said pavement was laid in a scientific and approved manner, under plans commonly used for such purposes, and that before said date in June, said Twenty-First street, as paved, between Third and Fourth avenues, was open for and was used by the public, as above described."

The answer admits the averments of this paragraph of the petition, "but says that said street had been paved with vitrified brick only a very short time prior to the issuance of respondent's order, on June 2, 1902, to wit, about ninety days, and that, prior to the time the said street was paved with vitrified brick, it was not paved at all, but was laid with gravel, or chert and earth, so that travel thereon, including the passage of heavy vehicles and street cars, was comparatively noiseless. This has been the condition of the street for a great many years prior to June 2, 1902, in fact, since the building of the said courthouse in the year 1887. That said vitrified brick pavement, while laid in a scientific manner, is of such material, and necessarily so laid and constructed, as to emit an extraordinarily loud and roaring kind of noise during the passage of vehicles over the same, and even light vehicles, unless they have rubber tires, cause a rattling and roaring noise, which can be as plainly heard in respondent's court room as by a person standing on the sidewalk of said street; indeed, it can be truthfully said that the noises made by vehicles and street cars in said street in front of said court room are greater and more resounding inside of the court room, than outside, the acoustic principles of said court

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room being such that the noises coming from said street reverberate in the court room to a much greater extent than in the air." The answer proceeds to state, in substance, that the noises created by the passage of vehicles and cars is so great as to create a combination of roaring and rattling noises, which fill the court room, drowning all other sounds therein, which cannot be kept out by shutting all the doors and windows, as respondent often tried to do; that these noises are so great as to stop the proceedings of the court for much of its time, because what is being said by the court, attorneys, and witnesses cannot be heard; that before said pavement was laid petitioners were warned and notified that it would cause the very disturbance it has caused and interfere with the business of the court but, in spite of such warning, petitioners proceeded to lay the same.

If this case were decided upon the mere equities of the equality of rights, it would seem that, the courthouse having been established long before the paving of the street, the petitioners, coming to exercise the power of paving conferred on them by their charter, should have done so in a manner, not to so seriously interrupt and interfere with the due administration of public justice, such as is shown has been done. The street should have been paved in a manner, and with materials, such as would not have caused the disturbance of the court complained of, and which the judge sought by his restraining order to prevent. Especially is this true, since it appears that, by paving with some other materials, the disturbance might have been largely avoided.

Aside from this view, however, it may be stated as a truism, that every court of record has inherent power, irrespective of statute, to make rules for the regulation and transaction of its business, not in conflict with the Constitution and laws of the land (4 Am. & Eng. Enc. Law, p. 450); and that such courts, endowed with this power, may punish all persons for contempt of their rules and orders, for disobedience of their process, or for disturbing them in their proceedings (3 Am. & Eng. Enc. Law, p. 780). Furthermore, it is provided by statute in this state, that "every court has power . . . to preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings." Code, § 2639, subd. 1. This common-law and statutory power of the court, well known to petitioners at the time they laid the pavement, or caused the same to be laid, was a warning to them that it should be laid in a manner not to hinder or prevent the due administration of justice at the place long theretofore ordained by law for it to be administered. A proper regard for the public interests should have so influenced them.

We are not without precedents for the action of the court in quelling these disturbances. The case of *New Orleans* v. *Bell*, 14 La. Ann. 210, was one of a rule taken against the sheriff, Bell, to show cause why he should not be enjoined from placing a barricade in the street, ordered by the judge of the first district court to be so placed, to prevent the disturbance of the proceedings of the court, while in session, by the passage of horses and vehicles. The supreme court, on appeal from the order denying the injunction, held that the judges of the courts in New Orleans are vested with full power to regulate the police of their courts, and to prevent the disturbances to the administration of justice referred to. Again, in *Belvin* v. *Richmond*, 85 Va. 574, 1 L. R. A. 807, 8 S. E. 378, it was held that a judge of the hustings court of the city of Richmond had authority to order ropes stretched across a street during the hours his court was sitting, to prevent travel in front of the courthouse, where the noise of passing vehicles was sufficient to obstruct the proper administration of justice therein. These decisions do not appear to have been based on statutes, and there is nothing in the statutes of this state which makes them inapplicable here.

It is to be admitted that any unauthorized obstruction of a public highway, such as impedes its lawful use as such, is a public nuisance at common law, which the public have the right to abate. But that rule does not apply to this case. If, during court hours, the unobstructed travel on Twenty-First street, between Third and Fourth avenues, does in fact obstruct, interrupt, or hinder the proceedings in said court, in the manner shown, then the power of the court to abate such obstruction, hindrance, or interruption to the administration of justice would seem, both on principle and authority, clearly to follow, and the order of the judge cannot be said to have been unauthorized.

This order, as amended, does not appear to have gone any further than was absolutely essential to abate the disturbance, and protect the court from interruption. It cannot be characterized as arbitrary or excessive.

We need not consider the question whether the court was under obligation to move into some other room in the courthouse occupied by other officers. It appears that this privilege was not open to it. Besides, the room it did occupy was the one in the building long theretofore dedicated to its uses for holding court.

The question has been raised by the respondent, as to whether the remedy here invoked is the proper one in such a case. We may forego its decision, however, since, having no wrongs to avenge, the consideration of the petitioner's remedy is unnecessary.

The prayer for mandamus is denied, and the petition therefor is dismissed.

Mandamus denied, and petition dismissed.

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CALIFORNIA SUPREME COURT.

GERMAIN FRUIT COMPANY, *Appt.*,
v.
WESTERN UNION TELEGRAPH COMPANY, *Respt.*

(137 Cal. 508.)

A telegraph company is not liable for the loss sustained by performance of a contract closed at a price quoted in a message as changed in transmission, where the sendee, from his knowledge of the market, knew that a mistake must have occurred, and acted in bad faith, since, the contract not being binding on the sender, he cannot voluntarily perform it and throw the loss on the company.

(November 17, 1902.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendant in an action brought to recover damages for negligent transmission of a telegram. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Ward Chapman** and **J. S. Chapman**, for appellant:

The evidence shows that defendant was guilty of gross negligence in the highest sense of that phrase.

Shearm. & Redf. Neg. § 12, 3d ed. § 559.

Plaintiff is entitled to judgment upon the finding that defendant did not use "great care" in transmitting and delivering this message.

Coit v. *Western U. Teleg. Co.* 130 Cal. 657, 53 L. R. A. 678, 63 Pac. 83; *Hart* v. *Western U. Teleg. Co.* 66 Cal. 579, 56 Am. Dec. 119, 6 Pac. 637; *Redington* v. *Pacific Postal Teleg. Cable Co.* 107 Cal. 317, 40 Pac. 432; *Primrose* v. *Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Pacific Postal Telcg. Cable Co.* v. *Fleischner*, 14 C. C. A. 166, 29 U. S. App. 227, 66 Fed. 899; *Bierhaus* v. *Western U. Teleg. Co.* 8 Ind. App. 246, 34 N. E. 581, 12 Ind. App. 17, 39 N. E. 881; *Western U. Teleg. Co.* v. *Cook*, 9 C. C. A. 680, 15 U. S. App. 445, 61 Fed. 624.

There is no evidence to support the finding that Cornforth & Co. did not rely upon the telegram as received by them. But the conduct and motives of Cornforth & Co. are wholly irrelevant to the case.

25 Am. & Eng. Enc. Law, p. 890, notes 3, 4; *Burrell Twp.* v. *Uncapher*, 117 Pa. 353, 11 Atl. 619; *Powell* v. *Deveney*, 3 Cush. 300, 50 Am. Dec. 738; 16 Am. & Eng. Enc. Law, pp. 441, 442; *Carterville* v. *Cook*, 129 Ill. 152, 4 L. R. A. 721, 22 N. E. 14; *Bank of California* v. *Western U. Teleg. Co.* 52 Cal. 280; *Bank of Palo Alto* v. *Pacific Postal Telcg. Cable Co.* 103 Fed. 841.

Wherever two innocent parties must suffer by the acts of a third, he who has by his negligence enabled the third party to occasion the loss must sustain it.

McClelland v. *Bartlett*, 13 Ill. App. 236; *Noble* v. *Moses Bros.* 74 Ala. 604.

Cornforth & Co. had a right to rely upon the telegram as received by it.

Trevor v. *Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Western U. Teleg. Co.* v. *Shotter*, 71 Ga. 760; *Haubelt Bros.* v. *Rea & P. Mill Co.* 77 Mo. App. 672.

Where two parties have contributed in causing an injury, both parties are liable, and neither can defend against an action on account of the injury by saying that a recovery might have been had against the other.

Bank of California v. *Western U. Teleg. Co.* 52 Cal. 280; *Burrell Twp.* v. *Uncapher*, 117 Pa. 353, 11 Atl. 619; *Powell* v. *Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Carterville* v. *Cook*, 129 Ill. 152, 4 L. R. A. 721, 22 N. E. 14; *Tompkins* v. *Clay Street R. Co.* 66 Cal. 163, 4 Pac. 1165; *Scott* v. *Shepherd*, 2 W. Bl. 892, 1 Smith Lead. Cas. 210; *Lynch* v. *Nurdin*, 1 Q. B. 29; *Jacksonville, T. & K. W. R. Co.* v. *Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L. R. A. 33, 9 So. 653; 25 Am. & Eng. Enc. Law, p. 890; *Trevor* v. *Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Western U. Teleg. Co.* v. *Shotter*, 71 Ga. 760; *Schultz* v. *McLean*, 93 Cal. 329, 28 Pac. 1053; *McClelland* v. *Bartlett*, 13 Ill. App. 236; *Noble* v. *Moses Bros.* 74 Ala. 604.

Messrs. **George H. Fearons** and **R. B. Carpenter**, for respondent:

Whenever there is a contract to do something, the obligation of the contract is the only obligation between the parties with regard to the performance, and any action for failure or negligence therein is an action on the contract, and this, whether there was a duty antecedent to the contract or not.

Pollock, Torts, Am. ed. p. 654; *Primrose* v. *Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Clement* v. *Western U. Teleg. Co.* 137 Mass. 463; *United States Teleg. Co.* v. *Gildersleve*, 29 Md. 232; 96 Am. Dec. 519; *Ellis* v. *American Teleg. Co.* 13 Allen, 226; *Grinnell* v. *Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Kiley* v. *Western U. Teleg. Co.* 109 N. Y. 231, 16 N. E. 75; *Passmore* v. *Western U. Teleg. Co.* 78 Pa. 238; *York Mfg. Co.* v. *Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *Hart* v. *Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

A party to whom a benefit is secured by contract may waive such benefit.

Smith v. *New York C. R. Co.* 24 N. Y. 222.

If this was a mistake of the operator, then it is covered by the contract. The fact of the peculiar and unusual phraseology of the message, taken in connection with the other fact that the message contained but nine words, while on its face it was plainly

NOTE.—For a case in this series somewhat similar to this, holding that the sender of a telegram, who, with knowledge of a mistake in transmitting it, completes a contract made in reliance thereon by his agent, in order to protect the agent, cannot recover against the telegraph company, see Shingleur v. Western U. Teleg. Co. (Miss.) 30 L. R. A. 444.

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marked ten words, was surely enough to put Cornforth & Co. upon their guard, and require from them further investigation.

The law does not allow damages for avoidable consequences.

Hamilton v. *McPherson*, 28 N. Y. 77, 84 Am. Dec. 330; *Grindle* v. *Eastern Exp. Co.* 67 Me. 317, 24 Am. Rep. 31; *Western U. Teleg. Co.* v. *Neill*, 57 Tex. 283, 44 Am. Rep. 589.

The stipulations on the back of the message are reasonable and legal, and, when signed by the sender, become a contract between the sender and the company.

Hart v. *Western U. Teleg. Co.* 66 Cal. 579, 56 Am. Dec. 119, 6 Pac. 637; *Redington* v. *Pacific Postal Teleg. Cable Co.* 107 Cal. 317, 40 Pac. 432; *Coit* v. *Western U. Teleg. Co.* 130 Cal. 657, 53 L. R. A. 678, 63 Pac. 83.

A common carrier may, by special contract, limit his common-law liability in cases of ordinary negligence.

New Jersey Steam Nav. Co. v. *Merchants' Bank*, 6 How. 384, 12 L. ed. 483; *York Mfg. Co.* v. *Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *Southern Exp. Co.* v. *Caldwell*, 21 Wall. 264, 22 L. ed. 556; *Ogdensburg & L. C. R. Co.* v. *Pratt*, 22 Wall. 123, 22 L. ed. 827; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 458, 32 L. ed. 798, 9 Sup. Ct. Rep. 469; *Hart* v. *Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *Boscowitz* v. *Adams Exp. Co.* 93 Ill. 523, 34 Am. Rep. 191; *Taylor* v. *Little Rock, M. R. & T. R. Co.* 32 Ark. 393, 29 Am. Rep. 1; *Cooper* v. *Berry*, 21 Ga. 526, 68 Am. Dec. 468; *Harvey* v. *Terre Haute & I. R. Co.* 74 Mo. 541; *Pittsburg, C. & St. L. R. Co.* v. *Barrett*, 36 Ohio St. 448; *Dillard* v. *Louisville & N. R. Co.* 2 Lea, 288; *East Tennessee, V. & G. R. Co.* v. *Brumley*, 5 Lea, 401; *Galveston, H. & H. R. Co.* v. *Allison*, 59 Tex. 193; *Baltimore & O. R. Co.* v. *Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664; *Cream City R. Co.* v. *Chicago, M. & St. P. R. Co.* 63 Wis. 93, 53 Am. Rep. 267, 23 N. W. 425; *Cutts* v. *Brainerd*, 42 Vt. 566, 1 Am. Rep. 353; *The Lady Franklin*, 8 Wall. 325, *sub nom. King* v. *The Lady Franklin*, 19 L. ed. 455; *The Delaware*, 14 Wall. 579, *sub nom. The Delaware* v. *Oregon Iron Co.* 20 L. ed. 779; *Merchants' Despatch Transp. Co.* v. *Leysor*, 89 Ill. 43; *Cincinnati, H. & D. R. Co.* v. *Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *Stecle* v. *Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *The Emily* v. *Carney*, 5 Kan. 645; *Newman* v. *Smoker*, 25 La. Ann. 303.

Temple, J., delivered the opinion of the court:

This action is for damages occasioned by alleged negligence in the transmission of a telegraph message. Judgment was for the defendant, and plaintiff appeals from the judgment and from an order refusing a new trial.

The plaintiff is a wholesale dealer in fruits, and engaged in buying and selling fruits, and in shipping from Southern California to various points east. On the 18th of February, 1887, plaintiff received a despatch from Cornforth & Co., fruit merchants at Denver, Colorado, asking for prices of oranges. In response, plaintiff sent the following despatch to Cornforth & Co.: "Offer Los Angeles, San Gabriel, Santa Ana oranges, one fifty; Riversides, two sixty." As delivered to Cornforth & Co., the despatch was altered by the omission of the word "two." As sent, the telegram was easily understood as an offer of Los Angeles, San Gabriel, or Santa Ana oranges, at $1.50 per box, and of Riverside oranges at $2.60 per box. As received, it was understood, and would have been understood, by those engaged in the trade at Denver, as an offer of Riverside oranges at $1.60 per box. Two carloads of Riverside oranges were ordered by Cornforth & Co., and were shipped to that firm by plaintiff, and were duly received, but Cornforth & Co. refused to pay more than $1.60 per box for them. Plaintiff settled with Cornforth & Co. at that rate, and brought this suit to recover the difference between the price stated in the offer as delivered to defendant for transmission and as delivered by it to Cornforth & Co.

The defendant practically admits the receipt and delivery of the message as charged, but denies that the change in the language of the message was caused by the gross carelessness or negligence of the defendant, its servants, or agents. It also denies that Cornforth & Co. relied upon the despatch as received, and avers that they well knew at the time that Riverside oranges were worth $2.60 per box in the Los Angeles market, and therefore that the word "two," and not the word "one," should be supplied before the word "sixty" in the message as delivered. It charges that Cornforth & Co. intended to defraud either the plaintiff or defendant. It is contended, therefore, that plaintiff could and should have compelled Cornforth & Co. to pay for the oranges at market rates, in which event there would have been no loss.

The court found, among other facts: (1) The despatch was sent, received, and delivered as alleged. (2) The omission of the word "two" was not done through gross carelessness or gross negligence. (3) The telegram, as received by Cornforth & Co., according to usage was properly understood as an offer of Riverside oranges at $1.60 per box; that Cornforth & Co. at the time knew the market price of Riverside oranges at Riverside and Los Angeles, and such price was so much greater than that named that Cornforth & Co. had reason to believe that there was a mistake, and therefore did not rely upon the telegram as giving the correct price, and did not act in good faith in sending their orders for two carloads at once. (4) Plaintiff shipped the carloads to Cornforth & Co., believing that the despatch had been correctly sent, and that Cornforth & Co.. by giving the order, were bound to pay $2.60 per box, which was the market value of the goods. Cornforth & Co., however, refused to pay, and have not paid, more than $1.60 per box, and plaintiff has been damaged, by the negligence of the defendant in transmitting and delivery of the said de-

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spatch, in the sum of $939. (5) Plaintiff was not aware that Cornforth & Co. at the time knew the real price of Riverside oranges, nor did Cornforth & Co. know the telegram was sent, received, or paid for, as containing ten words, or that it contained only nine words as delivered, or that any word had been omitted therefrom, or that the word "two," and not the word "one," should be understood before the word "sixty," but they had good reason to suspect or believe that something had been omitted, and that there was a mistake as to the price of Riverside oranges. (6) The despatch was sent subject to the conditions appearing upon the blank upon which it was written. In effect, that the message must be ordered "repeated" by the sender, who for that service must pay one half the cost of sending it: and the sender agrees that the company "shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured," nor then for errors in cipher or obscure messages. Also that it is not true that the mistake in the telegram was caused by atmospheric disturbances alone, nor wholly by the unavoidable pressure of business; nor is it true that defendant used great care and diligence in the transmission and delivery of the telegram. One line between the two points involved was out of order and could not be used, "throwing an unusual amount of business upon that line, all without the fault of the defendant, and thereby making it necessary for the operators to work at a higher rate of speed than usual, and in so doing, and while endeavoring to use great care, correctly to transmit and deliver telegrams coming over the line, the operator by a slight inadvertence omitted said word from said telegram, and delivered the same without observing the mistake, all of which was due to a slight degree of carelessness on the part of defendant's employees." It will be observed that the court finds that the omission of the word was caused by the negligence of the receiving operator, although the negligence is characterized as a "slight inadvertence," and as "a slight degree of carelessness," and expressly states that it was not "gross negligence."

It is argued with great force and plausibility for the appellant that these findings, notwithstanding some inconsistent phrases, did really find that the mistakes were occasioned through the gross negligence of the defendant. The error, it is said, was caused by the attempt to do too much work on one wire, because another which was ordinarily available had been prostrated by a storm on a previous day. This, it is argued, is conclusive evidence of negligence which may even be said to be wilful. No pressure of work could justify undue haste,—such haste as would increase the liability to make mistakes. In effect, the corporation contracts for accuracy when it agrees to send the very message delivered to it. The telegraph would be of little use to the business world unless it is thoroughly reliable. But we do not find it necessary to pursue the subject, because we are convinced that the other defense must prevail.

It is found that Cornforth & Co. did not rely upon the telegram as it was delivered to them, although the message as delivered would properly be understood as offering Riverside oranges at $1.60 per box, had not the state of the market been such as to indicate that a mistake had been made. That Cornforth & Co. did know the market price of Riverside oranges, at Denver and at Los Angeles, which was considerably more than $1.60 per box, "sufficiently to put Cornforth & Co. on inquiry as to whether or not said telegram was correct, and they made no inquiry and took no steps to ascertain the correctness of said telegram, but ordered of plaintiff two cars of oranges, Riversides, at once, and not in good faith." It is further found that Cornforth & Co. knew that Riverside oranges were at the time worth at least $2.60 per box at Los Angeles, and were practising a fraud when they ordered 1,000 boxes, intending to defraud defendant, the Germain Company, out of the difference between what they well knew to be the price and the price they falsely pretended to believe had been telegraphed by plaintiff. The conclusion naturally followed that plaintiff had a good cause of action against Cornforth & Co., and could not waive an action against that firm, and assume that it had suffered a loss through the missent message, when it had permitted Cornforth & Co. to get away with a fraudulently acquired advantage. It could have compelled Cornforth & Co. to pay what they knew was the real price, and thus could have avoided loss.

Appellant contends, first, that such defense is not open to the defendant, and, secondly, that the finding is not sustained by the evidence. The telegraph, it is argued, is the agent of the sender, who is bound by the acts of its agent. The recipient of the message has the absolute right to rely upon the message as correct, and to act upon it. Cornforth & Co. did act upon it, and plaintiff did actually incur the loss as the court finds. This is correct, provided that there was nothing to put Cornforth & Co. on inquiry. But it found, not only that there was reason to suspect that a mistake had been made, but that Cornforth & Co. actually knew that the message had not been correctly sent, and acted upon it in bad faith. It will not do to say that such a defense should never prevail. Such a rule would open the door to collusion and fraud.

The embarrassment comes from the fact that the suit could not be brought against both Cornforth & Co. and this defendant; and consequently the plaintiff might be successively defeated in his action against each, and judgment ordered against him in one case would not conclude the other party.

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This is true, but it is necessarily a defense to show that plaintiff might have avoided the loss. As to such issue, the defense has the laboring oar, and should be required to make out a clear case.

I think the evidence was sufficient to sustain the finding. I would have been as well satisfied with the finding had it been the other way, but there is much evidence to sustain it.

The judgment and order are affirmed.

We concur: **McFarland**, J.; **Henshaw**, J.

Petition for hearing in banc denied.

PEOPLE of the State of California, *Respts.*,
v.
Samuel McDANIELS, *Appt.*

(137 Cal. 192.)

A conviction of a battery bars a subsequent prosecution for the same acts as an assault with a deadly weapon with intent to murder, where the statute permits a conviction of any lower offense necessarily included in a higher one with which a defendant is charged.

(August 9, 1902.)

APPEAL by defendant from a judgment of the Superior Court for Fresno County convicting him of assault with a deadly weapon with intent to murder. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Lewis H. Smith** and **James A. Burns**, for appellant:

If two indictments set out like offenses and relate to one transaction, yet if one contains more of a criminal charge than the other, but upon it there could be a conviction for what is embraced in the other, the offenses, though of differing names, are, within our constitutional guaranty, the same.

1 Bishop, Crim. Law, § 1051.

The plea of former jeopardy is a mixed plea embracing both law and fact, and the establishment of the plea is upon the defendant.

Bishop, Crim. Proc. § 816.

The rejection of testimony introduced to sustain this plea was error.

People v. *Defoor*, 100 Cal. 150, 34 Pac. 642; *Clem* v. *State*, 42 Ind. 420, 13 Am. Rep. 369; *Wilson* v. *State*, 45 Tex. 76, 23 Am. Rep. 602; *State* v. *Egglesht*, 41 Iowa, 574, 20 Am. Rep. 612; *Quitzow* v. *State*, 1 Tex. App. 47, 28 Am. Rep. 397.

When one is placed on trial for the commission of an offense, a conviction or acquittal of that offense is a conviction or acquittal of every offense included within it.

Penal Code, § 1159.

An assault is included within a battery.

1 Bishop, Crim. Law, § 548; *People* v. *Helbing*, 61 Cal. 620.

Messrs. **O. L. Everts, Tirey L. Ford**, Attorney General, and **A. A. Moore, Jr.**, for the State, relied upon:—

Bear River & A. Water & Min. Co. v. *Boles*, 24 Cal. 359; *King* v. *Haney*, 46 Cal. 561, 13 Am. Rep. 217; *Keeran* v. *Griffith*, 34 Cal. 580; *People* v. *Keeley*, 81 Cal. 210, 22 Pac. 593; Code Civ. Proc. § 646; *Leet* v. *Wilson*, 24 Cal. 402; *People* v. *Chee Kee*, 61 Cal. 404; *People* v. *Nelson*, 85 Cal. 421, 24 Pac. 1006; *People* v. *Wong Ark*, 96 Cal. 125, 30 Pac. 1115; *People* v. *Craig*, 111 Cal. 460, 44 Pac. 186; *People* v. *Lane*, 101 Cal. 513, 36 Pac. 16; *People* v. *Rogers*, 71 Cal. 565, 12 Pac. 679; *People* v. *Ebanks*, 117 Cal. 663, 40 L. R. A. 269, 49 Pac. 1049; *People* v. *Walters*, 98 Cal. 138, 32 Pac. 864; *People* v. *Wilson*, 117 Cal. 693, 49 Pac. 1054; *People* v. *Yslas*, 27 Cal. 631.

Haynes, C., filed the following opinion:

Appellant was tried upon an information, for assault with a deadly weapon with intent to commit the crime of murder, and was found guilty, and sentenced to 14 years' imprisonment in state's prison, and appeals from the judgment, and from an order denying his motion for a new trial.

The offense charged in the information is alleged to have been committed on the 1st day of February, 1901, and the complaint upon which the preliminary examination was had was filed with the committing magistrate on February 12, 1901. The defendant was arraigned on March 26th, and on the 28th pleaded not guilty, and also pleaded a former conviction of the offense charged.

In support of his plea of former conviction, the defendant offered in evidence the records of a justice of the peace, showing, in substance: That on February 10, 1901, Bessie McDaniels (the person upon whom the information in this action charged the assault with intent to murder to have been committed), filed her complaint with said justice, charging the defendant with having committed a battery upon her on said 1st day of February, 1901; that a warrant was issued thereon, under which he was arrested on the 11th; that he pleaded guilty to the charge of battery, and on the 12th he was sentenced by said justice of the peace to imprisonment in the county jail of Fresno county for the term of 175 days, and also offered in evidence the commitment issued by the justice upon said judgment,—to all of which the district attorney objected upon the ground that it was incompetent, irrelevant, and immaterial. The objection was sustained, and the defendant excepted. The defendant then called Mrs. Bessie McDaniels, upon whom the assault charged in the information was alleged to have been committed, and asked whether she was a witness in the justice's court in the battery case

NOTE.—For conviction as bar of other prosecution, see in this series People v. Stephens (Cal.) 4 L. R. A. 845; Hess v. Lowrey (Ind.) 7 L. R. A. 90; Arrington v. Com. (Va.) 10 L. R. A. 242; Com. v. Vaughn (Ky.) 45 L. R. A. 858.

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prosecuted by her against the defendant. The prosecution's objection was sustained, and the defendant then offered to prove by said witness and by one John Griffin, the only witnesses who testified before the justice in the battery case, that they testified on that trial to the same facts to which they had testified in this case; that the prosecution then announced that they objected to any testimony in regard to the battery case, the objection was sustained, and defendant excepted. The testimony of said witnesses, who had been called and examined in chief by the prosecution in this case, covered all that appears to have occurred between the defendant and the prosecutrix on said 1st day of February, and, indeed, other matters occurring both before and after that date.

The court erred in these rulings. Respondent contends that: "The offense of battery consists in the use of force or violence upon the person of another, and is a greater offense than assault, and, being greater, includes the less; but the less—that is, assault—does not include the greater. Battery includes assault, but assault does not include battery." As said by the learned counsel, battery includes and implies an assault, for there can be no battery without an assault. What the defendant did, therefore, may have constituted a simple assault, or assault and battery, or assault with intent to murder; and the last-named offense may be committed either with or without a battery; but the evidence on the part of the prosecution, given upon this trial, showed an aggravated battery which may or may not have been committed with intent to murder. The prosecution before the justice of the peace was for the same acts of the defendant, but the complaint and judgment omitted the alleged intent to murder charged in the information. The identity of the acts of the defendant in the two cases is not questioned, and the defendant has therefore been convicted of the assault which is an essential fact to be proved under the information; the intent to murder not being a crime in the absence of some physical act constituting an assault. It is well settled that a conviction of a lower offense embraced in a higher one, for the commission of which a defendant was tried, is an acquittal of the higher offense, and an independent trial and conviction of the lower offense, when pleaded, must, upon the same principle, be a bar to the prosecution for the higher offense which included it. *People* v. *Defoor*, 100 Cal. 150, 34 Pac. 642, cited by appellant, is in point, and we think conclusive. It is not necessary here to cite or quote from the numerous cases there cited.

In *Reg.* v. *Elrington*, 9 Cox C. C. 86, 90, Cockburn, Ch. J., said: "It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred;" and upon the argument in that case he interrupted counsel for the prosecution, and said: "The case of *Reg.* v. *Stanton*, 5 Cox C. C. 324, is a very strong authority against you. There it was held that a conviction for an assault under the statute, followed by payment of the fine or endurance of the imprisonment, may be pleaded in bar of an indictment for felony, in respect of the same assault, charging an assault and wounding with intent to murder." Upon this subject it is said in 1 Bishop, New Crim. Law (§ 1057): "When he has been put in jeopardy for the lowest, then, for example, is prosecuted for the highest, our constitutional guaranty stands in the way of his being convicted a second time for the lowest. For a jeopardy of the highest is equally a jeopardy of the lowest. And since the government confessedly cannot begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest, and ascend to the highest, with precisely the same result." The respondent cites *People* v. *Helbing*, 61 Cal. 620. There the defendant was charged by the information with the offense of assault with a deadly weapon with intent to commit bodily injury, and was found guilty of battery. Upon the appeal the judgment was reversed, and a new trial ordered. Defendant then pleaded a former acquittal and twice in jeopardy for the same offense. He was found guilty as charged in the information, and again appealed. It was then held that battery was not included in the offense charged; that, upon trial for an assault with a deadly weapon with intent to commit bodily injury, "a defendant could not equally be convicted of battery, and [such conviction] constitutes no bar to a second trial upon the same information." The reason for this conclusion is that battery is not necessarily included in a charge of an assault with intent to commit bodily injury, and, not having been charged in the information, there could be no conviction for battery or the assault which is necessarily included in it. But here the prosecution for battery was an independent one, prosecuted in another tribunal, and was in every respect, so far as appears, regular, authorized, and valid, and therefore operated as a conviction of the assault, which did not follow the conviction for a battery in a case where such conviction was unauthorized. In *People* v. *Stephens*, 79 Cal. 428, 4 L. R. A. 845, 21 Pac. 856, the first prosecution was for a libel contained in an article published by the defendant in a newspaper, and that case was a prosecution for a libel contained in the same article, published in the same issue of the same paper, and it was held: "The state cannot split up one crime, and prosecute it in several parts; nor can a defendant be convicted and punished for two distinct crimes growing out of the same identical act." See also numerous cases there cited; also *People* v. *Willard*, 92 Cal. 482, 28 Pac. 585, and *People* v. *Ny Sam Chung*, 94 Cal. 304, 29 Pac. 642. *People* v. *Bentley*, 77 Cal. 7, 18 Pac. 799, appears, from the meager statement of facts given in the opinion, to be inconsistent with all the other decisions of this court above noticed, and has not been cited in any of them. In *State* v. *Chinault*, 55 Kan. 326, 40 Pac. 662, the defendant

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was charged by information in the district court of Wyandotte county for an assault with intent to kill; was put upon his trial; but the jury were discharged for sufficient cause, and the case went over. Afterwards he was prosecuted in the court of common pleas on a charge of assault with intent to rob; the two transactions being identical, the only difference in the two informations being that a different criminal purpose is charged. It was held that only one prosecution can be maintained for the same assault, whatever the purpose of the defendant may have been. *Moore* v. *State*, 71 Ala. 307, is directly in point. It was held: "A single crime cannot be split up, or subdivided into two or more indictable offenses;" that, "to an indictment for assault with intent to murder, a plea of former conviction of an assault and battery with a stick, in the county court, based on the same criminal act, is good, although the offense charged in the indictment is a felony, and the offense for which there was a former conviction is merely a misdemeanor." Syllabus. In the opinion it is said: "A conclusive reason for the soundness of this view, to our mind, is that if a defendant has been tried for the smaller offense,—whether convicted or acquitted, it is immaterial,—and he is afterwards put on trial for the larger, he is twice in jeopardy for the smaller offense." In *Jackson* v. *State*, 14 Ind. 327, 328, it was said: "The state cannot split up one crime, and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." In *People* v. *Hunckeler*, 48 Cal. 331, the defendant was indicted for manslaughter, and upon the trial the court, without the consent of the defendant, discharged the jury because in its opinion the defendant was shown to be guilty of murder, and, being afterwards indicted for murder, his plea of twice in jeopardy was sustained by this court, which held he was entitled to an acquittal. In England, prior to Lord Denman's act (Stat. 1 Vict. chap. 85, § 11, enacted in 1837), one indicted for a felony could not be convicted and sentenced for a misdemeanor. The reason for that rule was that persons indicted for a misdemeanor had certain advantages or privileges, — among others, that of making full defense by counsel,—which those charged with a felony did not then have. But Lord Denman's act provided that, on the trial of any person for any felony whatever where the crime charged shall include an assault against the person, there might be an acquittal of the felony and a conviction of the assault. The vital principle of that act is embodied in § 1159 of our Penal Code. There are many cases, however, in this country that have followed, in their results, at least, the old common law, and permit different crimes included in the same act or transaction to be separately prosecuted and punished. All offenses such as battery, mayhem, rape, robbery, etc., as well as assaults with intent, necessarily include an assault; and it is now generally conceded that a conviction of the higher offense is necessarily a conviction of the assault included in it; and it would seem to follow logically, as well as by construction, that a conviction or acquittal of any of the included offenses must bar a prosecution of the higher, since the higher cannot afterwards be prosecuted without opening the door for a second conviction, or a conviction of an offense for which the defendant had before been tried and acquitted. It is well settled that a conviction of a lower included offense is an acquittal of all higher offenses included in the indictment or information, and where such conviction for a lower offense is set aside, and a new trial granted, even upon the motion of defendant, or upon appeal, he cannot be convicted of any higher offense than that of which he was first found guilty. If an acquittal can have such effect, much more strongly it should be held that a prior conviction of any included offense should bar a subsequent prosecution for a higher offense included in the same transaction. Bishop, in his New Criminal Law (§ 1058), says that, "by the general and better doctrine, a conviction or acquittal of a common assault will bar proceedings for an assault with intent to do great bodily harm, and other assaults aggravated in like manner. It has been supposed that, if the tribunal trying the less offense has no jurisdiction over the higher, the case will be different; yet there does not seem to be any just foundation for this distinction. The fact that one has been in jeopardy for a lower offense is true equally whether the court had authority to try the higher or not."

All criminal prosecutions are by the state, which is a single entity. It may choose its forum, and determine for what particular offense it will prosecute the citizen for a violation of the criminal law. It cannot complain if it has made an unwise selection, but, having made its selection and inflicted the penalty it has imposed for such violation, the Constitution interposes for the protection of the accused, and declares that he shall not be twice put in jeopardy for the same offense; and this provision, being for the benefit and protection of the accused, is to be liberally construed. "This rule of interpretation is in many of the cases not thought of by the courts, and other obvious principles are overlooked, so that our books contain numerous decisions wherein this constitutional right has been denied to the prisoner." Bishop, New Crim. Law, § 1070. That there are numerous decisions in other jurisdictions inconsistent and even contradictory to this, and prior decisions of this court, hereinbefore cited, may be admitted. A recent example is that of *State* v. *Caddy*, 15 S. D. 167, 87 N. W. 927, where it was held that "an acquittal on trial . . . under Comp. Laws, § 6491, charging an assault on a certain person with a deadly weapon with intent to rob, is not a bar to a conviction under § 6481, on an indictment charging robbery in taking money from such person, against his will, by force." The transaction was the same. In that state, as here, they have a statute permitting a conviction

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of any lesser offense necessarily included in that charged in the indictment. Many cases were cited in the opinion, the first of which is *Morey* v. *Com.* 108 Mass. 433. In that case the record showed that the first indictment charged that the defendant and Bridget Kennedy, during a time specified, "did lewdly and lasciviously associate and cohabit together, not being married to each other." The second indictment charged that the defendant, being a married man and having a lawful wife, committed adultery with the same woman at specified dates included in the first indictment. The court held that "a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." Here there were two offenses not "necessarily included" in each other. Under the first indictment the defendant could not have been convicted of adultery charged in the second, though in his illicit cohabitation he committed adultery, and he might have committed adultery without having been guilty of illicit cohabitation. The court, however, further said: "An acquittal or conviction upon an indictment for murder is a bar to a subsequent conviction upon an indictment for manslaughter or assault by the same act by which the murder was charged in the first indictment to have been committed, because such a conviction might have been had upon the first indictment. And so, *e converso*, an acquittal or conviction of the manslaughter is a bar to a subsequent indictment for the murder." So, the Dakota case cites *Com.* v. *Roby*, 12 Pick. 496, where it was held that a conviction of an assault with intent to murder was no bar to an indictment for murder; but in *Morey* v. *Com.* 108 Mass. 433, the court remarked that the *Roby Case* was decided "before our statutes permitted a conviction of such an assault upon an indictment for murder." So, it may be concluded that in England, since Lord Denman's act, and in this country, wherever a statute permits a conviction of any lower offense necessarily included in a higher one with which the defendant is charged, a conviction or acquittal of such higher offense is a bar to a subsequent prosecution for any lower offense necessarily included in it, and *e converso*, a conviction for any lower offense necessarily included in the higher is a bar to a subsequent prosecution for such higher offense, and this conclusion is fully sustained by the prior decisions of this court hereinbefore cited. Of course, if the former conviction was procured by the fraud, connivance, or collusion of the defendant, this fact vitiates it, and it is no bar to a subsequent prosecution. *State* v. *Little*, 1 N. H. 257; *State* v. *Lowry*, 1 Swan, 34; *State* v. *Reed*, 26 Conn. 202; 1 Bishop, Crim. Law, §§ 1008, 1010. But here there is no pretense that the prosecution before the justice was fraudulent. The constitutional provision here involved was made for the protection of the citizen, and should be liberally construed in his favor. In *State* v. *Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490, it was said: "Where the state has thought proper to prosecute the offense in its mildest form, and it is better that the residue of the offense go unpunished, than, by sustaining a second indictment, to sanction a practice which might be rendered an instrument of oppression to the citizen."

In the case at bar all the facts were presented to the justice, and considered in fixing the penalty imposed. In the superior court the evidence heard and considered by the justice was excluded, as well as evidence of the punishment imposed. The superior court therefore had no knowledge of the prior proceedings and the penalty imposed, and must have, to the extent of the punishment imposed by the justice, imposed a second or double punishment.

Our conclusion is that the court below erred in rejecting the evidence of the former conviction, and that the judgment and order appealed from should be reversed, and the cause remanded.

We concur: **Chipman**, C.; **Smith**, C.

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment and order appealed from are reversed*, and the cause remanded.

Philo J. BEVERIDGE, *Respt.*,
v.
Mary A. LEWIS, *Appt.*

(137 Cal. 619.)

1. **The jury may be permitted, in weighing the evidence in an eminent domain proceeding**, to exercise their individual judgment as to values upon subjects within their knowledge which they have acquired through experience and observation.

On Rehearing.

2. **One seeking a right of way for a railway** which he intends to sell as soon as it is procured is not in charge of a public use so as to be entitled to exercise the right of eminent domain.
3. **The deduction of benefits from damages in case of the exercise of the power of eminent domain by an individual** is not impliedly authorized by a constitutional provision expressly forbidding such deduction in case of an attempt to exercise the power by a private corporation.

NOTE.—As to right to consider benefits in assessing damages in eminent domain proceedings, see also in this series Leroy & W. R. Co. v. Ross (Kan.) 2 L. R. A. 217; San Diego Land & Town Co. v. Neale (Cal.) 3 L. R. A. 83; Newman v. Metropolitan Elev. R. Co. (N. Y.) 7 L. R. A. 289, and *note;* State, Mangles, Prosecutor v. Hudson County (N. J. L.) 17 L. R. A. 785; Spencer v. Metropolitan Street R. Co. (Mo.) 22 L. R. A. 668; Hickman v. Kansas City (Mo.) 23 L. R. A. 658; Metropolitan West Side Elev. R. Co. v. Stickney (Ill.) 26 L. R. A. 773; Blair v. Charleston (W. Va.) 35 L. R. A. 852; and Schroeder v. Joliet (Ill.) 52 L. R. A. 634.

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4. **A rule of compensation for the taking of private property for public use by an individual** cannot be provided by the legislature which is less favorable to the property owner than the rule provided by the constitution in case of a taking by a private corporation for a similar purpose, where the constitution prohibits discrimination not justified by intrinsic differences, and requires a uniform operation of general laws.

5. **General benefit to land not taken cannot be set off** against damages to it by the taking of a railway right of way under a constitutional provision requiring compensation to be made in money and in advance.

(*McFarland, J., dissents.*)

(February 25, 1902.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County assessing damages for the condemnation of a railway right of way. *Reversed.*

The facts are stated in the opinions.

Mr. **Lynn Helm** for appellant.

Mr. **John D. Pope,** for respondent:

To put private persons in one class and railway companies in another, where they are seeking to condemn a right of way for a railroad, to be operated under the same circumstances and conditions, would be purely arbitrary, and arbitrary classifications are not permitted for the purpose of depriving one class of persons of legal rights enjoyed by another class.

Johnson v. *Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304; *California* v. *Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Truckee & T. Turnp. Road Co.* v. *Campbell,* 44 Cal. 89; *Spring Valley Waterworks* v. *Schottler,* 62 Cal. 69; *Bank of Augusta* v. *Earle,* 13 Pet. 575, 10 L. ed. 301.

It is a franchise for a number of persons to be incorporated and subsist as a body politic.

Memphis & L. R. R. Co. v. *Railroad Comrs.* 112 U. S. 619, *sub nom. Memphis & L. R. R. Co.* v. *Berry,* 28 L. ed. 841, 5 Sup. Ct. Rep. 299; *California* v. *Central P. R. Co.* 127 U. S. 40, 32 L. ed. 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Spring Valley Waterworks* v. *Schottler,* 62 Cal. 69.

To have and to use a franchise is to exercise a portion of the sovereign power. The state can confer or withhold the right at its pleasure. But if it does confer the right upon individuals to become bodies corporate, it cannot discriminate between them and natural persons in any matter or thing where the circumstances and conditions are identical.

Johnson v. *Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304.

On rehearing.

The provision in the Constitution of the state of California which denies to corporations other than municipal the right to set off benefits against damages in actions to condemn rights of way is in conflict with the 14th Amendment to the Constitution of the United States, and is therefore void.

A statute to be uniform in its operation must apply alike to all persons or objects within a class founded upon some natural, intrinsic, or constitutional distinction, and any classification not founded upon such distinction is not permitted.

Ex parte Clancy, 90 Cal. 553, 27 Pac. 411; *Pasadena* v. *Stimson,* 91 Cal. 238, 27 Pac. 604; *Dougherty* v. *Austin,* 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092; *Turner* v. *Siskiyou County,* 109 Cal. 332, 42 Pac. 434; *Bloss* v. *Lewis,* 109 Cal. 493, 41 Pac. 1081; *Van Harlingen* v. *Doyle,* 134 Cal. 53, 54 L. R. A. 771, 66 Pac. 44.

It is the duty of this court to declare the discrimination attempted in § 14 of the Declaration of Rights in the state Constitution ineffectual if such discrimination is forbidden by the 14th Amendment to the Constitution of the United States.

Corporations are persons within the provisions of the 14th Amendment of the Constitution of the United States.

Gulf, C. & S. F. R. Co. v. *Ellis,* 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Johnson* v. *Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304; *Railroad Tax Case,* 8 Sawy. 238, 13 Fed. 743.

Section 14 arbitrarily requires quasi public corporations to make just compensation to the land owner according to a rule which places an extra burden upon them by requiring them to pay for the land taken and to pay all damages to the remaining land without deduction for benefits.

When § 14 was adopted, § 1248 of the Code of Civil Procedure required benefits to be taken into account in all cases.

San Francisco, A. & S. R. Co. v. *Caldwell,* 31 Cal. 367; *California P. R. Co.* v. *Armstrong,* 46 Cal. 85.

The provision that a state shall not deny to any person within its jurisdiction the equal protection of the law is violated by a discrimination between persons which is not based upon any natural, reasonable or intrinsic distinction, and places on one person burdens from which other persons similarly situated are relieved.

Darcy v. *San José,* 104 Cal. 642, 38 Pac. 500; *Ayars's Appeal,* 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *State ex rel. Richards* v. *Hammer,* 42 N. J. L. 439; *Slocum* v. *Bear Valley Irrig. Co.* 122 Cal. 555, 55 Pac. 403; *Johnson* v. *Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 358, 59 Pac. 304; *Van Harlingen* v. *Doyle,* 134 Cal. 53, 54 L. R. A. 771, 66 Pac. 44; *Pasadena* v. *Stimson,* 91 Cal. 238, 27 Pac. 604; *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co.* v. *Matthews,* 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Tullis* v. *Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Connelly* v. *Union Sewer Pipe Co.* — Ill. —.

Natural persons can exercise the right of eminent domain.

Lewis, Em. Dom. § 3; Cooley, Const. Lim. 4th ed. 667; Mills, Em. Dom. § 60; Randolph, Em. Dom. § 103; *Philadelphia & G. Ferry Pass. R. Co's Appeal,* 102 Pa. 123;

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Pocantico Waterworks Co. v. *Bird*, 130 N. Y. 249, 29 N. E. 246; *Ash* v. *Cummings*, 50 N. H. 591; *Bank of Middlebury* v. *Edgerton*, 30 Vt. 182; *Coe* v. *Columbus, P. & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518; *Moran* v. *Ross*, 79 Cal. 549, 21 Pac. 958.

An individual may own and operate a railroad.

Gibbs v. *Tally*, 133 Cal. 373, 65 Pac. 970; *Morgan* v. *Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Laurence* v. *Morgan's L. & T. R. & S. S. Co.* 39 La. Ann. 427, 2 So. 69.

McFarland, J., delivered the opinion of the court:

The plaintiff, a natural person, having obtained a franchise to construct and operate a certain railroad, commenced this action to condemn a right of way for a part of its line of railway through the land of defendant. In the trial court plaintiff had judgment, from which, and from an order denying her motion for a new trial, defendant appeals.

The main question in the case relates to the amount of compensation which the appellant was entitled to for the value of the land taken and damages for land not taken. The jury found the value of the land taken to be $429; damages to the land not taken, $2,000; and for costs of fences and cattle guards, $233.84. It also found that the benefit from the construction of the railroad to the land not taken was $500. Upon this basis the court fixed the amount to be paid appellant at $1,929, which appellant contends was too small.

There are one or two minor matters to be disposed of. Appellant contends that the court erred in not sustaining her challenge to the juror Newell. On this point it is sufficient to say that, after considering all the testimony of the juror, we cannot say that the court erred in holding that he had not such an unqualified opinion about any question in the case as to make him an unfit juror.

It is contended that the court erred in instructing that in estimating damages "the jury are permitted to exercise, in weighing the evidence, their individual judgment as to values upon subjects within their knowledge which they have acquired through experience and observation." Although this instruction seems, at first blush, to be somewhat questionable, yet it does not go as far as appellant claims. It is not an instruction that the jury may shut their eyes to the evidence before them, and decide the case according to their own notions. It, in effect, merely tells them that "in weighing the evidence" they may do, what jurors always do,— exercise their judgment in the light of their own general knowledge of the subject about which evidence has been introduced. This statement has been frequently sanctioned by courts. This court itself said in *Cederberg* v. *Robison*, 100 Cal. 93, 34 Pac. 625,— almost in the very language of the instruction here assailed,— that "juries are . . . permitted to exercise their individual judgments as to values upon subjects presumptively within their own knowledge, which they have acquired through experience or observation;" and it approved that ruling in *Butler* v. *Ashworth*, 102 Cal. 663, 36 Pac. 922. In *Patterson* v. *Boston*, 20 Pick. 159, Chief Justice Shaw said: "Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisement, which depends on knowledge and experience, if they might not avail themselves of these powers of their minds when they are most necessary to the performance of their duties." And Justice Field, in delivering the opinion of the United States Supreme Court in *Head* v. *Hargrave*, 105 U. S. 45, 26 L. ed. 1028, said that jurors "may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." See also *Kansas City* v. *Butterfield*, 89 Mo. 646, 1 S. W. 831. Moreover, the evidence in the case at bar as to values was, substantially, all opinion evidence; and as to that kind of evidence the rule stated in the instruction is beyond all doubt correct. *McLean* v. *Crow*, 88 Cal. 644, 26 Pac. 596; *Haight* v. *Vullet*, 89 Cal. 245, 26 Pac. 897; Rogers, Expert Testimony, 2d ed. § 207, subd. 4, p. 487, and the numerous cases there cited. We are of the opinion that the instruction in question was not erroneous; and it may be further said that it could have done no harm, for it merely permitted the jury to do what they would necessarily and inevitably have done if the instruction had not been given.

It was not error for the court to tell the jury that they might consider benefits to the land not taken, although such benefits also accrued to other land in the vicinity. *California P. R. Co.* v. *Armstrong*, 46 Cal. 85; *San Francisco, A. & S. R. Co.* v. *Caldwell*, 31 Cal. 368.

Upon the main question in the case — that is, Upon what basis should the estimation of compensation be made? — it is not necessary to notice in detail the various instructions given and those which were asked by appellant and refused. It is sufficient to say that the court presented the case to the jury, and rendered judgment, upon the theory that appellant was entitled to the full value of the land taken, and damages to the land not taken, less the benefits to such land by the improvement. It is not seriously contended that this is not the correct rule where the party seeking the condemnation is a natural person, or a company of natural persons not incorporated; but it is contended that, where such party is a corporation, not municipal, there, under section 14 of article 1 of our state Constitution, no right of way shall be appropriated "until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation." And appellant sought to bring this case within that provision by offering evidence to the point that respondent had some understanding with a corporation called the Los Angeles Pacific Railroad Company, by

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which the latter was to receive the benefit of the condemnation, and was, therefore, the real party in interest. An objection by respondent to this offered evidence was sustained, and upon that ruling the main contention of appellant is based. Counsel for respondent contends that proof of the fact sought to be proved would not be admissible under any view, and, moreover, that the kind of evidence offered was not admissible to prove the fact; but we will not closely examine these contentions, because we are of opinion that his other contention, that said provision of section 14 of article 1 is invalid because repugnant to the fourteenth amendment of the Constitution of the United States, must be maintained. The fourteenth amendment to the Federal Constitution is a limitation of the powers of a state. It provides that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and it is definitely settled that a corporation is a "person" within the meaning of the amendment. *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132. "It is well settled that corporations are persons within the provisions of the 14th Amendment of the Constitution of the United States. . . . The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens." *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 154, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and cases there cited. Of course, a state cannot, by its own Constitution, any more than it can by an act of its legislature, evade a provision of the Federal Constitution. This is too obvious for argument. To hold otherwise would be, as was said in *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 154, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, "to make the protecting clauses of the 14th Amendment a mere rope of sand in no manner restraining state action." See *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 57 N. E. 303.

The provision that a state shall not "deny to any person within its jurisdiction the equal protection of the law" is violated by a discrimination between persons which is not based upon any natural, reasonable, or intrinsic distinction, and places on one person burdens from which other persons similarly situated are relieved. And the principle cannot be evaded by means of a mere arbitrary classification. Classification, to be valid, must be "for the purpose of meeting different conditions naturally requiring different legislation." *Darcy* v. *San José*, 104 Cal. 642, 38 Pac. 500, and cases there cited. In *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 154, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, where it was held that a state law putting certain burdens of litigation on railroad corporations which were not imposed on other litigants was void under the fourteenth amendment, the whole subject is elaborately discussed and many authorities cited, the Supreme Court of the United States saying: "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1071: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'" And in that case the court, after a full consideration of the subject, says: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,— some difference which bears a just and proper relation to the attempted classification,— and is not a mere arbitrary selection." The case of *Johnson* v. *Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304, is, substantially, determinative of the question here involved against the contention of appellant. It was there held that an act of the legislature imposing upon corporations alone certain burdens as to contracts and liens — not arising out of natural conditions — was "discriminating and arbitrary legislation against corporations," and "denies to such corporations the equal protection of the laws, and is unconstitutional and void." In that case the court, after again stating the proposition that "the word 'person,' within the meaning of the fourteenth amendment to the Constitution of the United States, applies to a corporation," says that "the classification must be founded upon differences either defined by the Constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation," and that "there is no reason why a different rule as to defenses that may be pleaded and proven and as to the nature of the lien of a judgment should obtain against a corporation than that which applies to other litigants." Now, there is absolutely no natural or reasonable distinction between different persons seeking to exercise the right of condemnation with respect to the measure of compensation for the land taken and damages for land not taken. A law might, perhaps, rightfully discriminate between the business of operating a railroad and some other kinds of business, but as between parties intending to engage in that business the right of way is the same no matter what "person"

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appropriates it, and there is no reason why one person should pay more for it than another person, except a desire to unjustly discriminate.

It is argued that, even if the above propositions are, as a general rule, true, still they do not apply to the case of the exercise of the right of eminent domain. It is said that this right belongs to the state by virtue of its sovereignty, and that, therefore, the state may exercise the right with as much favoritism as it pleases. But the right to make laws upon the subject of eminent domain is no different from the right to make laws on any other subject. The right to make laws at all is a sovereign power. But that power must be exercised within constitutional limits. The state could, no doubt, refuse to grant to any person the right to exercise the power of eminent domain,— as it could refuse the right to a writ of attachment to anyone; but when it does legislate upon either subject it must do so within the constitutional limitation against arbitrary discrimination. No one would contend that the power of condemnation could be legally given to persons having light hair and denied to persons having dark hair; and yet to say that this could not be done is to give up the whole contention. However, this contention has been definitely held untenable in *Pasadena* v. *Stimson*, 91 Cal. 238, 27 Pac. 604. That case dealt expressly with a law giving the right to exercise the power of eminent domain; and it was decided that a statute which imposed burdensome conditions to the exercise of the right upon certain municipal corporations which were not imposed on other municipal corporations was unconstitutional and void. In that case Chief Justice Beatty, in delivering the opinion of the court, having referred to the general law (Civil Code, § 1001) giving to "any person" the right to use the power of eminent domain, and to the proposition that "a corporation, whether private or public, is a person," said: "But the mode of exercising the power of eminent domain, and the conditions upon which it may be invoked, are no part of municipal organization. They are the subject of general laws applicable to every person alike, and the legislature has no power to make arbitrary discriminations in this respect between different classes of persons." And in replying to the position — which is also taken in the case at bar — that the plaintiff in the condemnation proceeding is a mere "agent" of the state he says: "In reaching this conclusion we have not overlooked the argument of appellants that, since the plaintiff in such proceedings is always a mere agent of the state, and acting on its behalf, he cannot question the conditions upon which his principal authorizes him to act. We think this rather a fanciful argument, and that it is based upon a supposed analogy which has no real existence. It is, in a very modified sense, that the state is the principal and the plaintiff the agent in cases like this. Such may be the theoretical view, but practically it is the reverse of the truth. The party directly and beneficially interested is the person in charge of the use." And it might be added that he, and not the state, is the party who pays the compensation to the owner of the land taken and damaged.

We think that the foregoing views cover substantially all the questions raised in the case, and in accordance with those views we are of the opinion that the judgment of the court below was right.

The judgment and order appealed from are affirmed.

We concur: **Temple**, J.; **Henshaw**, J.

A rehearing having been granted, **Temple**, J., handed down the following additional opinion on November 18, 1902:

The plaintiff, a natural person, commenced this action to condemn a strip of land through premises owned by defendant for a right of way for a railroad. It is averred in the complaint that the board of supervisors of Los Angeles county had granted to plaintiff a franchise to construct and maintain an electric railway in the county of Los Angeles over and along a route shown upon a map annexed to the complaint. The line described nearly bisects the land of defendant, which is a rectangular tract containing 120 acres. The strip sought to be condemned for the right of way is 35 feet wide. The matter was submitted to a jury, which, framing its verdict according to the statute, found that the land to be taken was of the value of $420 on the 25th day of November, 1899, when the proceeding was commenced; that the land not taken would be damaged to the extent of $2,000, and that such land would be benefited by the construction of the proposed road to the extent of $500; that fencing the right of way would cost $233.04. A motion for a new trial was denied, and from such order and from the judgment this appeal is taken.

There are many assignments of error, but the two principal points, as I think, are these: The court erred in not allowing defendant to prove that the plaintiff was not the proper party to commence this proceeding,— that he was not a person in charge of a public use; and, second, in allowing plaintiff to set off benefits against the damage to land not taken. The defendant offered evidence tending to show that plaintiff was not engaged in building a railway, and did not contemplate doing so; that he was an employee of the Los Angeles Pacific Railway, a corporation, and was endeavoring to secure a right of way for that corporation, and not for himself; that he had contracted to convey, or to cause to be conveyed, to that corporation, such rights as he should obtain, and that property owners along the proposed line, from whom rights of way had been obtained, had at his instance conveyed such rights to that company; and that all grading done or road constructed had been at the expense of the Los Angeles Railway Company, to which plaintiff had agreed to convey the franchise granted to him. Each

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particular item of the evidence was separately offered, objected to, and objection sustained, and the ruling excepted to. The offer was in fact to show that plaintiff was seeking to condemn the right of way solely for the purpose of transferring the same at once to the Los Angeles Pacific Railway, which was engaged in building the railway, and which would own and operate it. The evidence was relevant, material, and competent. It was offered for the purpose of showing that the real party in interest was a corporation with a view of enhancing the damage, as it was claimed that, if the corporation was the real party in interest, benefits could not be set off against the damage to land not taken, while perhaps, if a natural person was in charge of the use, and was seeking to acquire such right of way, such benefits might be allowed as a credit. But the point cuts much deeper than that. If the court were convinced that the facts were as contended, the plaintiff should not be allowed to maintain the proceeding at all. It is admitted on all sides, and necessarily, that the proceeding can be maintained only by one who is in charge of a public use, and who intends to perform the public service; and, further, if the proceedings may be in the name of an agent, or other representative, such agency should be stated. One who seeks a right of way to sell, merely, is not in charge of a public use.

But is there a different rule for estimating the damage when a natural person is in charge of a public use, and is seeking to take property for that use, and when a private corporation is the plaintiff in such a proceeding? In department it was assumed that § 14 of article 1 of our state Constitution discriminates in favor of natural persons and municipal corporations and against private corporations seeking to condemn land for a right of way, and it was held that the constitutional provision was void, because in conflict with the 14th Amendment to the Constitution of the United States, in which it is ordained that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." On reflection I am satisfied that the section in question neither does nor directs the doing of any of those acts which are forbidden in the 14th Amendment. It certainly does not authorize the taking of property without due process of law. On the contrary, it provides very ample protection in that regard. Neither does it deprive any person or property of the equal protection of the law. The section reads as follows: "Sec. 14. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." It is a mere limitation upon the power of the legislature in regard to eminent domain. No private railroad corporation can be permitted to appropriate a right of way over private property until compensation is first made in money, without deduction for estimated benefits from the improvement. It does not authorize any other persons — natural or artificial — to take property on more favorable terms. It is purely negative in its character. If the legislature had prescribed a similar rule for all condemnation proceedings, no one would have thought that this section secured special privileges to, or specially burdened, any class of persons. A constitutional limitation, in itself valid, and not in conflict with the Federal Constitution, cannot be made invalid by any act of the legislature. This will, of course, be conceded. The statute in terms prescribes a uniform rule for all cases. Code Civ. Proc. § 1248. It authorizes a deduction for benefits in all cases. It is made to have an unequal operation because one provision cannot be enforced in cases where a corporation other than municipal is endeavoring to condemn land for a right of way. The difference between the constitutional provision and the Code was commented upon in *Moran* v. *Ross*, 79 Cal. 549, 21 Pac. 958, and it was there held that the effect of both was to impose a greater burden upon corporations other than municipal than was imposed upon natural persons. Conceding the validity both of the statute and of the constitutional provision, and that a natural person could be in possession of a public use which would authorize him to condemn land for a right of way, the conclusion seems logical. It is now, however, earnestly contended that the statute and the Constitution together produce an inequality which is forbidden, and it matters not that the effect is the result of the Constitution and of the statute together. In department the difficulty was solved by declaring the constitutional rule invalid. This solution is, however, I am convinced, inadmissible. The question must be, Can the statute be sustained? And in considering this point we need not look to the 14th Amendment. Our state Constitution equally prohibits discrimination not justified by intrinsic differences, and requires a uniform operation of general laws. The case has been argued entirely from the standpoint of the person in charge of a public use who is seeking to acquire property by condemnation; but it is equally important to consider the question from the position of the property owner. Can the legislature provide that he shall receive a smaller sum for the taking of the land when it is taken by a natural person than when it is taken by a corporation for precisely the same use, especially when the natural person may at once transfer his property to the corporation? Or suppose two cases: Land belonging to one person is being taken by a natural

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person, and other land belonging to him by a corporation, the uses and burdens being in all respects similar. Can the law provide that in one case an allowance shall be made for supposed benefits and not in the other? I think it must be answered that the legislature cannot provide for the one case a less favorable rule than the Constitution has provided for the other. They are entitled to the equal protection of the law, or, as was said in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, "the protection of equal laws." Section 14 prescribes that in all cases of taking property for public use just compensation shall be first made. Under this clause a rule could not be sustained which would not fully compensate the property owner; but the legislature is not limited to a rule which will only compensate the property owner, and, if a law were enacted which would more than compensate the owner, if uniform in its operation, it would be valid. There would be no constitutional difficulty. It must always be for the judiciary to determine whether full compensation is provided. It is necessary, also, that the compensation provided must be in money. 2 Lewis, Em. Dom. § 460, and authorities cited. Of course, this must be so. The constitutional limitation would be of little value if the legislature could authorize payment in any commodity or conjectured advantage it might choose.

Benefits are said to be of two kinds, general and special. General benefits consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement. Lewis, Em. Dom. § 471. They are conjectural, and incapable of estimation. They may never be realized, and in such case the property owner has not been compensated, save by the sanguine promise of the promoter. Special benefits are such as result from the mere construction of the improvement, and are peculiar to the land in question. The trend of decision is very decidedly to the conclusion that general benefits shall not be allowed as a set-off to damages, even when no statute prescribes a contrary rule. Id. § 471, notes 44, 45. Such appears to be the conclusion of Judge Cooley. Const. Lim. 567–580. The question has been very much discussed, and now in a majority of states the rule is against the credit of such benefits, established variously by constitution, by statute, or by judicial decision. I am satisfied that in a proceeding to condemn a right of way, at least by a corporation other than municipal or by a natural person, such benefits cannot be set off against damages to lands not taken under our present Constitution. Prior to the adoption of the present Constitution the supreme court had decided, in a case where it was found that there were no special benefits, but only general benefits as I have defined them, that such benefits could be set off against damages, and that by this rule the owner was fully compensated. *California P. R. Co.* v. *Armstrong*, 46 Cal. 85. By section 14, involved here, I believe the people intended to overrule this case, and other like decisions, so far as applicable to private railroad corporations. But I think it must be assumed that the intention was to provide in the Constitution a rule which would justly compensate the landowner, and that there was no intention of discriminating unjustly against any; and, in my opinion, the rule of the Constitution is the just and proper rule, and, furthermore, if the allowance of a credit for such benefits were not expressly prohibited, they are impliedly prohibited by other clauses of the same section. In the first place, such benefits are uncertain, incapable of estimation, and future. Compensation must be made in money, and in advance. The property owner, therefore, cannot be compelled to receive his compensation in such vague speculations as to future advantages in which a jury may be induced to indulge. And then for the reason usually given for the disallowance of credit for such benefits by the courts, when they are not governed by any constitutional or statutory rule. Some of the reasons are as follows: The chance that land will increase in value as population increases and new facilities for transportation and new markets are created is an element of value quite generally taken into consideration in the purchase of land in estimating its present market value. This chance for gain is the property of the landowner. If a part of his property is taken for the construction of the railway, he stands, in reference to the other property not taken, like similar property owners in the neighborhood. His neighbors are not required to surrender this prospective enhancement of value in order to secure the increased facilities which the railroad will afford. If he is compelled to contribute all that he could possibly gain by the improvement, while others in all respects similarly affected by it are not required to do so, he does not receive the equal protection of the law. The work is not being done for his benefit, but for the pecuniary advantage of those who are constructing it. The law will not imply a promise on his part to pay anything toward it. His property will be similarly benefited by many of the improvements in the vicinity,— by the erection of mills, schoolhouses, churches, etc.,— as will also the railroad after it has been constructed. This expected enhancement of value through the general improvement of the country is a legitimate motive for investing in property or for building a railroad. The improvements made by each one adds to the value of all the property in the vicinity. The right to share in the general prosperity cannot be taken from any one for the advantage of others. In consideration that the community will be benefited, private persons are allowed to exercise the right of eminent domain. The parties constructing a railroad agree to thus serve the public, being allowed to charge for their service. The consent of the public to this use of the right of eminent domain included the consent of the property owner. To com-

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pel him to give up or pay full value for his share of the common benefit is to take from him the consideration for which he gave his consent, while others are allowed to retain it. In this he is not equally protected by the law. Lewis, Em. Dom. § 471, and authorities cited in note. Special benefits, as I have said, are such as are peculiar to the property which it is alleged has been damaged, such as are reasonably certain to result from the construction of the work. Illustrations are afforded where a marsh will be drained, or levee built which will protect the land from floods. It is generally thought that different considerations must be applied to such benefits. They are not involved here. Often special benefits, which afford protection to the land, or will at once render it more productive, are taken into consideration in determining how much land not taken will be damaged. Only the arbitrary rule of the statute which requires separate findings of benefit and damage will prevent this. These are matters, however, which need not be determined in this case.

The judgment and order are reversed, and a new trial ordered.

We concur: **Beatty**, Ch. J.; **Harrison**, J.; **Van Dyke**, J.; **Henshaw**, J.

McFarland, J., dissenting:

I dissent, and think that the judgment should be affirmed. I adhere to the opinion delivered and the conclusion arrived at in department. *Ante*, 583. I desire to add only that, in my judgment, the intent of section 14 of article 1 of our state Constitution to discriminate against corporations other than municipal, and against them alone, is so obvious as to leave no room for doubt on the subject. Clearly, a constitutional provision must be construed in the light of the law as it stood when the provision was adopted. Now, at the time of the adoption of the provision in question the established law of this state was that in all cases of the exercise of the power of eminent domain—irrespective of the character of the persons seeking to exercise it—the owner of the land taken was entitled to only "just compensation;" and that in determining what was just compensation, as was said in *San Francisco, A. & S. R. Co.* v. *Caldwell*, 31 Cal. 368, the weight of authority is in favor of "allowing benefits and advantages to be considered in ascertaining what is a just compensation to be awarded in such cases, and it seems to us that the reasons in support of this view of the subject are unanswerable." See also *California P. R. Co.* v. *Armstrong*, 46 Cal. 85. That was the law of the state, and it included the consideration of general as well as special benefits. Now, the purpose of the constitutional provision in question was not to change that judicially determined just principle as to any person except a private corporation. It was to stand as to all other persons, and it forever prohibits the legislature from allowing that just principle to be invoked by such a corporation. If that is not a discrimination founded upon no intrinsic or natural difference, and therefore in violation of the Federal Constitution, I cannot imagine how such a discrimination could exist.

PEOPLE of the State of California, *Respt.*,
v.
Bartolo CURIALE, *Appt.*

(137 Cal. 534.)

1. **Offenses committed before marriage** are not within an exception of "cases of criminal violence upon one by the other," in a statute forbidding husband or wife to testify against the other.
2. **An act of sexual intercourse with a female by her consent** when she was under the age when she could legally consent is not an act of criminal violence within the meaning of an exception of evidence as to such acts, in a statute forbidding a woman to be a witness against her husband.

(October 27, 1902.)

APPEAL by defendant from a judgment of the Superior Court for San Bernardino County convicting him of rape. *Reversed.*

The facts are stated in the opinion.

Mr. **Henry W. Nisbet**, for appellant:

It was error for the court, over the objection of the defendant, to allow his wife to become a witness against him in this case, although she was not his wife at the time of the alleged commission of the offense charged.

State v. *Frey*, 76 Minn. 526, 79 N. W. 518; *People* v. *Schoonmaker*, 117 Mich. 190, 75 N. W. 439; *Miller* v. *State*, 37 Tex. Crim. Rep. 575, 40 S. W. 313; *United States* v. *White*, 4 Utah, 499, 11 Pac. 570; *State* v. *Evans*, 138 Mo. 116, 39 S. W. 462; *Bassett* v. *United States*, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165.

Messrs. **Tirey L. Ford**, Attorney General, and **A. A. Moore, Jr.**, for respondent:

Rape against a child under the age of consent, even though she offer no resistance, is an act of criminal violence under our laws. *People* v. *Lourintz*, 114 Cal. 628, 46 Pac. 613.

The husband or wife is competent as against the other, "in cases of personal violence."

Wharton, Crim. Ev. § 395; Greenl. Ev. § 343; 1 Hale P. C. p. 639; 4 Bl. Com. p. 209; East P. C. p. 454; Roscoe, Crim. Ev. p. 118;

NOTE.—As to what constitutes a personal wrong or injury within the meaning of statute allowing testimony of wife or husband in such cases, see, in this series, People v. Quanstrom (Mich.) 17 L. R. A. 723.

For competency of woman as witness in suit for deceit whereby she was induced to enter into a void marriage, see, in this series, Morrill v. Palmer (Vt.) 33 L. R. A. 411.

For testimony of woman to alleged unlawful marriage, see Com. v. Hayden (Mass.) 28 L. R. A. 318.

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1 Russell, Crimes, p. 949; 2 Starkie, Ev. § 403; Stephen, Digest of Ev. art. 108.

Mr. **J. W. Curtis** also for respondent.

Cooper, C., filed the following opinion:

Defendant was convicted of the crime of rape, and sentenced to ten years in the state prison at Folsom. He appeals from the judgment and order denying his motion for a new trial.

The facts are substantially as follows: Francesco Petruccelli is the father of Isabella, and the husband of Mrs. Petruccelli, who is the stepmother of Isabella. In December, 1900, and for some time prior thereto, the family lived in San Bernardino. The defendant had been boarding with the family, and living in the same house, for about three months. The daughter, Isabella, was then under fifteen years of age, but had been receiving attentions from defendant, going buggy riding with him, and to different places, apparently with the approbation of the parents. He had asked Isabella to marry him, but it is not clear that she had promised to do so. Isabella had, prior to December 15, 1900, promised to go with defendant to Redlands, for the purpose of having him buy her some shoes and clothing. On the afternoon of said day, Isabella, with the consent of her parents, went to Redlands for the purpose of meeting the defendant. He met her at the depot, and they then went to a restaurant and had "supper." After that they went to the shoe store, where defendant bought the girl a pair of shoes, and to a dry goods store, where he bought cloth for a dress, and gave it to her. They then went to defendant's room in the hotel or lodging house, where they slept in the same bed, and had sexual intercourse. They had breakfast together next morning, and returned on the train together to San Bernardino, and together went to the house of the girl's father. The girl told her stepmother and her father of what had occurred, and it does not seem that defendant made any attempt to conceal it. He told the stepmother on Sunday, the 16th of December, that he intended to marry the girl; and on Monday, the 17th, they were married, with the consent of the girl's father and stepmother. The father went with defendant to the county clerk's office to get the marriage license, and made an affidavit stating that he was the father and guardian of the girl, and that he consented to the marriage. After the marriage the defendant and Isabella lived together as husband and wife until the latter part of June, 1901. The information was filed on the 7th day of September, 1901, charging the defendant with the crime of rape on the 16th day of December, 1900, in having sexual intercourse with Isabella Petruccelli, then and there under the age of sixteen years. Defendant's wife, Isabella, was allowed, under his objection, to testify against him as to the facts occurring at the hotel at Redlands, and which facts are here claimed to constitute the crime of rape. It is claimed that the admission of this testimony was error, and this is the controlling question in the case.

It is provided in the Penal Code (§ 1322): "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties." The defendant was a party, and his wife was called and testified against him without his consent. The crime charged was not an act or crime committed by defendant upon his wife. The crime charged was upon the person of Isabella Petruccelli, and committed before she became the wife of defendant. "Criminal violence upon one by the other" means what it says,—criminal violence upon the wife by the husband, or criminal violence upon the husband by the wife. The statute is founded upon public policy. It prohibits, in general terms, the examination of one spouse against the other, without his or her consent. For the purpose of protecting one against the criminal violence of the other, the statute provides further that the prohibition shall not apply to cases of criminal violence by one upon the other; that is, by one spouse upon the other spouse. The exception does not extend to acts committed before the marriage. This has been the uniform interpretation of similar statutes in other states, so far as we are advised. In *State* v. *Evans*, 138 Mo. 116, 39 S. W. 462, the defendant was charged with rape upon a female child of the age of thirteen years. Defendant and the girl were afterwards, and before the finding of the indictment, lawfully married. The court held that the wife was not a competent witness as to the act that took place before the marriage. In the opinion it is said: "It is urged by the attorney general that this case falls within the exceptions to the general rule; that it is a criminal injury to the wife. This contention ignores the limitation of the exception itself. *Ex vi termini*, a wife is only admitted to testify concerning criminal injuries to herself, as a wife; not to a woman who was not, at the time of the injury, the wife of the defendant." Minnesota has a statute similar to ours, which provides: "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, . . . but this exception does not apply to . . . a criminal action or proceeding for a crime committed by one against the other." Gen Stat. 1894, § 5662. In *State* v. *Frey*, 76 Minn. 527, 79 N. W. 518, it was held, upon an indictment for rape by the husband upon the wife prior to marriage, and when she was of the age of fourteen years, that she was incompetent to testify. It was said in the opinion: "The statute deals with the parties in the marriage relation, and not as to acts committed before the marriage." In Texas the statute is similar to ours, and the exception is, "except in a criminal prosecution for an offense committed by one against the other." Code Crim. Proc. 1895, art. 775. It was held that the wife, under the above statute, could not

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be permitted to testify to an abortion produced by the husband upon her prior to her marriage. *Miller* v. *State*, 37 Tex. Crim. Rep. 576, 40 S. W. 313. In *People* v. *Schoonmaker*, 117 Mich. 191, 75 N. W. 439, the defendant was prosecuted for rape alleged to have been committed by having intercourse with his wife before marriage, and while she was under the age of consent. The court held the evidence of the wife incompetent, and reversed the case. And the rule here stated, and adopted in the cases cited, is in accord with the common law. In 1 Hale, P. C. p. 301, it is stated that upon an indictment for taking away and forcibly marrying a woman, the woman so married may be sworn against her husband, if the force were continuing upon her till the marriage, for the reason that, though a marriage *de facto*, yet, if it were effected by a continued act of force, it was not a marriage *de jure*, unless ratified by a subsequent free cohabitation or consent. The *Cases of Fulwood*, Cro. Car. 482, and of *Brown*, 1 Vent. 243, are referred to as authority, but the author, in speaking of the views of the judges, says: "But most were of the opinion that, had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband." In the case at bar, if the girl had never freely consented to the marriage and cohabitation with defendant, the question would be different.

Again, the statute prohibits the wife from being a witness against her husband, except in cases of "criminal violence" upon her. If the crime charged should be regarded with reference to the person of the wife, regardless of the question as to whether she was the wife at the time of its commission, still we do not think it is a charge of criminal violence under the statute. The act of having sexual intercourse with a female under the age of sixteen with her consent is not an act of criminal violence. It is a crime because made so by statute. *People* v. *Vann*, 129 Cal. 118, 61 Pac. 776, and cases cited. Our legislature has seen fit to make the act of sexual intercourse with a female under the age of sixteen rape, regardless of the question of consent. The female may be a voluptuous, abandoned woman, and may even solicit the male, but under the statute the party so solicited must resist at his peril. Even then, though he resist like Joseph of old, Potiphar's wife may cry out against him, and hold up his garment as evidence. The act is a crime regardless of the question of violence. In *Miller* v. *State*, 37 Tex. Crim. Rep. 576, 40 S. W. 313, it was held that administering drugs to a female for the purpose of producing an abortion was not personal violence. The court said: "They subsequently married, and the statute, by its terms, excludes the wife from testifying against her husband, except as to acts of personal violence against her. However, the acts constituting and causing the alleged abortion in this case were the administration of certain drugs, no force being used in the administration thereof, and apparently with her consent." The statute of Utah is in the exact language as ours, and in *Bassett* v. *United States*, 137 U. S. 499, 34 L. ed. 762, 11 Sup. Ct. Rep. 165, it was held that the crime of polygamy was not a criminal act of violence by the husband toward the wife, and that the wife was not a competent witness. It is claimed that the rule here adopted will prevent such crimes from being punished. We must construe the law, and not attempt to make it. But it is not apparent to us that it would be any great injustice to forbid the woman who marries a man freely, and lives with him as his wife, from testifying that he had sexual intercourse with her before she was sixteen years old and prior to her marriage. The act was with her consent. She knew it when she gave to him her vow to be his good and lawful wife. Her moral turpitude is perhaps as great as his.

It follows that the court erred in admitting the testimony, and that the judgment and order should be reversed.

We concur: **Chipman**, C.; **Haynes**, C.

Per Curiam:

For the reasons given in the foregoing opinion, ***the judgment and order are reversed.***

GEORGIA SUPREME COURT.

Mrs. Joseph MABRY, *Plff. in Err.*,
v.
CITY ELECTRIC RAILWAY COMPANY.

(.....Ga.....)

***A railroad company is liable in damages for an injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury thereby.**

(December 10, 1902.)

ERROR to the City Court for Floyd County to review a judgment in favor of defendant in an action brought to recover

*Headnotes by CANDLER, J.

NOTE.—For a case in this series holding that compensation for shame and mortification may be included in damages for ejection of passenger, see Texas & P. R. Co. v. James (Tex.) 15 L. R. A. 347.

For a case holding that damages may be recovered for paroxysms of the nervous system caused by the indignity and humiliation suffered by a passenger on being wrongfully ejected, see Sloane v. Southern California R. Co. (Cal.) 32 L. R. A. 193.

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damages for the alleged wrongful expulsion of plaintiff from defendant's car. *Reversed.*

The facts are stated in the opinion.

Messrs. **Seaborn Wright** and **Barry Wright**, for plaintiff in error:

A common carrier is bound to take and transport all who comply with its reasonable rules.

City & Suburban R. Co. v. *Brauss*, 70 Ga. 368.

The passenger has a right to rely upon information received from an employee as to what the rules are.

Atkinson v. *Southern R. Co.* 114 Ga. 146, 55 L. R. A. 223, 39 S. E. 888.

A passenger has a right to recover damages for expulsion from the vehicle of a common carrier.

City & Suburban R. Co. v. *Brauss*, 70 Ga. 369; *East Tennessee, V. & G. R. Co.* v. *King*, 88 Ga. 443, 14 S. E. 708.

Messrs. **Denny & Harris**, for defendant in error:

Unless some physical injury, or its equivalent, is set up, there can be no recovery.

There being no cause of action set out in this petition, either a motion to dismiss could be made, or a general demurrer for lack of essential allegations could be filed and heard at the trial term.

Hobbs v. *Chemical Nat. Bank*, 97 Ga. 524, 25 S. E. 348.

The court will take judicial cognizance of the universal system in street car transportation of carrying passengers by trip fares, and allowing "transfers" over connecting lines or branches only, as facts known to every man of common understanding.

Snider v. *State*, 81 Ga. 753, 7 S. E. 631; *Southern R. Co.* v. *Covenia*, 100 Ga. 46, 40 L. R. A. 253, 29 S. E. 219; *Atlanta Consol. Street R. Co.* v. *Arnold*, 100 Ga. 566, 28 S. E. 224.

If a plaintiff have a right to carriage on a street car, it is his duty to produce it. If he cannot produce the evidence of his right to carriage, he must pay his fare and look to the company for redress on his contract.

Mahoney v. *Detroit Street R. Co.* 93 Mich. 612, 18 L. R. A. 335, 53 N. W. 793.

Candler, J., delivered the opinion of the court:

Mrs. Mabry brought suit for damages against the City Electric Railway Company, a street railroad corporation, of the city of Rome. Her petition alleged that on a named day she boarded a car of the defendant at a point "some 200 yards from the switch where all cars on the line of the defendant company meet, . . . and from which points the cars run to the several destinations of the line." It was her intention to go to her home in North Rome. As she boarded the car, she asked the conductor if she could ride to the switch, and be transferred to an outgoing car, and go to her home, and the conductor replied that she could. She then paid her fare, and when the car reached the switch she "got off of the incoming car from North Rome and boarded the outgoing car to North Rome." Transfers of passengers were made orally by the conductors of the company, and not by written transfer tickets, and she supposed that she had been transferred, as promised by the conductor of the car that she first boarded. After riding a short distance on the outgoing car, the conductor asked for her fare. She told him that she had paid her fare, and explained the agreement made by the conductor of the car which she had first boarded; but in spite of her protests the conductor ejected her in the presence of other passengers, and she was compelled to walk to her home, a distance of more than a mile. She sued for $500 on account of wounded feelings and "great physical distress." The defendant demurred to the petition, the material portions of which are substantially set forth in the foregoing statement, the grounds of demurrer being: (1) That no cause of action was set out, in that no physical injury was alleged to have been sustained by the plaintiff; and (2) that no damages for pain and suffering "or other pathological damages" can be recovered unless there is some physical injury. The court sustained this demurrer, and dismissed the petition, and the plaintiff excepted.

It will be observed that the defendant does not call in question by its demurrer the sufficiency of the allegations of wrong done to the plaintiff by its servants, but asserts that no cause of action is set out, in that no physical injury is alleged to have been sustained by her. So far as appears from the pleadings, the plaintiff was rightfully on the car from which she alleges that she was ejected, and under the alleged agreement made with her by the conductor of the first car she was entitled to ride to her home on the second car. After informing the conductor of the second car of the facts of that agreement, which, if true, entitled her to ride to her destination in pursuance of her original design, it is alleged that he, over her protests, and in the presence of other passengers, ejected her from the car, compelling her to walk to her home, a distance of more than a mile. Her suit is for wounded feelings and physical distress on account of this wrongful treatment. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical." *Head* v. *Georgia P. R. Co.* 79 Ga. 360, 7 S. E. 218. The defendant company owed the duty to the plaintiff to carry her safely and properly to her destination, and under this obligation she was entitled to be treated respectfully. If it intrusted this duty to servants, the law holds it responsible for the manner in which these servants executed their trust. The precise question made by the demurrer in the case at bar was before this court in the case of *Cole* v. *Atlanta & W. P. R. Co.* 102 Ga. 474, 31 S. E. 107. In the present case, as in the case cited, the question presented is, Does the law afford any redress for wounded feelings unaccompanied by injury to the person or purse? Both cases are

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clearly distinguishable from the case of *Chapman* v. *Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430, 15 S. E. 901. In the *Chapman Case* there was no tort independently of the violation of the contract, and in such cases the best decisions of the courts of last resort are to the effect that the damages recoverable are strictly compensatory, and take on the vindictive or exemplary feature only in cases where the injury is wilful, wanton, or malicious. That case proceeds upon the idea of a negligent omission to perform a contractual obligation, and the judgment might well have been placed upon the character of the suffering alleged and the remoteness of the damages arising therefrom. The case at bar, however, is based upon the wrongful commission of an overt act, which in itself involved the feelings, sensibilities, and, in a measure, the reputation, of the plaintiff; an act tending to degrade her in the estimation of other persons present at the time. The injury alleged is, not the failure to carry the plaintiff to her destination, but her expulsion from the car over her protestations of her right to remain thereon. We do not think, therefore, that the *Chapman Case* is applicable to the case at bar. While the law protects the person of the citizen from physical injury, it also protects his feelings from laceration, and will apply money to such wounds as a salve for their healing.

The court erred in sustaining the demurrer to the petition, and *the judgment is therefore reversed.*

All the Justices concur, except **Lumpkin, P. J.**, absent.

Oscar ASHWORTH, by Next Friend, *Plff. in Err.*,
v.
SOUTHERN RAILWAY COMPANY *et al.*

(.....Ga.....)

*1. **The only duty which a railroad company owes,** in this state, to a trespasser upon or about its property, is not to injure him wantonly or wilfully; but this rule does not relieve the company, under all circumstances, from anticipating the presence of a trespasser upon its property, and from taking proper precautions to prevent injury to him.

2. **Where a number of children, ranging in age from six to fifteen years,** are, with the knowledge and without the disapproval of the employees of a railroad company in charge of its trains, permitted to board and ride upon the trains while they are passing over a side track through a playground of the children to a point beyond, and while they are returning from such point to the main line of the road, the children alighting from the trains at the limits of the playground, both going and returning, and this custom is a continuous one, engaged in whenever the trains enter the playground, it is the duty of the employees of a train, who are aware of this custom, to anticipate that when the train enters the playground the children will attempt to ride upon it and alight from it at the point where they have been accustomed to do so; and they are under a further duty, consequent upon the first, to take proper measures to prevent injury to such children.

3. **Where, under the circumstances above detailed, a child lacking in experience** and discretion, and incapable of appreciating the danger incident to his conduct, gets upon the running board behind the tank of an engine before the engine begins its return trip through the playground, and is injured while attempting to jump therefrom at the point where children have been for a long time previous continuously in the habit of alighting, the company is liable in damages for the injuries thus received, even though its employees in charge of the train have no actual knowledge of the presence of the child upon the running board of the engine. An ordinarily prudent person would, under such circumstances, have reason to anticipate the presence of the child upon the engine, and the servants of the company, as prudent men, would be required to ascertain whether the child is in fact upon the engine before beginning the return trip, and should either require him to alight, or, at least, stop the train for this purpose at the place where the children have been accustomed to alight.

4. **A petition setting forth facts** such as are above detailed should not have been dismissed on a general demurrer.

*Headnotes by COBB, J.

(December 10, 1902.)

ERROR to the Superior Court for Floyd County to review a judgment in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Seaborn Wright** and **Barry Wright,** for plaintiff in error:

The duty to a trespasser is to observe ordinary care not to injure him after his danger is discovered.

Savannah, F. & W. R. Co. v. *Waller,* 97 Ga. 164, 34 L. R. A. 459, 25 S. E. 823; *Hambright* v. *Western & A. R. Co.* 112 Ga. 36, 37 S. E. 99.

Knowledge of the trespasser's presence may be either actual or constructive.

Crawford v. *Southern R. Co.* 106 Ga. 870, 33 S. E. 826; *Savannah, F. & W. R. Co.* v. *Waller,* 97 Ga. 164, 34 L. R. A. 459, 25 S.

NOTE.—As to duty of railroad company to children trespassing on track or cars, see also, in this series, Ward v. Southern P. Co. (Or.) 23 L. R. A. 715; Bottoms v. Seaboard & R. R. Co. (N. C.) 25 L. R. A. 784, and *note;* Barney v. Hannibal & St. J. R. Co. (Mo.) 26 L. R. A. 847; Roth v. Union Depot Co. (Wash.) 31 L. R. A. 855; Savannah, F. & W. R. Co. v. Waller (Ga.) 34 L. R. A. 459; Gunn v. Ohio River R. Co. (W. Va.) 36 L. R. A. 575; Rosse v. St. Paul & D. R. Co. (Minn.) 37 L. R. A. 591; Mack v. South Bound R. Co. (S. C.) 40 L. R. A. 679; Trudell v. Grand Trunk R. Co. (Mich.) 53 L. R. A. 271; Becker v. Louisville & N. R. Co. (Ky.) 53 L. R. A. 267; Mason v. Southern R. Co. (S. C.) 53 L. R. A. 913.

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E. 823; *Smith* v. *Savannah, F. & W. R. Co.* 84 Ga. 698, 11 S. E. 455.

Constructive knowledge is notice sufficient to excite attention, and to put a party on inquiry.

Ga. Civil Code, 3933; *Savannah, F. & W. R. Co.* v. *Waller*, 97 Ga. 164, 34 L. R. A. 459, 25 S. E. 823; *Crawford* v. *Southern R. Co.* 106 Ga. 870, 33 S. E. 826; *Smith* v. *Savannah, F. & W. R. Co.* 84 Ga. 698, 11 S. E. 455, 86 Ga. 229, 12 S. E. 579; *Wynn* v. *City & Suburban R. Co.* 91 Ga. 346, 17 S. E. 649.

Constructive notice may be inferred from notice of a custom or a habit.

Houston v. *Gate City Street R. Co.* 89 Ga. 272, 15 S. E. 323; *Perry* v. *Macon Consol. Street R. Co.* 101 Ga. 400, 29 S. E. 304; *Shaw* v. *State*, 102 Ga. 660, 29 S. E. 477; *Crawford* v. *Southern R. Co.* 106 Ga. 870, 33 S. E. 826.

Ordinary care is the degree of care every prudent man exercises.

Ga. Civil Code, 2898; *Bohler* v. *Owens*, 60 Ga. 188; *Central R. & Bkg. Co.* v. *Ryles*, 84 Ga. 420, 11 S. E. 499; *Holland* v. *Sparks*, 92 Ga. 753, 18 S. E. 990; *Crawford* v. *Southern R. Co.* 106 Ga. 870, 33 S. E. 826.

It is a question for the jury whether a railroad company, having notice that a child is in a place of danger, exercises the requisite care.

Branham v. *Central R. Co.* 78 Ga. 35, 1 S. E. 274.

If a railroad company fails to exercise ordinary care in preventing an imminent injury of which it has notice, such failure amounts to recklessness.

Atlanta R. & Power Co. v. *Walker*, 112 Ga. 726, 38 S. E. 107.

When children are on or about a work train so frequently that a person of ordinary prudence will apprehend danger to them, the fact that employees do not know that a child is on the train in a dangerous position does not relieve the railroad company from liability for an accident resulting therefrom.

St. Louis S. W. R. Co. v. *Abernathy* (Tex. Civ. App.) 68 S. W. 539.

Messrs. **Shumate & Maddox** and **Harris & Chamblee**, for defendants in error:

The facts alleged in the petition wholly fail to make a case of liability against the company.

Underwood v. *Western & A. R. Co.* 105 Ga. 48, 31 S. E. 123.

Cobb, J., delivered the opinion of the court:

The plaintiff brought his action against the railway company and Wyley Hartin for damages. The defendants filed a demurrer to the petition upon various grounds. The demurrer was sustained, and the plaintiff excepted. The only ground of the demurrer insisted upon in this court was that which set up that the petition set forth no cause of action. The petition was, in substance, as follows: On the 10th day of June, 1901, and for two or three years prior thereto, the defendant company used a track extending from its main line, a distance of half a mile through the village of Lindale, into the yard of a manufacturing company. For about 150 yards from the entrance to the manufacturing company's yard the track extends through the village "common," and, after leaving the common, the track extends across the principal street of the village into the yard. The village common was on the day above named, and for some time prior thereto had been, used as a playground by the children of the village. It was the custom of these children to board the engines and cars of the defendant when they came into the common, and ride upon them while they remained in that place; and when such engines and cars entered the yard of the manufacturing company the children were accustomed to jump off; and, likewise, when the engines and cars left the common for the main line the children would jump from them to the ground. This was not an occasional practice, but was usually and regularly done when the engines and cars came into the common. This custom of the children to ride upon and jump off the cars and engines was known to the defendant company, through the knowledge of its servants and employees who operated the trains, and to Wyley Hartin, a servant of the railway company, who, with other employees, was in charge of the engine and cars on the date above mentioned. The children who were accustomed to board the engines and cars of the defendant while on the common ranged in age from six to fifteen years. On June 10, 1901, the plaintiff, a child of eight years, was upon the village common with a large number of other children, when a switch engine of the defendant company, which was pushing a number of box cars, came into the common, and stopped on the track, preparatory to pushing the cars into the yard of the manufacturing company. While the engine and cars were stationary, a number of children climbed upon and into the cars; and one child, together with the plaintiff, stepped upon the running board behind the tank of the engine. In a few moments the cars were pushed by the engine into the yard. The engine itself did not enter the yard, but was reversed, and started backward, with the plaintiff and his companion on the running board. When the plaintiff and his companion discovered that the engine was going out to the main line, they jumped from the engine, as was the custom; and in doing so the plaintiff fell under the engine, which ran over his legs, cutting them off between the knees and ankles. The plaintiff had never been upon the cars or engine before that time, and was induced to do so upon the occasion in question by the unrestrained liberty of many other children, some older and some younger than himself, to so ride upon the engine and cars. The petition alleges that it was the daily custom of children, too young to appreciate the danger, at the particular place mentioned, to ride upon and jump from the engine and cars of the company, and this cus-

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tom was known to defendant company and to Wyley Hartin. It is alleged that no reasonable, serious, and effective effort to keep the children off the engine and cars at this particular place had been made by the employees of defendant who operated the engine and cars, or anyone else, and this was known to defendant company and to Wyley Hartin; that the children could have been kept off and away from the engine and cars by ordinary and reasonable care and effort; that knowledge of the presence of the children put the defendant company and Wyley Hartin upon legal notice of the presence of the plaintiff upon the running board of the engine at the time of his injury, and imposed upon defendants the duty of examining the cars and engine before starting for the main line of the road, and of removing the plaintiff therefrom; that the injury was occasioned by the negligence of defendants; and that the plaintiff was without fault, he being an infant of eight years.

Notwithstanding the plaintiff was an infant of immature years, he was wrongfully upon the running board of the company's engine, and was therefore a trespasser. The only duty which a railroad company owes a trespasser is not to injure him wantonly or wilfully; and ordinarily this rule imposes upon the company simply the duty of taking proper precautions after the presence of a trespasser in a position of peril has been discovered. It will not do, however, to lay this down as an absolutely invariable rule. A railroad company may, by its own acts and conduct, impose upon itself the duty of anticipating the presence of a trespasser in such a position. Indeed, in no case would the servants of a railroad company in charge of its train be warranted in closing their eyes to avoid seeing a person of whose presence they had had previous warning, or when, under the circumstances, they ought to have known of his presence. In referring to the duty of a railroad company to a trespasser upon or near its trains, Mr. Justice Fish, in *Crawford* v. *Southern R. Co.* 106 Ga. 870, 873, 33 S. E. 826, 827, used this language: "Admitting, for the sake of the argument, that the general rule is that a railroad company owes no duty to a trespasser who is upon or dangerously near its track in front of a moving train, until its servants have discovered his presence there, and therefore, so far as his safety is concerned, is not obliged to maintain a lookout in the direction in which the train is moving, we do not think that this could properly be held to be a uniform, fixed, and invariable rule, applicable alike to all cases and under all circumstances. Conduct which might, under one set of circumstances, show that all ordinary and reasonable care and diligence had been observed, might, under a different set of circumstances, be insufficient to show an observance of such care and diligence. We think that such a rule could mean no more than this: Taking the locality where the train is running, and all the surrounding circumstances, if those in control of the movement of the train have no reason to apprehend that there may likely be a human being on the track in front of the engine, they are under no duty to one who may in fact be there, until they have actually discovered that he is there. But if, from the locality or surrounding circumstances, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings, then, it seems to us, it is the duty of the employees of the company to keep a lookout ahead of the train." There is no reason why the rule above laid down is not applicable to trespassers in other situations of peril in and about the property of railroad companies; and in such cases it may be laid down as a safe rule that the railroad company must not wantonly or wilfully injure the trespasser after his presence has become known, and must use proper diligence to discover him, if, under all the circumstances, it has reason to anticipate that he may be present at that particular place and that particular time. And more especially would this be so in a case where the company, by its own acts and conduct, rendered it likely that he might be present at that time and place. The rule as to the duty of the company to anticipate the presence of an infant trespasser is no more rigorous than in the case of an adult; but there are cases where the company would be justified in assuming that an adult would extricate himself from his position of peril, when it would not be authorized to presume that an infant of immature years, and lacking in discretion and judgment, would do so.

A railroad company cannot in all cases relieve itself from liability to a trespasser by showing merely that its servants and employees did not know of the presence of the trespasser, but in some cases it must go further, and show that there were no circumstances from which an ordinarily prudent person would have had reason to anticipate his presence. See, in this connection, *Williams* v. *Kansas City, S. & M. R. Co.* 96 Mo. 275, 9 S. W. 573; *Atchison, T. & S. F. R. Co.* v. *Plaskett*, 47 Kan. 107, 26 Pac. 401; *Whalen* v. *Chicago & N. W. R. Co.* 75 Wis. 654, 44 N. W. 849; *Chicago & N. W. R. Co.* v. *Smith*, 46 Mich. 504, 41 Am. Rep. 177, 9 N. W. 830; *Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626, 11 N. W. 55; *East St. Louis Connecting R. Co.* v. *Jenks*, 54 Ill. App. 91, 96; 3 Elliott, Railroads, § 1260; Hopkins, Personal Injuries, § 87. If a railroad company expressly invites or tacitly permits persons to be upon its premises, or in or about its machinery, the company owes to such persons the duty, not only not to injure them when their presence becomes known, but also to anticipate their presence at the time when or the place where such invitation or permission would probably bring about their presence, and to take such measures as ordinary prudence would require to prevent injury to them if they are in fact present. A railroad company is the owner of its right of way, its track, and its machinery, and is entitled to exclude therefrom others who have no interest or right therein. A railroad company which

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continuously permits persons to be upon its right of way, or in or about its machinery, at given times and places, is put on notice by this conduct on its part that such persons may be present at such times and places; and by this conduct it imposes upon itself the duty, not only to prevent injury to such persons, but to anticipate their presence, and take the precautions of an ordinarily prudent person to prevent injury to them. Let these principles be applied to the allegations of the petition in the present case. It is alleged that a side track of the defendant company extended through a village common used by the children of the village as a playground, and that, with the knowledge of the company and its servants in charge of its engines and cars, these children were accustomed to board the engines and cars as they came through the common, and ride upon them to the limits of the common. On the occasion upon which the plaintiff was injured, the children, following the usual custom, and without any objection being raised by the employees of the company, got upon a switch engine and the cars attached thereto for the purpose of riding the length of the common. If the allegations of the petition are true, it is impossible to conclude that the servants of the company in charge of the engine and cars did not know that the children had boarded them; and as it was the custom of the children to ride out toward the main line, to the end of the common, ordinary prudence would require that the employees of the company should anticipate that some of them would remain on the engine or cars until the end of the common was reached. Negligent ignorance is, in law, the equivalent of knowledge; and, if the servants of the company knew the children were aboard the cars or upon the engine, it was their duty to stop the train and require them to get off. Instead of doing this, the train was allowed to proceed on its way, thus allowing small children, inexperienced and without discretion, to alight from the moving train. The plaintiff in this case was a boy eight years of age, probably incapable of appreciating the danger of alighting from a moving train,—especially when guided by the example of an older boy who was his companion. The plaintiff was on the running board of an engine which was moving backwards, and, according to the allegations of the petition, the servants of the defendant company had, as reasonably prudent persons, sufficient grounds to anticipate his presence upon the engine, and, in legal contemplation, knew he was there, were aware of his perilous position, and yet took no steps to protect him against his ignorance and inexperience. The allegations of the petition make a case of wanton and wilful injury,—not wilful in the sense of intentional, but wilful in the legal sense, growing out of a failure to anticipate the plaintiff's presence and provide against his injury, when it should have been done.

Railroad companies may not be bound to anticipate that children will be allured by passing trains, and attempt to board and ride upon them. But when the right of way of a railroad company extends through a place used by a number of children, of ages varying from six to fifteen years, as a playground, and when these children are accustomed continuously, every time the train enters the playground when they are upon it, to swarm upon the train and ride to the limits of the playground, and when the employees of the company know of this custom and make no objection to it, the company is bound to carry the burden which such a knowledge and tacit permission impose, and this burden would require the company to comply with the demands of ordinary care for the prevention of injury to the children. In *Louisville & N. R. Co.* v. *Popp*, 96 Ky. 99, 27 S. W. 992, the railroad company had two cars stationed on a side track near a depot for the purpose of being attached to an excursion train. Children of all sizes were in the habit of going about the depot building and grounds for pastime and amusement, and this was known to the servants of the company in charge of the train by which the plaintiff, a small boy, was injured. It appears that the plaintiff and a companion went into one of the vacant cars to get ice water, and remained in the car, loitering about, for some time; the plaintiff remaining on the platform. When an engine with four cars attached was backed for the purpose of making a coupling to the car on which the plaintiff was standing, he became frightened, and endeavored to get on the bumper of the car, and, while making this attempt, was caught between the backing car and the bumper, and was injured. There was no evidence that the employees in charge of the train actually saw the plaintiff in time to avoid injuring him, but the company was held liable on the theory that under the circumstances of the case they were bound to anticipate his presence there, and to take proper measures to prevent injury to him. In *Thompson* v. *Missouri, K. & T. R. Co.* 11 Tex. Civ. App. 307, 32 S. W. 191, the petition alleged that the plaintiff, a child of twelve years of age, was injured while attempting to board a moving freight train at a public crossing which was much frequented by children and the public generally. It was alleged that the plaintiff and other children were, within the knowledge of the employees in charge of the train, in the habit of boarding trains at that crossing and riding a distance, and that the fact that the plaintiff was attempting to board the train when he was injured either was known to the employees operating the train, or could have been known by the exercise of ordinary diligence. It was held that the declaration set forth a cause of action. In *Tully* v. *Philadelphia, W. & B. R. Co.* 2 Penn. (Del.) 537, 47 Atl. 1019, a boy was killed while on an empty stationary car of the defendant company. There was evidence tending to show that the employees of the company actually knew of the boy's presence upon the car, and evidence of a custom on the part of children to play in the empty cars of the

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company was held to have been properly rejected, solely for the reason, however, that, inasmuch as the employees, under the evidence, actually knew of the boy's presence, evidence of the custom was immaterial. In *Harriman* v. *Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451, the company was held liable for injuries received by a boy from an exploding torpedo which had been picked up by the boy, and which the company had placed on its track at a point where the plaintiff and other children, together with the general public, had, with the knowledge and without the disapproval of the company, been accustomed to cross the track. The recent case of *St. Louis S. W. R. Co.* v. *Abernathy* (Tex. Civ. App.) 68 S. W. 539, is very similar to the present case. In that case the company was engaged in ditching and leveling up its roadbed with a steam plow, within the limits of an incorporated town. The construction train used by the company consisted of an engine and three or four cars, and the steam plow and scraper were attached to this train. The machinery and apparatus were new to the residents of the town, and attracted many children and grown people to see them operate. From the time the work was commenced, numbers of small boys, from five to eighteen years of age, were attracted by the train and machinery, especially before and after school hours, and on Saturdays all day, ranging in numbers from ten to fifty. The boys were permitted by the employees to ride upon and be in and around the train, in the caboose, on the steps, on the flat cars, around the air machinery, in the cab of the engine, on the cowcatcher, along and upon the right of way, and in front of the plow and behind it. The son of the plaintiffs, a boy ten years of age, was seen by a bystander riding upon the pilot attached to the tender of the engine, and, when first seen by the employees of the company in charge of the train, was lying across the track rail, just in front of the back wheels of the tender, and then it was impossible to prevent the train from running over him. The employees of the train did not know that the boy was on the pilot attached to the tender of the engine. The court ruled: "Where children are on or about a work train so frequently that a person of ordinary prudence will apprehend danger to them, the fact that employees do not know that a child is on the train, in a dangerous position, does not relieve the railroad company from liability from an accident resulting therefrom." In the opinion, in discussing whether the court properly submitted to the jury the question whether the employees of the defendant ought to have anticipated the boy's presence on the pilot of the engine, it is said: "If, as a matter of fact, boys of immature years and discretion were on and about the train so frequently that persons of ordinary prudence would have apprehended danger to them, although the employees at the time did not know deceased was on the train, then it devolved upon the employees to use ordinary care to ascertain whether or not some were on the train, and prevent injury." This case is to be distinguished from the case of *Underwood* v. *Western & A. R. Co.* 105 Ga. 48, 31 S. E. 123, in that there were in that case no allegations in the petition from which it appeared that the employees in charge of the train had reason to apprehend that Underwood was upon or about the train at the time of the injury. It was alleged that he had, previously to the injury, been in the habit of climbing upon and riding on the moving trains of the defendant at that place, but there was no allegation which would charge the employees with knowledge of his presence on the train at the time of the injury. The court erred in dismissing the petition. Of course, when the trial is had, it will be necessary to submit to the jury the question of contributory negligence of the plaintiff; and, for the rules governing in cases of this kind, see Hopkins, Personal Injuries, §§ 7*et seq.*; *Tully* v. *Philadelphia, W. & B. R. Co.* 2 Penn. (Del.) 537, 47 Atl. 1019.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent.

W. J. LOVELESS, *Plff. in Err.*,
v.
STANDARD GOLD MINING COMPANY.

(.....Ga.....)

***The negligence of a fellow servant does not relieve the master from liability to a coservant for an injury which would not have happened had the master not been negligent himself.**

(October 30, 1902.)

ERROR to the Superior Court for Lumpkin County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. **H. H. Dean**, for plaintiff in error:

If the master furnishes one fellow servant or one squad of hands defective material which they put together, and this causes injury and damage to another laborer not connected with the squad that does the work, but with an entirely separate squad that comes on at a different hour and knowing nothing whatever of the defective material, the master is liable, and this regardless of whether the servant who actually put the

*Headnote by FISH, J.

NOTE.—As to master's liability where his negligence combines with that of a fellow servant to injure an employee, see also in this series Lutz v. Atlantic & P. R. Co. (N. M.) 16 L. R. A. 819, and *note*, and Pullman's Palace Car Co. v. Laack (Ill.) 18 L. R. A. 215.

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material together knew or should have known of the defects.

Mr. **W. A. Charters,** for defendant in error:

No recovery can be had because the petition shows that if there was any negligence it was the negligence of plaintiff's fellow workmen.

Brush Electric Light & P. Co. v. *Wells,* 110 Ga. 192, 35 S. E. 365; *McCosker* v. *Hilton & D. Lumber Co.* 110 Ga. 328, 35 S. E. 369.

The plaintiff assumed all usual and ordinary hazards of the business.

One of these was injuries that might result from latent defects in machinery or tools.

Allen v. *Augusta Factory,* 82 Ga. 76, 8 S. E. 68.

Another of these hazards is the negligence of fellow servants in the use of defective appliances.

Hazlehurst v. *Brunswick Lumber Co.* 94 Ga. 535, 19 S. E. 756; *Hamby* v. *Union Paper Mills Co.* 110 Ga. 1, 35 S. E. 297; *Railey* v. *Garbutt,* 112 Ga. 290, 37 S. E. 360.

Where the petition shows that the injury resulted from a defective appliance which was known to a fellow servant and unknown to petitioner, and such fellow servant was negligent in the use of such appliance, still no recovery can be had, and the demurrer should be sustained.

White v. *Kennon,* 83 Ga. 343, 9 S. E. 1082; *Gunn* v. *Willingham,* 111 Ga. 433, 36 S. E. 804; *Ingram* v. *Hilton & D. Lumber Co.* 108 Ga. 197, 33 S. E. 961; *Baxley* v. *Satilla Mfg. Co.* 114 Ga. 722, 40 S. E. 730; *Daniel* v. *Forsyth,* 106 Ga. 568, 32 S. E. 621.

Fish, J., delivered the opinion of the court:

Loveless sued the Standard Gold Mining Company for damages for personal injuries alleged to have been sustained by him in consequence of the negligence of the defendant. He alleged that he was employed by the defendant as a laborer; that at the time he was injured he and three others were engaged, under the direction of the defendant company, in timbering a mining shaft upon its property ("that is, were placing timbers on each side of said shaft, which was perpendicular), and, as said timbers were put in, . . . petitioner was required to put them in place, and bolt the same to other timbers" and to the walls of the shaft, so as to protect the walls thereof; that the defendant company furnished the timbers, bolts, and taps necessary for this purpose, and it was its duty to furnish suitable material; that it furnished a number of bolts and taps that were unfitted for use, the taps being too large for the bolts, so that when they were put on the bolts the threads therein would not catch to the threads on the bolts sufficiently to hold the timbers through which the bolts were placed; that another squad of laborers had put in a number of timbers before the plaintiff and the squad with which he was working went into the shaft to carry on the work; that the men employed in the work previously to the coming on of the petitioner and his squad placed some timbers in the shaft, and sought to fasten the same with the defective taps furnished by the defendant company; and that plaintiff and his assistants went into the shaft, "and stepped onto the plank placed there for safety, so that [he] could work,—the planks resting on the said timbers so upheld by the defective bolts and taps,—and after stepping out on said planks and commencing work, and while in the performance of his duty, with no knowledge of the defective taps and bolts, he was injured by the giving way of the bolts and the falling of the said timbers, which caused him to fall some 15 or 25 feet and strike the solid rock on the bottom of the shaft." The defendant demurred to the petition, and pending the demurrer the plaintiff amended the petition by alleging that he had no opportunity of discovering the defects set forth, and by the exercise of ordinary care could not have known of the same, while they were well known to the defendant. The court then sustained the demurrer and dismissed the petition, to which ruling the plaintiff excepted.

The case, as it comes before us, involves the determination of a single question, and that is, Did the petition, in the language of the demurrer, show "on its face that the negligence which worked the injury complained of was attributable to the coemployees and fellow servants of the petitioner, the risk of which he assumed, under the law, when he entered the employment of defendant?" It is earnestly contended by counsel for the defendant in error that the petition shows that the injury was occasioned by the negligence of the plaintiff's fellow servants, in knowingly using the defective bolts and taps in fastening together the timbers of the shaft, and that therefore the master is not responsible to the plaintiff for the injury which he sustained. Granting that these fellow servants of the plaintiff, who had preceded him in the work which he undertook to continue, were thus negligent, their negligence in knowingly using, in timbering the shaft, defective bolts and taps which were furnished them for this very purpose by the master, would not relieve the master from liability to the plaintiff for the injuries which he sustained in consequence of the use of this defective material. The initial negligence, without which the plaintiff would not have been injured, was that of the master, in furnishing improper and unsafe appliances to the plaintiff's fellow servants, to be used by them in fastening together the timbers, upon the security of which the safety of the plaintiff, while engaged in the work for which the defendant employed him, depended. Had the master not been negligent in furnishing these appliances or materials, the fellow servants of the plaintiff could not have been negligent in using them in timbering the shaft. Their negligence in the matter depended upon and grew out of the negligence of the master, and the defend-

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ant was therefore directly responsible for its own negligence, and indirectly responsible for that of its employees. If the negligence of the master had been wanting, the plaintiff would not have been injured. The master furnished improper materials or appliances to these fellow servants of plaintiff, to be used exactly as they did use them; and their negligence in using them under the implied direction of the master was but a continuance of the latter's negligence in furnishing them to be thus used.

In the case of *Cheeney* v. *Ocean S. S. Co.* 92 Ga. 726, 19 S. E. 33, this court held that "the negligence of a fellow servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty." This ruling is found in the opinion, on page 732, 92 Ga., and page 36, 19 S. E., and is supported by a number of cited cases. "That a master is liable for an injury to his servant, caused by the concurrent negligence of himself and a fellow servant, but which could not have happened had the master performed his duty, is clear. . . . If, therefore, a servant who is himself free from negligence receives an injury caused in part by the negligence of his master, or, what amounts to the same thing, of a servant for whose negligence the master is responsible, and in part by that of a fellow servant, he can maintain an action against his master for such injury." 12 Am. & Eng. Enc. Law, 2d ed. p. 905.

Counsel for defendant in error cites and relies upon *Baxley* v. *Satilla Mfg. Co.* 114 Ga. 720, 40 S. E. 730. That case came up on the grant of a nonsuit by the trial court, and this court held that the nonsuit was properly granted. There the plaintiff, who was employed in the defendant's sawmill, was injured in consequence of the breaking of an iron bolt which held in position the guide of the saw. He "claimed to have established by his evidence that the defendant was negligent in two particulars: First, in employing an incompetent machinist, or, if the incompetency was not known at the time of his employment, in retaining in its employment an incompetent machinist after knowledge of his incompetency, one of the duties of this machinist being to put in a proper bolt at the place where the bolt which caused the plaintiff's injuries was located, to test the bolt when it was put in, and to inspect it from time to time after it had been put in position; and, second, in furnishing for the purpose of being placed in position by the machinist a defective iron bolt, when ordinary care would have required that a sound steel bolt should be used." The ground upon which the decision was based is stated by Mr. Justice Cobb, who delivered the opinion, as follows: "There being no evidence authorizing a finding that the master was negligent either in the employment of the servant who was claimed to have been negligent, or in furnishing a defective bolt to be used by such servant, the plaintiff has failed to make out his case, and was not entitled to recover, notwithstanding the evidence authorized a finding that the plaintiff himself was without fault." It was held that the evidence in the case showed that the defect in the bolt "was a latent one, and, such being the case, the mere fact that the bolt broke is [was] not sufficient to remove the presumption that the master had furnished a proper appliance to be used; the defect being of such a character that the master would not know of it, and could not by the exercise of ordinary care have discovered it." There is nothing in the facts of that case, or the grounds upon which the decision therein was placed, which conflicts with the ruling which we make in the present one. It is true that Mr. Justice Cobb, in stating the case hypothetically, uses some language which seems to support the contentior of the defendant in error in the case now under review, but what the learned justice says in reference to the nonliability of the master in the case thus stated was not necessary to support the decision which the court rendered, which was based upon the grounds indicated above.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness.

W. C. GROVES, *Plff. in Err.*,
v.
STATE of Georgia.

(116 Ga. 516.)

***Mere preparatory acts for the commission of a crime, and not proximately leading to its consummation, do not constitute an attempt to commit the crime.**

(November 12, 1902.)

ERROR to the Superior Court for Chatham County to review a judgment overruling a demurrer to an indictment charging defendant with attempting to commit robbery. *Reversed.*

The facts are stated in the opinion.

Mr. **Robert L. Colding**, for plaintiff in error:

A mere effort, without any step taken toward the commission of the offense, is not an attempt. There must be an act directly approximating to the commission of the offense.

Desty, Am. Crim. Law, § 12 *a*.

The law does not punish mere intention, but requires some overt act in an attempt to carry that intention into execution.

Clark, Crim. Law, p. 103, § 54; 3 Am. &

*Headnote by FISH, J.

NOTE.—As to what constitutes an attempt to commit a crime, see also cases in *note* to Com. v. Tolman (Mass.) 3 L. R. A. 747; also the later cases in this series of State v. Bowers (S. C.) 15 L. R. A. 199; State v. Butler (Wash.) 25 L. R. A. 434; People v. Gardner (N. Y.) 28 L. R. A. 699; Foster v. Com. (Va.) 42 L. R. A. 589; People v. Youngs (Mich.) 47 L. R. A. 108.

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Eng. Enc. Law, 2d ed. pp. 250, 251; *State* v. *Bowers*, 35 S. C. 262, 15 L. R. A. 199, 14 S. E. 488; *People* v. *Bush*, 4 Hill, 133; 17 Cent. L. J. 26; 4 Crim. L. Mag. 1; *Henwood* v. *Com*, 52 Pa. 425; *Griffin* v. *State*, 26 Ga. 493.

Mr. **John R. Cooper** also for plaintiff in error.

Mr. **William W. Osborne**, for defendant in error:

Attempts in Georgia are entirely regulated by statute, and this case comes clearly within the statute.

Griffin v. *State*, 26 Ga. 493; Clark, Crim. Law, p. 103.

Fish, J., delivered the opinion of the court:

W. C. Groves, E. H. Mahlay, and Joe Waters were indicted for an attempt to commit robbery by force upon the person of Frank Deiter. The indictment alleged that the accused "in such attempt did do an act towards the commission of said crime, to wit, by hiring a hack for the purpose of assisting them in the commission of said crime, to wit, by ascertaining that said Frank Deiter had no weapon of offense, to wit, by procuring false faces for the purposes of a disguise, but were intercepted and prevented from executing said crime." Upon the trial of Groves, he demurred to the indictment, one of the grounds of demurrer being that the acts alleged did not make out the offense charged. The demurrer was overruled, and the accused excepted.

We think the demurrer should have been sustained. The indictment was based upon § 1040 of the Penal Code, which declares that, "if any person shall attempt to commit a crime, and in such attempt shall do any act toward the commission of such crime, but shall fail in the perpetration thereof, or shall be prevented or intercepted from executing the same, he shall, in cases where no provision is otherwise made in this Code, or by law, for the punishment of such attempt, be punished as follows," etc. In order to constitute the offense of attempt to commit a crime, the accused must do some act toward its commission. "Commission" means the act of committing, doing, or performing, the act of perpetrating. Webster, Dict. Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it. In *People* v. *Murray*, 14 Cal. 159, it was held that declarations of an intent to enter into an incestuous marriage, followed by elopement for the purpose, and sending for a magistrate to solemnize the ceremony, were mere acts of preparation, and did not constitute an attempt to commit the crime. Chief Justice Field, who delivered the opinion in that case, said: "Between the preparation for the attempt, and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made." In *United States* v. *Stephens*, 8 Sawy. 116, 12 Fed. 52, the accused was charged with an attempt to introduce spirituous liquors into Alaska in violation of an act of Congress. The evidence showed that he sent from Alaska, where he resided, to a wholesale dealer in San Francisco, an order for 100 gallons of whisky, to be shipped to him in Alaska. It was held that he was not guilty of an attempt to introduce the whisky into Alaska, as he had done no act to carry out his illegal intent of which the law could take cognizance; the offer to purchase the whisky being an act preparatory and indifferent in its character. "Procuring or loading a gun, or buying poison, or walking to a particular place, with intent to kill another, is not enough to make one guilty of an attempt to commit murder. The same is true of a purchase of coal oil and matches with intent to commit arson, or the procuring of metal and dies with intent to commit the offense of counterfeiting money. . . . These acts are mere preparations, indifferent in their character, and do not advance the conduct of the party far enough to constitute an attempt." Clark & M. Crimes, § 123, and cases cited. Mr. Clark, in his work on Criminal Law, 2d ed. p. 126, says: "An attempt to commit a crime is an act done with intent to commit that crime, and tending to, but falling short of, its commission," and that two of the essential elements of the offense are: "(1) The act must be such as would be proximately connected with the completed crime. (2) There must be an apparent possibility to commit the crime in the manner proposed." Again, on page 127, the author says: "To constitute an attempt, there must be an act done in pursuance of the intent, and more or less directly tending to the commission of the crime. In general, the act must be inexplicable as a lawful act, and must be more than mere preparation. Yet it cannot accurately be said that no preparations can amount to an attempt. It is a question of degree, and depends upon the circumstances of each case." Citing *Com.* v. *Peaslee*, 177 Mass. 267, 59 N. E. 55, and *Com.* v. *Kennedy*, 170 Mass. 18, 48 N. E. 770. Mr. Bishop defines an attempt to be "an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing, sufficient both in magnitude and in proximity to the fact intended to be taken cognizance of by the law, that does not concern itself with things trivial and small. Or, more briefly, an attempt is an intent to do a particular criminal thing, with an act toward it falling short of the thing intended." 1 Bishop, New Crim. Law, § 728. Mere preparation, when made at a distance from the place where the substantial offense is to be committed, is ordinarily too remote an act to satisfy the law of indictable attempt. Id. § 763. As defined by Bouvier, an attempt to commit a crime is, "an endeavor to accomplish it, carried beyond mere preparation, but falling short of the ultimate de-

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sign." Burrill gives substantially the same definition. We think it manifest that the hiring of the hack, the ascertaining of the fact that the intended victim had no weapons, and the procuring of the false faces for disguise, were merely preparatory acts, and not proximately leading to the consummation of the crime of robbery, and that therefore no attempt to commit that offense was sufficiently charged in the indictment.

The solicitor general, to sustain the indictment in the present case, relied on the case of *Griffin* v. *State*, 26 Ga. 493. The indictment in that case charged Griffin with an attempt to burglarize a certain storehouse by unlawfully taking the impression of a key which unlocked a door to the same, and from that impression preparing a false key to fit such lock, for the purpose of unlawfully, feloniously, and fraudulently entering, and, through the agency of one Jones, to break and enter the storehouse with intent to steal. The accused demurred to the indictment upon the ground that it did not charge any offense against him which was punishable by law, and that the facts charged against him did not constitute the offense of attempt to commit larceny from the house. The demurrer was overruled, and upon the trial the accused was convicted. He excepted to the overruling of the demurrer, and to various rulings made by the court during the trial. McDonald, J., delivered the opinion; Lumpkin, J., concurred; and Benning, J., dissented. Judge McDonald, in his opinion, said: "The object of the act [now § 1040 of the Penal Code] under which the plaintiff in error is indicted is to punish intents to commit crime, if they are demonstrated by an act. The word 'attempt' ordinarily implies an act, an effort; but the general assembly, in this statute, uses it as synonymous with 'intend,' for it declares that if a person shall attempt to commit a crime, and in such attempt shall do any act toward the commission of such offense, etc. The accused, according to the bill of indictment, conceived the purpose of perpetrating the offense, and he did an act toward the commission of it, for it was an act to take the impression of the key, and that alone is sufficient to subject him to the law; but he prepared the key, and for the object, and so the indictment alleges." The learned judge therefore held that the demurrer was properly overruled. While Judge Lumpkin concurred in the affirmance of the judgment of the trial court, he does not, in his concurring opinion, refer to the question made by the demurrer, as to whether the acts charged in the indictment constituted the offense of an attempt to commit larceny from the house. He sets forth the evidence submitted upon the trial, which went far beyond the allegations in the indictment, and says: "The proof being full and complete as to the foregoing facts, was the conviction of Griffin . . . for an attempt to commit larceny from the house legal?" He continues: "What is an attempt to commit a crime? It is an endeavor to accomplish it, but falling short of execution of the ultimate design. [Substantially the same definition given by Bouvier and Burrill.] In many cases it is difficult to determine the difference between preparations and attempts to commit crime. One may intend to commit a crime, and do many things towards its commission, and yet repent of his purpose. The law gives to such an one a *locus penitentiæ*. One of the illustrations given in the books is where a man buys poison and mixes it in the food designed for his victim, and places it on the table that he may eat it. If he take back the poisoned food before it is tasted or an opportunity is given of swallowing it, awakened by a just consideration of the enormity of the crime, he will not be guilty of an attempt to poison. All that was done would amount only to preparation. Is this Mr. Griffin's case? Did he countermand his repeated instigations to his supposed confederate, urging him to the speedy execution of his diabolical scheme? Did he recall the key? On the contrary, had he not consummated his part of the preparations,—all that he had to do except to share the spoils? And was he not waiting in hopeful anxiety to learn the result?" Judge Lumpkin's concurrence was based upon the theory that the evidence made out a case of attempt to commit larceny from the house. The language quoted certainly does not indicate that he subscribed to the construction placed by Judge McDonald upon the statute defining an attempt to commit a crime. Judge Benning did not concur in the affirmance of the judgment of the court below. In his opinion, the trial judge erred in overruling the motion for a continuance, and in refusing to give a charge requested by counsel for the accused. At most, therefore, the judgment of this court in *Griffin's Case* was concurred in by only two judges, and consequently is not binding authority. Nor has that case been followed by subsequent adjudications of this court holding that certain specified acts do not constitute an assault. As an assault is an attempt to commit a crime,—that is, a violent injury upon the person of another,—such later adjudications are directly in point in determining the question under consideration. In *Brown* v. *State*, 95 Ga. 481, 20 S. E. 495, it was held: "Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not justify a conviction for an assault; and therefore, where the evidence showed that, during an altercation between the person alleged to have been assaulted and two other persons acting in concert, one of the latter picked up a stone, but made no attempt to cast it at the former, who was about twenty steps distant, neither of the two persons so acting in concert could be lawfully convicted of an assault." In *Peebles* v. *State*, 101 Ga. 585, 28 S. E. 920, it was held: "The act of maliciously putting poison into a well, with the intent that the water thereof shall be drunk by another, and that he shall in this

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manner be killed, does not, without more, constitute the offense of an assault with intent to murder, when the person whose death was intended never in fact drank of the water after the poison had been introduced into the same." In *Jackson* v. *State*, 103 Ga. 417, 30 S. E. 251, where the accused was charged with assault with intent to murder, it was held to be erroneous for the trial judge to refuse to give in charge a written request that "mere preparation to commit a crime upon the happening of an event which may or may not occur, and which depends upon an act to be done or not done by the person acted upon, is not an attempt to commit the offense of assault with intent to murder." In *Gaskin* v. *State*, 105 Ga. 631, 31 S. E. 740, it was held: "Before there can be a conviction for the offense of assault with intent to commit a rape, it must appear that the accused, with the intention of having carnal knowledge of the female forcibly, and against her will, did some overt act amounting to an assault upon her. It was therefore error to charge the jury that, 'if you find that this defendant formed the intent and design in his heart to have carnal knowledge of [the female alleged to have been assaulted] forcibly and against her will, and, in the accomplishment of that evil design and intent, slipped into her room, and secreted himself there, awaiting an opportune moment to carry his evil design into execution, and, being detected, fled and made his escape, the court charges you that that would make such a case as that the necessary element of assault would be in it, and you would be authorized to find this defendant guilty of the offense as charged in the indictment, that of an assault with intent to rape." Again, in *Burton* v. *State*, 109 Ga. 134, 34 S. E. 286, it was held: "One cannot legally be convicted of the offense of assault with intent to murder, alleged to have been committed with a pistol, upon proof which merely shows that he drew the weapon from his hip pocket, and, in consequence of its being caught in the lining of his coat, did not make any actual attempt to inflict with the pistol an injury upon the person alleged to have been assaulted." On the same line, in the late case of *Penny* v. *State*, 114 Ga. 77, 39 S. E. 871, it was held that the court erred in refusing to charge, as requested in writing, that "a mere preparation to commit a violent injury upon the person of another, or a mere threat to do so, unaccompanied by physical effort to do so, will not justify a conviction for an assault. Mere words or threats, unaccompanied by some physical effort to commit a violent injury upon the person of another, will not justify a conviction for an assault."

In view of what we have said, *the judgment overruling the demurrer to the indictment must be reversed.*

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness, and **Candler**, J., not presiding.

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Sion JUSTICE, *Plff. in Err.*,
v.
STATE of Georgia.

(.....Ga.....)

***Evidence that a father refused to permit medicine to be administered to one of his minor children while sick does not support a conviction of the father for depriving such child of necessary sustenance, within the meaning of the statute which declares such deprivation to be an offense against the laws of this state.**

(December 9, 1902.)

ERROR to the City Court of Dublin to review a judgment convicting defendant of violating the statute against depriving children of necessary sustenance. *Reversed.*

The facts are stated in the opinion.

Messrs. **H. P. Howard** and **James A. Thomas** for plaintiff in error.

Mr. **F. G. Corker** for defendant in error.

Little, J., delivered the opinion of the court:

Sion Justice was put on trial in the city court of Dublin under an accusation charging him with a misdemeanor. The specific allegation is that the accused did "unlawfully deprive of necessary sustenance one William Jordan Justice, a child five and a half years old; the said William Jordan Justice being ill, and the said Sion Justice failing and refusing to provide said child with necessary sustenance, the said Sion Justice being the father of said child." The trial resulted in a verdict of guilty, and the defendant made a motion for a new trial, which being overruled, he excepted. Each ground set out in the motion presents sufficient cause for the grant of a new trial.

Penal Code, § 708, declares that "whoever shall torture, torment, deprive of necessary sustenance, mutilate, cruelly, unreasonably, and maliciously beat or ill-treat any child," etc., shall be guilty of a misdemeanor. The theory under which the accused was prosecuted in this case was that he was guilty of depriving his minor child of necessary sustenance, because, on account of a religious belief, he refused to procure medicine to be administered to any of his children when they were sick. It was not shown, or attempted to be shown, that the accused deprived his minor child of food. One of the witnesses for the state testified that the defendant provided for his family in a decent and respectable manner, in the way of something to eat and drink, and was kind to his wife and children. He said: "The only thing I have to complain of is, he don't give any medicine." Another said that defendant "furnished his family all the necessaries of

*Headnote by LITTLE, J.

NOTE.—For cases in this series as to the practice of Christian Science, see Robinson v. Robinson (N. H.) 15 L. R. A. 121; State v. Buswell (Neb.) 24 L. R. A. 68, and State *ex rel.* Swarts v. Mylod (R. I.) 41 L. R. A. 428.

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life as well as any ordinary farmer in his circumstances of life (all but medicine), and that is all I complain of." Still another said that defendant "always furnished his family with all the ordinary provisions that farmers have, and he was kind and considerate to his family and children, seemed to be a Christian, seemed to keep the commandments, and seemed to do unto others as he would have them do unto him." In our opinion, there is a very great difference between depriving a child of sustenance, and refusing to permit medicine to be administered to him. Sustenance is "that which supports life; food; victuals; provisions;" while medicine is defined to be "any substance administered in the treatment of diseases; a remedial agent; a remedy; physic." Our statute, in the use of the word "sustenance," means that necessary food and drink which is sufficient to support life and maintain health. And evidence that, while a father fully provides for the wants of his children as to food, he refuses to permit them to take medicine, will not support a conviction under this statute; and we know of no provision in our penal laws enacted to meet a case of this character. It appears from the evidence that, under a belief characterized as a religious belief, the father conscientiously prohibits the use of any kind of medicine by any member of his family. From the standpoint which a majority of us occupy, this is a grave and grievous error of judgment, and oftentimes would deprive those who are nearest and dearest to us of the means of alleviating pain and suffering. But while this is true, it cannot be corrected, as the law now stands, through the medium of a criminal prosecution. Each ground of the motion embodies good cause for setting aside the verdict, and the trial judge erred in overruling the motion for a new trial.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent.

J. F. WATSON, *Plff. in Err.*,
v.
Mayor, etc., of THOMSON.

(.....Ga.....)

*A **municipal corporation cannot, under the general welfare clause** usually found in municipal charters, prohibit one from carrying on a lawful avocation on Christmas Day, when there is nothing in the character of the business carried on, which is calculated to interfere with the peace, good order, and safety of the community.

(November 12, 1902.)

*Headnote by COBB, J.

ERROR to the Superior Court for McDuffie County to review a judgment convicting defendant of violating an ordinance against working on Christmas Day. *Reversed.*

The facts are stated in the opinion.

Mr. **John T. West,** for plaintiff in error:

One is not prevented from following his usual avocation on a holiday.

Hamer v. *Sears*, 81 Ga. 288, 6 S. E. 810.

It is doubtful if the legislature itself would have the power to pass a law making it a crime for one to follow his usual avocation on a legal holiday. Such power from the legislature to the corporation must be directly conferred; it will not be inferred.

Hill v. *Decatur*, 22 Ga. 203; *Bethune* v. *Hughes*, 28 Ga. 560, 73 Am. Dec. 789; *Sanders* v. *Butler*, 30 Ga. 679; *Augusta & S. R. Co.* v. *Augusta*, 100 Ga. 701, 28 S. E. 126; *Frank* v. *Atlanta*, 72 Ga. 428; *Cranston* v. *Augusta*, 61 Ga. 572; *Henderson* v. *Heyward*, 109 Ga. 373, 47 L. R. A. 366, 34 S. E. 590; *Karwisch* v. *Atlanta*, 44 Ga. 204.

Mr. **Ira E. Farmer** for defendant in error.

Cobb, J., delivered the opinion of the court:

Watson, a merchant, was convicted in the municipal court of the town of Thomson for the violation of an ordinance providing that "it shall be illegal for any person to follow any trade, avocation, or calling within the limits of the town of Thomson on the 25th day of December of each year; said day being hereby set aside as a holiday, and is to be observed by all persons within the limits of the town." By the terms of the ordinance its provisions were not to be applicable to such "works" as are usually performed on Sunday; and it was further provided that railroad and express companies should be allowed to conduct their respective businesses for a stated period before and after the arrival of trains; that drug stores should be allowed to sell drugs upon request of the party desiring to purchase, and should immediately after the sale close; and that dealers in "green groceries" should be allowed to conduct their business until 10 o'clock A. M., on the day named. The accused did not come within any of the exceptions just referred to. His petition for certiorari complains that the judgment of the municipal court was erroneous, because the town of Thomson had no authority under its charter to pass the ordinance; and that, even if it had, the general assembly had no power to confer such authority. The superior court overruled the petition for certiorari, and the petitioner excepted.

The town of Thomson had no express authority from the general assembly to pass the ordinance in question; and, inasmuch as we have reached the conclusion that such

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NOTE.—As to constitutionality of Sunday laws, see *note* to Judefind v. State (Md.) 22 L. R. A. 721; also Thelsen v. McDavid (Fla.) 26 L. R. A. 234; People v. Havnor (N. Y.) 31 L. R. A. 689; *Ex parte* Jentzsch (Cal.) 32 L. R. A. 664; Tacoma v. Krech (Wash.) 34 L. R. A. 68; State v. Powell (Ohio) 41 L. R. A. 854; Norfolk & W. R. Co. v. Com. (Va.) 34 L. R. A. 105; State v. Hogriever (Ind.) 45 L. R. A. 504; and Denver v. Bach (Colo.) 46 L. R. A. 848.

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authority cannot be fairly implied from the general grant of power contained in the general welfare clause, which is the only clause in the town's charter which could by any possible construction be held to confer the authority, it will be unnecessary to determine whether the general assembly could constitutionally enact itself or delegate to municipal corporations the power to pass such a law as is involved in the present case. Christmas Day is declared by the law of this state to be a holiday. The general assembly has not, however, seen proper to provide for an entire cessation of business on public holidays. On such days it is not lawful to note and protest bills and notes, but further than this the law does not prohibit the carrying on of business avocations. Civil Code, § 3692. See also *Hamer* v. *Sears*, 81 Ga. 288, 6 S. E. 810. It is well settled that a municipal corporation cannot, by ordinance, provide for the punishment of an act which is made an offense under the law of the state. It does not necessarily follow, however, from this, that a municipal corporation may provide for the punishment of any act which the state has not seen fit to declare a crime. The power of municipal corporations to provide for the punishment, under the general welfare clause in their charters, of acts otherwise lawful, is a limited power. As a general rule, a municipal corporation cannot, under this clause, exercise any powers but those which are necessarily or fairly to be implied from, or incident to, its express powers, and those which are indispensable to the declared purposes for which the corporation was created. See *Henderson* v. *Heyward*, 109 Ga. 377, 47 L. R. A. 366, 34 S. E. 590. See also *Turner* v. *Forsyth*, 78 Ga. 683, 3 S. E. 649 (3). An ordinance prohibiting one from following his avocation upon a given day can be sustained only as an exercise of the police power of the state. Up to the present time the general assembly has seen proper to interfere with the right of the citizen to follow his ordinary avocation only to the extent of prohibiting him from pursuing such calling on Sunday, and prohibiting those engaged in the business of banking from doing the acts above referred to on public holidays. Further than this the general assembly has not seen proper to go. The power of the government to interfere with the citizen in his right to labor is one which should be cautiously exercised. "The right to follow any of the common occupations of life is an inalienable right." Bradley, J., in *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 762, 28 L. ed. 588, 4 Sup. Ct. Rep. 657. The state itself cannot interfere with the right to labor except upon reasons which demand that this right shall be restrained for the public good. Laws requiring cessation from labor at given times have been upheld for the reason that experience has demonstrated that it is for the welfare of each individual, and therefore for the society of which he is a member, that all persons should take periodic rests from their work. The policy of the law of this state is, and has been for many years, favorable to the right of a man to labor, and to follow the pursuit of his ordinary avocation. The only restraints upon this right which the general assembly has ever seen proper to exercise are those above referred to. The general assembly has never, so far as we are informed, conferred in express terms upon any municipal corporation the right to altogether prohibit a person from carrying on one of the lawful avocations of life on a public holiday, even if it could confer such power. Municipal corporations, under the general welfare clause, have been permitted to pass ordinances in aid of the policy of the law of the state by punishing acts which were not punishable under the law of the state, but which, if permitted in the municipality, might tend to bring about violations of state laws. It was held in *Karwisch* v. *Atlanta*, 44 Ga. 204, that, while the city of Atlanta could not punish a person for carrying on his ordinary avocation on Sunday, for the reason that that would be an offense against the law of the state, it was competent for the city, under the authority of the general welfare clause, to enforce an ordinance prohibiting merchants from keeping open their doors on Sunday, the purpose of the ordinance being to prevent the violation of the state law in reference to persons carrying on the work of their ordinary calling on Sunday. See also *Rothschild* v. *Darien*, 69 Ga. 503. It has also been held that in municipalities where the sale of liquor is altogether prohibited, or allowed to be sold under given regulations, an ordinance prohibiting one from having liquors in his possession for the purpose of illegal sale could be passed under the power granted in the general welfare clause; the purpose of the ordinance being to aid in the enforcement of the state law prohibiting or regulating the sale of liquor. See the cases cited in *Henderson* v. *Heyward*, on page 380, 109 Ga., 47 L. R. A. 368, and page 592, 34 S. E. The general assembly never having seen proper to attempt to bring within the police power the right of the citizen to carry on his ordinary labor on public holidays, it is manifest that it is the intention of the general assembly and the policy of the state that one shall be permitted to pursue his ordinary avocation on any day other than Sunday, unless he is engaged in the business of banking, and then the restraint upon this right is limited in the manner above referred to. Such being the undoubted policy of the state, it is not to be presumed that the general assembly intended, by granting a municipal charter, that the general welfare clause therein, although it may be broad in its terms, should be construed as authority for a municipal corporation to interfere with one who is carrying on an occupation at a time when it is lawful under the law of the state for him to pursue this calling. To prohibit individuals generally from carrying on their ordinary avocations on days other than Sunday would, with the exceptions above noted, be a departure from the settled policy of the state, and any such departure must commence

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with the general assembly itself, either by a direct law to this effect or by granting some subordinate public corporation express authority to make such departure. See *Henderson* v. *Heyward*, 109 Ga. 380, 47 L. R. A. 368, 34 S. E. 592, and cases cited. Of course, what is said above with reference to the power of a municipal corporation under the general welfare clause of its charter to prohibit the carrying on of lawful occupations on public holidays is applicable only to such occupations the prosecution of which is not calculated to disturb on the particular day the peace, good order, and safety of the community, in the sense in which those terms are understood by the law. A municipal corporation would doubtless have the right even to entirely prohibit on a given day the carrying on of a business, which, though lawful, was of such a character that its prohibition for the time was absolutely essential to the welfare, in a legal sense, of the community.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness, and **Candler**, J., not presiding.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

City of OTTUMWA, *Appt.*,
v.
CITY WATER SUPPLY COMPANY.

(119 Fed. 315.)

1. **Whether or not the amount in dispute in a suit by a taxpayer to enjoin a city from issuing bonds** because it is already indebted beyond its limit is sufficient to give jurisdiction to a Federal court is determined by the amount of bonds contemplated.
2. **A constitutional provision that no city shall become indebted beyond a certain limit,** "in any manner or for any purpose," cannot be evaded by making a present levy of an annual tax, to extend over a long period of years, for the payment of interest-bearing bonds, with the proceeds of which a municipal water supply is to be immediately procured, on the ground that it is merely anticipating the future revenue for present use.
3. **The question whether or not the issuance and sale of bonds by a municipality** to procure a water supply will create an indebtedness must be solved by the law applicable to contracts in general, and to negotiable bonds in particular, upon which the Federal courts are not bound by state decisions.

(November 26, 1902.)

APPEAL by defendant from a judgment of the Circuit Court of the United States for the Southern District of Iowa in favor of complainant in a suit to enjoin the issuance of bonds for the acquisition of a water-supply system. *Affirmed.*

Statement by **Lochren**, District Judge:

By Ordinance 566, passed by the city council of the city of Ottumwa August 21, 1899, it was provided and ordained that the city of Ottumwa accepts and elects to exercise the powers granted it by chapter 5 of the Code of Iowa of 1897, as amended, and to acquire by purchase or erection a system of waterworks for supplying the city and its inhabitants with water. To create a sinking fund for such purchase or erection, there was levied by said ordinance for the year 1899, and every year thereafter until the purchase or contract price for the waterworks should be fully paid, a tax of 2 mills on the dollar on all property within the corporate limits of the city, except lots greater than 10 acres, used for horticultural or agricultural purposes; the proceeds of such tax levy to be used exclusively to pay the purchase price or cost of such waterworks, and any bonds, mortgages, or other obligations issued therefor, with interest; also that there should be levied every year

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NOTE.—*Effect of limitation of municipal indebtedness upon the acquisition of a water supply or sewer system.*

I. *The problem*, 604.
II. *Excessive contracts void*, 605.
III. *Construction of limitation*, 607.
IV. *What is not indebtedness.*
a. *Contracts for annual supplies*, 610.
b. *Provision of fund for payment*, 616.
c. *Creation of independent corporation*, 619.
V. *Contract to purchase*, 619.
VI. *Other matters*, 620.

I. *The problem.*

SWANSON v. OTTUMWA well illustrates the result when the effort on the part of the courts to encourage municipal improvement in the face of constitutional restrictions is carried to its logical conclusion. Stripped of subterfuges, that decision permits a municipality, which is already indebted beyond the constitutional limit, to impose an additional indebtedness of $400,000 upon its taxpayers by making a distinction between the taxpayers in their organized capacity and the same persons as individuals. This may be a valid distinction when applied to business corporations, but it hardly seems to be so with respect to municipal corporations.

Debt limits are placed upon such corporations to counteract their tendency to obtain present conveniences at the expense of unborn generations. The limit is usually fixed at an amount the payment of which within a reasonable time will not, in addition to necessary taxes for current expenses, necessitate a tax decimal so large that the property of the municipality will not support it. This limit is soon reached, and in many cases is exceeded when the prohibitory law is enacted; and, unless some means is found to evade the law, the municipality will for some time be deprived of desirable conveniences, and in some instances of improvements

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on all taxable property within the limits of benefit and protection of the waterworks a water tax of 5 mills on the dollar, or so much as should be necessary, together with the net proceeds of water rents collected from consumers, to pay the cost of maintenance, operation, repairs, extensions, and improvements, and any of the purchase price or cost of construction, or bonds or mortgages issued therefor, or interest thereon, not paid from the proceeds of said 2-mill tax. The ordinance, after some provisions for an effort to purchase the waterworks of the appellee, which need not be further noticed, provided that, if such effort failed, the city council should cause plans and specifications for waterworks to be prepared, advertise for bids, and contract with the lowest bidder; the contract to be subject to the approval of the electors of said city at a special election to be called. By an amendment to said ordinance, passed February 4, 1901, it was provided that, to create a special fund to pay the cost of erecting the contemplated waterworks in case the electors of the city should approve the contract for such erection, a sufficient number of bonds, enough, with the sinking fund on hand, to pay the contract price for the waterworks and connected expenses, should be issued in denominations not less than $100 nor more than $1,000, bearing semiannual interest not more than 4½ per cent, and payable $5,000 two years from their date and $5,000 at the end of each year thereafter for twenty-two years, and then not less than $10,000 per year not exceeding fifty years from their date, such payment to be secured by a mortgage on the system of waterworks, and that to such payment should be pledged the entire proceeds of the 2-mill sinking fund tax and so much of the water rates and rentals from consumers and of said water tax as might not be needed for maintenance, operation, repairs, extensions, and improvements; that said bonds should be sold for not less than par, and the money received therefor be held by said city as a special and trust fund to pay for the construction and completion of the waterworks; that the contract for the erection of the works should provide for payment out of said funds only; and that the city should assume no other obligation than that of negotiating and selling said bonds and holding said fund for the purpose of paying for said plant, and that the fund should be devoted to no other purpose; the bonds to be sold before the erection was begun, or during the progress of the work to pay monthly estimates, or turned over to the contractor to pay as the work progressed, should the city so contract. On March 30, 1901, in accordance with a bid accepted by said city council, said city, through its proper officers, entered into a written contract with the Fruin-Bambrick Construction Company for the construction by that company of such waterworks in accordance with plans and specifications mentioned for the sum of $398,991; the work to be begun within sixty days after the ratification and approval of the contract by the

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which are actually necessary for the healthful growth of the city.

The problem how to permit the obtaining of these necessities without violating the prohibitory law is then a very serious one. Various expedients have been resorted to, but Iowa seems to have exceeded the other states in expedients for evading the limit. It would seem, however, that the evil which the limitation of indebtedness seeks to remedy would be no less where a number of special assessments for various objects are provided, the combined amount of which, added to the necessary tax for current expenses, exceeds what the property will bear, than when the whole amount is collected under one assessment. OTTUMWA v. CITY WATER SUPPLY CO. is certainly more nearly within the spirit of the prohibition, and will more effectually obviate the evil than will the other case.

II. *Excessive contracts void.*

Where the contract plainly exceeds the limit which the municipality is authorized to obligate itself for, it will be void as to the excess, and its execution may be prevented by persons interested. The proposition in this form is not disputed.

A municipal corporation cannot override the constitutional limitation to the indebtedness it may incur by contracting for a water supply at a stipulated annual rental, under the claim that it was providing for a necessary protection to health and property, which is a current expense. Gold v. Peoria, 65 Ill. App. 602.

While the power of a municipality to contract for a supply of water for public use is, in a general sense, a discretionary one, it cannot be exercised so as to create a corporate debt beyond that limited by law, or to surrender or

suspend legislative power. Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416.

Where, by a valid special provision amending a municipal charter, authority to issue bonds for obtaining a water supply is limited to a certain amount, it has no authority to exceed such amount, although, in the absence of such special limitation, it would have power, under its charter, to issue bonds to any amount for that purpose. Grace v. Hawkinsville, 101 Ga. 553, 28 S. E. 1021.

Bonds issued by a city for the purpose of paying for the construction of waterworks by a contractor are void where the ordinance, authorizing their issue, provides for their payment by the levying of a tax in amount larger than that authorized by law. Texas Water & Gas Co. v. Cleburne, 1 Tex. Civ. App. 580, 21 S. W. 393.

Where a city has no power to levy an annual tax exceeding ¼ of 1 per cent, except for the payment of debts already incurred, and for the erection of public buildings, it has no power to authorize the laying of a tax in excess of ¼ of 1 per cent for the payment of bonds to be issued for the construction of waterworks. *Ibid.*

The statute of a state limiting the amount which the town shall pay in water rents to a water company is public notice that the town is limited in its powers, and it will be presumed that a water company contracted with the trustees of the town with knowledge of the statute; and, where such a contract provides for the payment by the town of an amount in excess of that prescribed by law, the water company will not be heard to contend, in a suit for specific performance of the contract, that the stipulated price should be paid on the ground that the town has received the benefits accruing from the contract. Raton Waterworks Co. v. Raton, 9 N. M. 70, 49 Pac. 898.

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electors of said city at a special election to be called, or as soon thereafter as the city should succeed in negotiating and selling its bonds for the purpose of creating a trust fund; the work to be completed by June 25, 1902. Thereupon the appellee, a corporation of the state of Maine, filed its bill of complaint in the circuit court of the United States for the southern district of Iowa, alleging that complainant owned a large amount of real estate and personal property in said city on which was expended more than $500,000, and which was mainly devoted to supplying said city and its citizens with water, under franchises derived from said city, and is a large taxpayer of said city, and that its annual tax charge and payment equals and exceeds $2,000. That the Iowa Constitution provides that no municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding 5 per cent on the value of the taxable property within such corporation, as ascertained by the last state and county tax lists previous to the incurring of such indebtedness; and that the valuation of the taxable property within said city as ascertained by the last state and county tax list made for the year 1900 was $2,394,890. That the limit of indebtedness it could incur lawfully was $119,744.51, and that on the 30th and 31st days of March, 1901, it was already indebted more than $123,000. That a special election to ratify and approve said contract for the erection of waterworks had been called; and that such contract, if entered into and carried out, would increase the then existing indebtedness of said city $400,000. That the matter in dispute in the suit exceeded $2,000, exclusive of interest. And complainant prayed for decree enjoining the holding of the special election and the issuing of any bonds in accordance with said ordinances and contract, and for other relief, including a similar injunction *pendente lite*. The defendant city took issue by demurrer and plea to the allegations of the bill that the matter in dispute in the suit exceeds $2,000, exclusive of interest. Its answer, also filed, in effect admitted all the other facts above recited, and the allegations of the bill above stated, as to the existing indebtedness of the city and the value of the taxable property within the city as shown by the last state and county tax lists. Upon full hearing July 31, 1901, the court ordered the temporary injunction as prayed, except that the proposed special election was not enjoined, and from this order the defendant appealed to this court. Afterwards, on November 25, 1901, upon leave of the court duly obtained, the complainant filed its supplemental bill in said cause, reciting the original bill and proceedings thereunder, and that at a special election held in said city September 7, 1901, the canvass of the votes showed that said contract between said city and the Fruin-Bambrick Construction Company was approved by the electors, and that said city threatened and was about to carry out said contract and

But where a town is limited by statute in the amount to be paid for water rents by a provision that the tax for such purposes shall not exceed a certain per-cent levy on the taxable property, a contract by the trustees of the town to pay an amount per year in water rents in excess of that allowed by statute will not be held void *in toto*, but only void to the extent that it provides for the payment of a larger sum than that prescribed by law. *Ibid.*

And it has been held that a contract for supply of water to a municipal corporation is not made void by the fact that the annual amount which the municipality is required to pay under it, added to the necessary expenses of the corporation, prima facie exceeded the amount of tax authorized to be levied by the charter, and that, therefore, the city will undertake to levy an illegal tax. Stedman v. Berlin, 97 Wis. 503, 73 N. W. 57.

The power granted by statute to municipalities to contract for water supply for fire and other purposes being strictly a municipal purpose, the discretion exercised by the legislature in authorizing the raising of taxes therefor beyond the charter limitation is not a violation of the constitutional provision making it the duty of the legislature to organize cities and restrict the power of taxation so as to prevent abuse, and will not be interfered with by the court where the indebtedness does not exceed the constitutional limit. Oconto City Water Supply Co. v. Oconto, 105 Wis. 76, 80 N. W. 1113.

An indebtedness for hydrant rentals arising under a contract between a city and a water company, valid at the time of its execution, is invalid under a constitutional limitation of the indebtedness of the city, where, at the time it falls due or arises, the city is already indebted in an amount equal to or exceeding the constitutional limit. Kiehl v. South Bend, 36 L. R. A. 228, 22 C. C. A. 618, 44 U. S. App. 687, 76 Fed. 921.

A city may be enjoined from issuing bonds for a water supply in excess of the constitutional limitation of municipal indebtedness as fixed by a new assessment which became operative subsequent to a municipal election for voting the bonds but prior to their issuance, although, under the valuation in force at the time of the election, the city could lawfully incur an indebtedness for the amount of the proposed issue: but such issue will be limited to the amount authorized by the new valuation where no contract had been previously entered into calling for the full issue. Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059.

It seems that bonds issued by a city for the construction of waterworks are invalid where the annual payment of the interest on the bonds and the principal, as provided by the state Constitution, will require the amount of taxes levied by the city to be more than the amount prescribed as the limit by the city charter. Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960.

A taxpayer of a municipality may enjoin it from making payments under a contract for the construction of a sewer, where the contract price, added to its existing indebtedness, exceeds the constitutional limit. O'Malley v. Olyphant, 198 Pa. 525, 48 Atl. 483.

An injunction will be granted to prevent city authorities from carrying out the provisions of a contract for a water supply which is void because it increases the municipal indebtedness beyond the statutory limit; and it is not necessary to wait until the water is furnished and the city is threatening to pay therefor, where, under the contract, nothing remains to be done but the issuing of monthly warrants as soon as

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incur indebtedness in excess of the constitutional limit; and upon said supplemental bill, and the answer of the city thereto, and further showing, the court, on December 21, 1901, ordered a further temporary injunction, enjoining and restraining said city and its officers from issuing or causing to be issued, executed, or negotiated any bonds or other obligations of said city pursuant to said ordinances, and from doing any act under said contract with said Fruin-Bambrick Construction Company. From this order the second appeal to this court is taken. Pursuant to stipulation, the two appeals were consolidated and heard together in this court.

Argued before *Sanborn* and *Thayer*, Circuit Judges, and *Lochren*, District Judge.

Messrs. **W. H. C. Jaques, George F. Heindel,** and **Joseph R. Jaques,** for appellant:

Where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provisions.

Grant v. *Davenport*, 36 Iowa. 396; *Dively* v. *Cedar Falls*, 27 Iowa, 227; *Creston Waterworks Co.* v. *Creston*, 101 Iowa, 687, 70 N. W. 739; *Council Bluffs* v. *Stewart*, 51 Iowa, 385, 1 N. W. 628; *Burlington Water Co.* v. *Woodward*, 49 Iowa, 59; *Dodge* v. *Council Bluffs*, 57 Iowa, 567, 10 N. W. 886; *Hanson* v. *Hunter*, 86 Iowa, 722, 48 N. W. 1005, 53 N. W. 84; *Allen* v. *Davenport*, 107 Iowa, 91, 77 N. W. 532; *Clinton* v. *Walliker*, 98 Iowa, 655, 68 N. W. 431; *Davis* v. *Des Moines*, 71 Iowa, 500, 32 N. W. 470; *Anderson* v. *Orient F. Ins. Co.* 88 Iowa, 579, 55 N. W. 348.

If the city obligates itself to pay, no matter what its revenues from special assessments, a debt is created which falls within the constitutional inhibition. If, however, it simply appropriates a part of its revenues, and pledges them to the payment of the obligation, or if it simply undertakes, as trustee or agent, to collect these assessments and apply them upon the work, without liability upon its part for anything further, then no debt is created.

Council Bluffs v. *Stewart*, 51 Iowa, 385, 1 N. W. 628; *Quill* v. *Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Fowler* v. *Superior*, 85 Wis. 411, 55 N. W. 800; *Springfield* v. *Edwards*, 84 Ill. 626; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *People ex rel. Seeley* v. *May*, 9 Colo. 404, 12 Pac. 838; *Law* v. *People ex rel. Huck*, 87 Ill. 385; *State* v. *Fayette County*, 37 Ohio St. 526; *Laporte* v. *Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L. R. A. 686, 45 N. E. 588; *Windsor* v. *Des Moines*, 110 Iowa, 175, 81 N. W. 476; *Tuttle* v. *Polk*, 92 Iowa, 433, 60 N. W. 733.

Obligations payable out of a special fund to be created by special taxation, or from

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the works are constructed, and the water is furnished. Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

III. *Construction of limitation.*

Public policy favors freedom of contract. The limitations are put upon municipal indebtedness as a check upon the enthusiasm often excited by an aggressive campaign for public improvements, or to protect the taxpayer against the effect of his apathy in failing to protest against a proposed contract about to be entered into by the municipal authorities. The limitation, therefore, should be strictly construed, so as not to impose any more restriction than is necessary. And such has been the policy of the courts. In case of conflicting statutes, the one will control which is favorable to the contract, unless such course is plainly impossible.

A municipal corporation may issue its bonds for the construction and maintenance of a system of waterworks, and levy an annual tax for the payment of principal and interest thereof, under an act of legislature authorizing all cities etc., to erect and maintain waterworks, and to borrow money and levy and collect a general tax therefor, and to appropriate money for the same, although the issue of the bonds will exceed the limit to which such city is authorized by its special charter to borrow money, and the tax levied will exceed the maximum rate allowed by such charter. Such limitations are binding only upon the municipal authorities, and not upon the general assembly; and the passage of such general law, after the granting of the special charter, will operate to repeal those provisions in the latter repugnant to the former, but only with respect to the indebtedness and borrowing of money for constructing and maintaining such waterworks system, leaving the limitations in

force as to the contracting of indebtedness for other purposes. Dutton v. Aurora, 114 Ill. 138, 28 N. E. 461.

A provision of a municipal charter requiring the trustees to contract for a water supply, which contract shall not extend for a longer term than three years, will control a provision of the charter prohibiting the municipality from incurring any indebtedness beyond the amount of the taxes applicable to payment of it which shall have been voted to be raised; so that the contract will be valid although no taxes have been voted at the time it is made. Port Jervis Waterworks Co. v. Port Jervis, 151 N. Y. 111, 45 N. E. 388, Affirming 71 Hun, 66, 24 N. Y. Supp. 497.

Under the amendment to the charter of Duluth by Special Laws 1891, chap. 55, § 35, providing that water and light bonds may be issued by the city to such extent as may be necessary to erect and maintain suitable water and light plants, but that this indebtedness shall not be deemed a part of the general indebtedness of the city heretofore referred to as not to exceed 5 per cent of the assessed valuation of the property within the city, but shall be held to be a special indebtedness constituting a special and exclusive lien upon the franchises purchased in whole or in part by the funds,—such bonds may be issued as part of the city's general indebtedness, although the bonded indebtedness already exceeds 5 per cent of the assessed valuation of the taxable property within the city. Woodbridge v. Duluth, 57 Minn. 256, 59 N. W. 296.

Indebtedness for waterworks and sewers, incurred under a constitutional provision authorizing municipalities to become indebted, for those purposes, in a certain amount in excess of the constitutional limitation of municipal in-

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the proceeds of waterworks and the like, are not an indebtedness within the meaning of the constitutional prohibition.

Baker v. *Seattle*, 2 Wash. 576, 27 Pac. 462; *Winston* v. *Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner* v. *Seattle*, 19 Wash. 320, 53 Pac. 365; *Quill* v. *Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Monroe County* v. *Harrell*, 147 Ind. 500, 46 N. E. 124; *Switzerland County* v. *Reeves*, 148 Ind. 467, 46 N. E. 995; *Strieb* v. *Cox*, 111 Ind. 299, 12 N. E. 481; *Walker* v. *Monroe County*, 11 Ind. App. 285, 38 N. E. 1095; *Braun* v. *Benton County*, 17 C. C. A. 166, 34 U. S. App. 393, 70 Fed. 369; *Kelly* v. *Minneapolis*, 63 Minn. 125, 30 L. R. A. 281, 65 N. W. 115; *Perrigo* v. *Milwaukee*, 92 Wis. 236, 65 N. W. 1025; *Burnham* v. *Milwaukee*, 98 Wis. 128, 73 N. W. 1018; *State, Read, Prosecutor,* v. *Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *McAleer* v. *Angell*, 19 R. I. 688, 36 Atl. 588; *Hunt* v. *Utica*, 18 N. Y. 442; *Whalen* v. *La Crosse*, 16 Wis. 271.

The board of supervisors has a right to extend the period of taxation over a large number of years.

Witter v. *Polk County*, 112 Iowa, 380, 83 N. W. 1041.

No valid reason can be given why a board of supervisors should not transact the business of the county along well-established lines, when it has power to do it at all.

Clark v. *Janesville*, 10 Wis. 136; *State* v. *Madison*, 7 Wis. 688; *Ketchum* v. *Buffalo*, 14 N. Y. 356; *Clark* v. *School Directors*, 78 Ill. 474.

Mr. **William A. Underwood**, with *Mr.* **William McNett**, for appellee:

No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding 5 per cent on the value of the taxable property within such county or corporation.

Iowa Const. art. 11, § 3.

The underlying object and purpose is to protect the taxpayer from undue burdens of taxation by confining the indebtedness of municipalities within certain prescribed limits.

McPherson v. *Foster Bros.* 43 Iowa, 48, 22 Am. Rep. 215; *French* v. *Burlington*, 42 Iowa, 614; *Kane* v. *Independent School Dist.* 82 Iowa, 5, 47 N. W. 1076; *Anderson* v. *Orient F. Ins. Co.* 88 Iowa, 579, 55 N. W. 348; *Spilman* v. *Parkersburg*, 35 W. Va. 605, 14 S. E. 281; *Law* v. *People ex rel. Huck*, 87 Ill. 385; *People ex rel. McCagg* v. *Chicago*, 51 Ill. 35, 2 Am. Rep. 278; *Newell* v. *People ex rel. Phelps*, 7 N. Y. 86; *Browne* v. *Boston*, 179 Mass. 321, 60 N. E. 934.

The term "indebted," as used in the Constitution, includes all forms of indebtedness.

Doon Dist. Twp. v. *Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *Litchfield* v. *Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *French* v. *Burlington*, 42 Iowa, 614; *Scott* v. *Davenport*, 34 Iowa, 208; *Council Bluffs* v. *Stewart*, 51 Iowa, 385, 1 N. W. 628; *Windsor* v. *Des Moines*, 110 Iowa, 175, 81 N. W. 476; *Ander-*

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debtedness, does not, if within the limits of such excess, constitute a part of the general indebtedness of the city within the meaning of the constitutional limitation. Austin v. Seattle, 2 Wash. 667, 27 Pac. 557.

The grant to municipalities by statute of the power to contract for water supply for fire and other purposes gives, by implication, to a municipality whose charter made no provision therefor, the power to make and carry out a contract for such water supply to the extent of raising taxes for that purpose beyond the charter limitation for current expenses. Oconto City Water Supply Co. v. Oconto, 105 Wis. 76, 80 N. W. 1113.

The act of the general assembly of May 26, 1897, authorizing a town to hire the sum of $200,000 for the purpose of acquiring, building, or constructing a system of waterworks, and of improving and adding to the same, and to issue its notes or bonds therefor, grants to the town the statutory authority required by R. I. Gen. Laws, chap. 36, § 21, to enable the town to incur an indebtedness to that extent in excess of 3 per cent of its taxable property. Peabody v. Westerly Waterworks, 20 R. I. 176, 37 Atl. 807.

A city whose charter permits it to agree with any person, company, or corporation for the establishment of a system of waterworks may, by ordinance, make a contract for that purpose which will not be totally invalidated by the inclusion of a provision that the city shall rent a definite number of fire hydrants, at an aggregate annual rental in excess of 7 mills per dollar of the assessed valuation of the property within the city, by reason of a charter provision that the amount levied to pay for water shall not exceed that amount, although the charter provision will prevent a recovery by the water company of more rent money than the 7 mills per dollar. State *ex rel.* Tarr v. Crete, 32 Neb. 368, 49 N. W. 272.

A limitation of the amount to be expended in any one year by a municipal corporation for sewers does not prevent the expenditure of more than that sum for sewers actually constructed during previous years but not paid for, if the amounts to be credited to the sewer fund from year to year, including those properly transferred from other funds, are not exceeded. *Re* Plattsburgh, 157 N. Y. 84, 51 N. E. 512, Reversing 27 App. Div. 353, 50 N. Y. Supp. 356.

A provision of a Constitution limiting the rate of taxation for municipal purposes to a certain rate, "which shall apply to taxes of every kind and description, whether general or special," is not a limitation upon a subsequent provision prohibiting indebtedness to an amount exceeding the annual income "without the assent of two thirds of the voters," and requiring provisions for the collection of an annual tax to pay interest on any debt created when it falls due, and to provide a sinking fund to pay principal. Lamar Water & Electric Light Co. v. Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756, 140 Mo. 145, 39 S. W. 768; Aurora Water Co. v. Aurora, 129 Mo. 540, 31 S. W. 946.

Overruling State *ex rel.* Robinson v. Columbia, 111 Mo. 365, 20 S. W. 90, which had held that a municipal corporation cannot, under one section of a Constitution, issue bonds for the construction of waterworks upon authority of a vote of its citizens, where the tax necessary to pay the interest and raise a sinking fund to pay the principal, added to the tax for current expenses, will exceed the amount permitted by another section of the Constitution, which provides that the tax in municipal corporations of

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son v. *Orient F. Ins. Co.* 88 Iowa, 579, 55 N. W. 348.

Limiting the payment of contracts and obligations to taxes levied for a special purpose, or to particular assets, does not affect their essential quality as constitutional debts.

Scott v. *Davenport*, 34 Iowa, 208; *Mosher* v. *Independent School Dist.* 44 Iowa, 122; *French* v. *Burlington*, 42 Iowa, 614; *First Nat. Bank* v. *Doon Dist. Twp.* 86 Iowa, 331, 53 N. W. 301; *Orvis* v. *Des Moines Park Comrs.* 88 Iowa, 674, 56 N. W. 294; *Allen* v. *Davenport*, 107 Iowa, 90, 77 N. W. 532; *Council Bluffs* v. *Stewart*, 51 Iowa, 385, 1 N. W. 628; *Brown* v. *Corry*, 175 Pa. 528, 34 Atl. 854; *Joliet* v. *Alexander*, 194 Ill. 457, 62 N. E. 861; *Browne* v. *Boston*, 179 Mass. 321, 60 N. E. 934; *Reynolds* v. *Waterville*, 92 Me. 292, 42 Atl. 553; *Ironwood Waterworks Co.* v. *Trebilcock*, 99 Mich. 454, 58 N. W. 371; *Baltimore* v. *Gill*, 31 Md. 375; *Earles* v. *Wells*, 94 Wis. 285, 68 N. W. 964; *Newell* v. *People ex rel. Phelps*, 7 N. Y. 9; *Hodges* v. *Crowley*, 186 Ill. 305, 57 N. E. 889.

Whether the obligations involve a scheme to buy the equity in property subject to prior liens, or to procure ownership under the guise of paying high rents, or whether the payment of obligations is limited to collaterals or other assets, or to the mortgaged property, or to pledged revenues or taxes, they are all, alike, constitutional debts.

Litchfield v. *Ballou*, 114 U. S. 192, 29 L. ed. 133, 5 Sup. Ct. Rep. 820; *Ironwood Waterworks Co.* v. *Trebilcock*, 99 Mich. 454, 58 N. W. 371; *Browne* v. *Boston*, 179 Mass. 321, 60 N. E. 934; *Reynolds* v. *Waterville*, 92 Me. 292, 42 Atl. 553; *Brown* v. *Corry*, 175 Pa. 528, 34 Atl. 854; *Earles* v. *Wells*, 94 Wis. 285, 68 N. W. 964; *Orvis* v. *Des Moines Park Comrs.* 88 Iowa, 674, 56 N. W. 294; *Windsor* v. *Des Moines*, 110 Iowa, 175, 81 N. W. 476; *Hall* v. *Cedar Rapids*, 115 Iowa, 199, 88 N. W. 448.

An obligation to levy a tax in the future for the benefit of a particular individual necessarily implies the existence of a present debt in favor of the individual against the corporation, which he is lawfully entitled to have paid by the levy.

Springfield v. *Edwards*, 84 Ill. 626; *Winamac* v. *Huddleston*, 132 Ind. 217, 31 N. E. 561; *State ex rel. Helena Waterworks Co.* v. *Helena*, 24 Mont. 521, 55 L. R. A. 336, 63 Pac. 105; *Hodges* v. *Crowley*, 186 Ill. 305, 57 N. E. 889.

The provision for a mortgage implies a debt, since a mortgage cannot exist without a debt.

Joliet v. *Alexander*, 194 Ill. 457, 62 N. E. 861; *Browne* v. *Boston*, 179 Mass. 321, 60 N. E. 934.

All debts of municipalities are limited in their enforcement, and, even where there is no remedy by suit, as there is none against a state, the obligations still are constitutional debts.

State ex rel. Hahn v. *Young*, 29 Minn. 474, 9 N. W. 737; *Joliet* v. *Alexander*, 194

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the class to which it belongs shall not exceed a certain amount on the taxable valuation.

A town authorized to provide for a water supply, but forbidden to contract debts in excess of $400, unless the money to defray them was actually in the treasury, may contract with individuals to furnish a supply of water, and the provision in the contract giving such individuals the unrestrained right to establish general water rates is valid. Santa Ana Water Co. v. San Buenaventura, 56 Fed. 339.

A specific charter provision conferring authority upon a city to establish or purchase and maintain waterworks, or contract for the furnishing of water, must prevail over a general provision prohibiting the contracting of indebtedness except such as shall be paid out of the ordinary current revenue collected in the year the debt or liability is contracted. Capital City Water Co. v. Montgomery, 92 Ala. 366, 9 So. 343.

The construction in favor of the contract is apparent, even in the absence of conflicting statutes, where some provision may be held to authorise it.

A city prohibited by a constitutional amendment from increasing its indebtedness, except that it may issue drainage warrants under a pending contract, is entitled to purchase from the contractor the drainage system then in process of construction, and to issue warrants for the purchase price. Warner v. New Orleans, 31 C. C. A. 238, 59 U. S. App. 131, 87 Fed. 829.

A statutory requirement that cities shall have on hand the funds necessary to meet the expenditure contemplated by a contract for improvements does not preclude it from entering into a contract for a water supply, although the money is not available, when no payment under the contract will become due for a year and a half, or more. Defiance Water Co. v. Defiance, 90 Fed. 753.

A constitutional provision limiting municipal indebtedness, excepting bonds for water supply which have been issued for a term not exceeding twenty years, does not limit such bonds to that time, if, when issued, the aggregate amount of the water bonds and the other indebtedness does not exceed the prescribed limit. Rochester v. Quintard, 136 N. Y. 221, 32 N. E. 760.

But a city, already having a sewer system, is not entitled to create an indebtedness greater than a certain per cent of the assessed value of the property therein, under a provision in the Constitution and a statute in pursuance thereof, authorizing the creating of an indebtedness by a municipality in excess of that per cent, where necessary and authorized by the vote of the taxpayers, for the purpose "of constructing a sewerage system, or to secure a supply of water for such municipality." Palmer v. Helena, 19 Mont. 61, 47 Pac. 209.

So, where a statute providing for the levy of a special tax by a town for the payment of water rents to a water company contains a proviso that such tax "shall not exceed the sum of 2 mills on the dollar for any one year," such proviso operates as a limitation on the sum to be paid by the town for water rents, and as an inhibition on the trustees of the town from paying any more than the amount derived from the special tax,—especially where it appears that the water rents of the town over and above the special tax would exhaust the current revenue of the town, which it was authorized to collect by the levy of a tax not to exceed a certain per cent. Raton Waterworks Co. v. Raton, 9 N. M. 70, 49 Pac. 898.

And a contract between a water-supply company and the water commissioners of a city hav-

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Ill. 457, 62 N. E. 861; *Newell* v. *People ex rel. Phelps*, 7 N. Y. 9; *People ex rel. McCagg* v. *Chicago*, 51 Ill. 34, 2 Am. Rep. 278.

The right to foreclose and appropriate the property, and the right to a mandamus to compel the city to levy and pay over the taxes pledged, are very adequate remedies to coerce the payment of the debt by suit, even if this were essential to the existence of a constitutional debt.

Reynolds v. *Waterville*, 92 Me. 292, 42 Atl. 553; *Jolict* v. *Alexander*, 194 Ill. 457, 62 N. E. 861; Iowa Code 1897, §§ 1007, 3973; 2 Dill. Mun. Corp. 4th ed. § 855.

The Constitution does not classify obligations as nonpayable and payable, out of special funds, or otherwise, nor change any from being a charge against the city generally into a charge against its current revenues only, but makes them all, alike, absolutely nonpayable and void, if in excess of the limit.

Prince v. *Quincy*, 128 Ill. 443, 21 N. E. 770; *Spilman* v. *Parkersburg*, 35 W. Va. 605, 14 S. E. 282; *French* v. *Burlington*, 42 Iowa, 614; *Scott* v. *Davenport*, 34 Iowa, 208; *Lake County* v. *Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Doón Dist. Twp.* v. *Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *Litchfield* v. *Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820.

Where the city is at the time indebted to its constitutional limit, it cannot then make a contract for even ordinary expenses without an infraction of the Constitution.

Lake County v. *Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 21, 43 L. ed. 341, 350, 19 Sup. Ct. Rep. 77; *Prince* v. *Quincy*, 128 Ill. 443, 21 N. E. 768, 105 Ill. 138, 44 Am. Rep. 785; *Springfield* v. *Edwards*, 84 Ill. 626; *Chicago* v. *McDonald*, 176 Ill. 404, 52 N. E. 982; *Chicago* v. *Galpin*, 183 Ill. 408, 55 N. E. 731; *Spilman* v. *Parkersburg*, 35 W. Va. 605, 14 S. E. 282; *Laporte* v. *Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L. R. A. 686, 45 N. E. 590; *Sackett* v. *New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *Valparaiso* v. *Gardner*, 97 Ind. 8, 49 Am. Rep. 416; *French* v. *Burlington*, 42 Iowa, 617; *State ex rel. Helena Waterworks Co.* v. *Helena*, 24 Mont. 521, 55 L. R. A. 336, 63 Pac. 99.

There is a radical distinction between a contract to procure water for a city and its inhabitants, and a contract for the construction of a water plant for a city; and the necessity for the plant would constitute no excuse or justification for the violation of the Constitution.

Windsor v. *Des Moines*, 110 Iowa, 175, 81 N. W. 476; *Grant* v. *Davenport*, 36 Iowa, 396; *Brown* v. *Corry*, 175 Pa. 528, 34 Atl. 854; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1–20, 43 L. ed. 341–349, 19 Sup. Ct. Rep. 77.

The cost of a supply of water to the city and its inhabitants properly comes within the term "ordinary expenses;" but if a city purchases or procures a system of water-

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ing a plant of its own, to maintain a plant and furnish the city with water to the amount of over $46,000 per year, is within the limitation of the statutes forbidding any contract of over $1,000 for the extension or repair of the waterworks to be made without the consent of the common council, and providing that the expenses of the water department shall not exceed $24,000 per year. Woodside Water Co. v. Long Island City, 23 App. Div. 78, 48 N. Y. Supp. 686.

In Michigan, cities are authorized to contract for a water supply for a period not exceeding ten years, provided the appropriation therefor does not, in connection with other taxes, exceed 1¼ per cent of the assessed valuation. Monroe Water Co. v. Heath, 115 Mich. 277, 73 N. W. 234.

IV. *What is not indebtedness.*

a. *Contracts for annual supplies.*

The desire to uphold contracts when possible has led in some cases to rulings that no indebtedness was incurred, which hardly accord with the ordinary understanding of that term. The question has most frequently arisen in cases for long-term contracts for water supply. In most cases an adequate supply cannot be obtained at advantageous prices unless the one furnishing it has some assurance that his returns will be satisfactory for a certain future time. To accomplish this, the municipality is usually asked to contract for a minimum quantity of water at a fixed price for a given term. The question is whether or not, under such a contract, the municipality becomes indebted for the aggregate amount of the yearly payments. The weight of authority is that it does not, and with good reason, for no obligation to make payment arises until the water is delivered, and the contract is nothing more than one for annual supplies with a provision for continuance, a breach of which could by no possibility involve a present liability for the sum of all payments called for, and it may well be treated, when made, as a contract involving only the amount accruing in the current year.

A limitation of municipal indebtedness is not violated by a contract for a water supply for a series of years merely because the aggregate of the rentals during the life of the contract may exceed the limit of the indebtedness. Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, Affirming 60 Fed. 957, which held that a contract by a city to pay a water company $1,500 annually for twenty-five years in consideration of a supply of water for municipal purposes, and reserving the right to determine the contract for any default on the part of the water company, is not void on the ground that, added to the debts of the municipality, such sum would exceed the city's limit of indebtedness, since the city is only obliged to make the annual payment when earned, so that their aggregate amount does not constitute a debt.

A valid agreement on the part of the city to rent water hydrants for a period of years at an annual rental, being a current expenditure, does not create an indebtedness of the kind contemplated by the Iowa Constitution in its provision limiting indebtedness of municipalities. Centerville v. Fidelity Trust & G. Co. 118 Fed. 332.

A contract to pay an annual rental for water supply does not constitute an indebtedness, contemplated by constitutional provisions limiting the indebtedness of cities, for the aggregate amount which may ultimately become due

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works, the cost thereof is an "extraordinary expense" and a constitutional debt.

Brown v. *Corry*, 175 Pa. 528, 34 Atl. 854; *Grant* v. *Davenport*, 36 Iowa, 396; *Laporte* v. *Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L. R. A. 686, 45 N. E. 588; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1–20, 43 L. ed. 341–349, 19 Sup. Ct. Rep. 77.

Where a city enters into a contract to pay a sum of money when a certain improvement contracted for and to be owned by it, such as waterworks, shall be done and accepted, the obligation thereby assumed will constitute a debt within the meaning of the constitutional limitation; and such indebtedness will be regarded as having been incurred from the date of the contract, though it be payable in the future by instalments.

Earles v. *Wells*, 94 Wis. 285, 68 N. W. 964; *Culbertson* v. *Fulton*, 127 Ill. 30, 18 N. E. 782; *Windsor* v. *Des Moines*, 110 Iowa, 175, 81 N. W. 476; *Grant* v. *Davenport*, 36 Iowa, 396; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1–20, 43 L. ed. 341–349, 19 Sup. Ct. Rep. 77; *Chicago* v. *McDonald*, 176 Ill. 404, 52 N. E. 982; *Chicago* v. *Galpin*, 183 Ill. 399, 55 N. E. 731.

Lochren, District Judge, delivered the opinion of the court:

1. The amount in dispute in this suit, if only measured by the injury to the complainant from the increased taxation of its property in the city of Ottumwa necessary to provide for the payment of bonds proposed to be issued for the construction of the new waterworks, was more than sufficient to sustain the jurisdiction of the circuit court. Whether we consider the proportion of the $398,991 — the cost of the proposed waterworks — which would rest on the complainant's property as part of the taxable property of the city, or the 2-mill tax thereon during the period of fifty years provided for, the burden or encumbrance which would be made to rest on the property of complainant would considerably exceed the sum of $2,000.

But the city of Ottumwa was about to enter into the proposed contract for the erection of waterworks, and issue and negotiate bonds of the city as proposed to the amount of $398,900 to procure money to pay for the same. Complainant contends that the city, being already indebted beyond the constitutional limit, has no right or power to enter into such contract or issue such bonds. Whether it has or has not such power to issue and negotiate that large amount of bonds is certainly the matter in dispute in this suit, brought to restrain and prohibit the city from taking such action. *Johnston* v. *Pittsburg*, 106 Fed. 753; *Rainey* v. *Herbert*, 5 C. C. A. 183, 3 U. S. App. 592, 55 Fed. 443; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 25 L. ed. 782; *Mississippi & M. R. Co.* v. *Ward*, 2 Black, 485, 17 L. ed. 311; *Stinson* v. *Dousman*, 20 How. 461, 15 L. ed. 966; *Scott* v. *Donald*, 165 U. S. 107, 114, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262.

2. Section 3 of article 11 of the Constitu-

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at a certain per cent of the assessed valuation of the city. Lamar Water & Electric Light Co. v. Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756; Saleno v. Neosho, 127 Mo. 627, 27 L. R. A. 769, 30 S. W. 190.

So that the aggregate amount involved in a municipal contract, the performance of which will extend over a series of years, but payments upon which are to be made annually, is immaterial in determining whether or not the constitutional prohibition of indebtedness exceeding revenues is infringed. It is sufficient if the revenues equal the sums falling due each year. Lamar Water & Electric Light Co. v. Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756.

Under a charter provision limiting the authority of the city council in respect to incurring indebtedness to 1 per cent of the assessed valuation, a contract for a term of years for water supply, to be paid for annually, is not void as exceeding the authorized limit of expenditure, since a contract for future services to be paid for as rendered is not an incurring of indebtedness. Ludington Water-Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558.

A contract by a municipality for a water supply and for the use of a water company's plant for a number of years is not invalid under constitutional and charter provisions prohibiting the incurring of any indebtedness or liability exceeding in any year the income and revenue provided for that year, although the aggregate of all payments to become due thereunder exceeds the revenue provided for a single year, if the payments of each year do not exceed the revenue for the year in which they are to be made. Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

An agreement by a town to pay hydrant rentals annually, or semiannually, for a stated time in the future does not create an indebtedness for the aggregate sum of all such payments within the constitutional provision limiting the indebtedness of municipal corporations. Fidelity Trust & G. Co. v. Fowler Water Co. 113 Fed. 560.

A contract by which a city agrees to pay an annual rental during a term of years for a water supply to be furnished by a company does not create an indebtedness for the aggregate amount of such rental, so as to render it invalid under the statute forbidding the contracting of an indebtedness in such an amount without a vote of the electors. Cunningham v. Cleveland, 39 C. C. A. 211, 98 Fed. 657.

A vote of a town to make a contract for a municipal water supply for fire purposes for a series of years does not create a debt, within the meaning of a statute prohibiting towns from incurring debts except by vote of two thirds of the inhabitants. Smith v. Dedham, 144 Mass. 177, 10 N. E. 782. The court says it is, in effect, a cash transaction, where the payments are made *pari passu* with the accumulation of the yearly service, which determines the amount to be paid. It is like the other ordinary expenses of the town, within the limits of its annual current expenses.

Expenses for water supply furnished under a contract at a fixed annual rental are incidental expenses of the corporate business of a municipal corporation, and not debts; and, as long as the current revenues will pay them as they fall due without taking from funds devoted to other purposes, there is no indebtedness within the meaning of the constitutional inhibition against incurring a municipal indebtedness beyond a certain limit. Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416.

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tion of Iowa is as follows: "No county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding 5 per cent on the value of the taxable property within such county or corporation,—to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness."

The language of this section is plain and simple, and its meaning is unmistakable. The incurring of indebtedness beyond the amount limited is absolutely and unqualifiedly prohibited, no matter what the pretext or circumstances, or the form which the indebtedness is made to assume. It curbs equally the power of the legislature, the officials, and the people themselves; and was designed to protect the taxpayers from the folly and improvidence of either, or of all combined. When the ordinances referred to in the foregoing statement were passed, and the contract for the erection of the waterworks entered into subject to the approval of the voters, which approval has since been had, it is admitted that the city of Ottumwa was, and still remains, indebted beyond its constitutional limit, and that it could not and cannot incur any further indebtedness "in any manner or for any purpose." Under these ordinances and that approved contract, the city now proposes to issue and sell at par its bonds to the amount of $398,900, bearing interest at 4½ per cent, payable semiannually, the principal payable at stated times, as above mentioned; and with the money obtained by the city from the sale of such bonds to cause to be constructed under said contract the projected system of waterworks, to be owned by the city when constructed. The scheme thus stated, in its principal features, without considering the details which are claimed to have the effect of wholly changing its character, plainly involves the incurring of indebtedness by the city to the amount of the bonds. The bonds are obligations of the city to pay the amounts thereof to the holders as the bonds and coupons shall mature. The city is to sell the bonds at par, and use the proceeds for the construction of its own waterworks plant, constructed for its municipal uses and purposes. The city, therefore, by the transaction, will borrow the money from the purchasers of the bonds, obligate itself to repay it according to the terms of the bonds, and invest the money thus borrowed in property to be owned by it and used for a municipal purpose.

But it is contended by the appellant that no indebtedness on the part of the city will be incurred by the issuing and negotiation of such bonds and construction of such waterworks, because in the ordinances referred to for the purpose of creating a sinking fund to be used in the erection of a system of waterworks there is levied for the year 1899 and each year thereafter till the cost of the waterworks is fully paid a tax of 2 mills on the dollar upon all property within the limits of the city, except lots greater than 10 acres, used for horticul-

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So that the constitutional limitation as to municipal indebtedness does not apply to contracts for a water supply for a term of years at a certain annual rental as the water is furnished, provided the contract price can be paid from the current revenues as the rent becomes due without increasing the corporate indebtedness beyond the constitutional limit, or encroaching upon funds set apart for other purposes. *Ibid.*

A contract for the supply of water to a city for a term of years for an annual rent is one relating to the ordinary expenses of the city, and does not create an indebtedness within the prohibition of the Constitution. Grant v. Davenport, 36 Iowa, 396.

A contract by which a city agrees to pay certain rentals to a water company does not create an indebtedness within the meaning of the Iowa Constitution limiting the indebtedness. Creston Water Works Co. v. Creston, 101 Iowa, 687, 70 N. W. 789.

A contract for water supply in consideration of payments extending over a series of years does not make the aggregate amount of the payments an indebtedness for the purpose of determining whether or not the municipality has exceeded its constitutional limit of indebtedness. Stedman v. Berlin, 97 Wis. 505, 73 N. W. 57.

A contract for the payment for a term of years for the annual supply of a municipality with water does not create a debt for the aggregate amount, which may become due upon a compliance with the contract. Cain v. Wyoming, 104 Ill. App. 538.

So an ordinance providing that a city shall rent a certain number of hydrants for a term of years at a stated annual rental for each does not create a present indebtedness for the whole sum, but only as the water shall be supplied from year to year, and is not, therefore, prohibited by a constitutional provision against municipal indebtedness over a certain amount, when the indebtedness for one year does not exceed that amount. *Ibid.*

That an obligation for a municipal water supply is a continuing one for several years does not make the contract void under a charter which prohibits the contracting of a debt which cannot be discharged from the income of any year, where the payments are to be made annually, and each instalment may be paid from the income of the year in which it accrues. Utica Waterworks Co. v. Utica, 31 Hun, 427.

A contract by a municipal corporation for the erection and maintenance of a waterworks system, by which it agrees to pay a specified annual amount per hydrant for a term of years, does not create a present indebtedness against the city for the aggregate amount of such rentals for the entire period, so as to bring it within a congressional limitation of municipal indebtedness. Territory *ex rel.* Woods v. Oklahoma, 2 Okla. 158, 37 Pac. 1094.

The liability incurred by a city contract to pay an annual sum during a period of years for the disposal of sewage is, within the meaning of a constitutional provision that any liability "exceeding in any year the income and revenue provided for it for such year" shall be void, to be deemed the amount annually payable, and not the aggregate for the whole time of the contract. McBean v. Fresno, 112 Cal. 159, 31 L. R. A. 794, 44 Pac. 338. The court said, in a certain very restricted sense it may be said that a liability is created by a contract such as this; but to call it a present liability for the aggregate amount of the payments in the contract contemplated thereafter to be made is not le-

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tural or agricultural purposes. The proceeds of such tax are to be used exclusively to pay the cost of construction of such waterworks and any bonds, mortgages, or other obligations issued to pay such cost and the interest thereon. And, further, that there shall be levied each year on all taxable property lying within the limits of benefit and protection of the waterworks, after its construction, a water tax of 5 mills on the dollar, or so much thereof as may be necessary, together with the net proceeds of water rents collected, to pay the cost of maintenance, repair, and operation of the waterworks and extensions and improvements, "and to pay any of the purchase price or cost of constructing said works, or of any bonds or mortgages issued therefor, or interest thereon, which shall not be paid from the proceeds of the 2-mill tax." It was also provided that the payment of the bonds and the interest thereon shall be secured by a mortgage on the system of waterworks; and to the payment thereof shall be pledged the entire proceeds of the 2-mill sinking fund, and so much of the proceeds of the water rates and rentals and of said 5-mill water tax as may not be needed for the maintenance, repairs, operation, extension, and improvement of the waterworks. Said ordinances further provide that no part of the cost of said waterworks, or any of the bonds issued therefor, shall ever be paid out of the general funds of said city, or out of any fund or the proceeds of any tax other than the property and funds specifically named; and that such provision and limitation shall be recited in the bonds; and hence it is argued that the transaction will not create any indebtedness on the part of the city, but that the money borrowed by the city from the purchasers of the bonds will be only an anticipation by the city, for its present use, of specific revenues which it has provided for, to accrue in the future. This contention of the appellant is based upon a palpable jugglery of phrases, and cannot be maintained. If it can, the constitutional provision above quoted, which prohibits any municipality from becoming indebted beyond the specified limit "in any manner or for any purpose" is delusive, and of no avail to protect taxpayers. Here the city of Ottumwa is admittedly indebted beyond the constitutional limit. It is conceded that legislative sanction is powerless to authorize it to increase its indebtedness. It proposes to issue and sell at par its bonds to the amount of nearly $400,000 to raise money to construct waterworks to be owned by the city. The bonds are to be formal obligations of the city to pay the interest and principal, as the same shall mature, from moneys to be raised and collected by taxes levied on the taxable property of the city. The mixing of water rent surplus with the "sinking fund" means nothing, as, in addition to the water rents, an annual tax of 5 mills is agreed to be levied yearly to provide the annual current expenses of operating the waterworks. The city has no revenue, nor means of raising money, ex-

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gally permissible. The city cannot be liable in any one year for more than $4,000, an amount far within the revenue derived from the sewer fund, and it cannot become liable at all for this amount until faithful service rendered by the contractor each year. *Ibid.*

The obligation of a city, under an ordinance regulating the maximum sums to be paid annually for water hydrants, does not create an indebtedness within the meaning of that section of the Constitution requiring a direct annual tax to be provided at the time the indebtedness is incurred; but such ordinance merely establishes, subject to review by the courts, that a greater sum than the rate fixed cannot be lawfully exacted for its water supply. Danville v. Danville Water Co. 180 Ill. 235, 54 N. E. 224.

The above construction has not met with universal approval, however. Some of the courts have held that an indebtedness for the aggregate amount was created, and have held the contracts to be invalid. Some of these cases are slightly distinguishable on the facts. One of these is Niles Waterworks v. Niles, 59 Mich. 312, 26 N. W. 525, which held that a contract for a water supply for a period of thirty years, involving an annual expenditure of $2,500, is a liability for the entire amount within the meaning of a charter forbidding the common council to "contract debts, incur liabilities, or make expenditures," in any one year which shall exceed the revenue of that year.

How such a contract could be an incurring of a liability when it is not a contracting of a debt is not very obvious.

The Illinois Constitution forbids becoming indebted "in any manner or for any purpose," and the court held that a contract between a municipal corporation and a water company, whereby the former binds itself to pay a certain water rent, payable in monthly instalments for a definite period, for the water supplied it by the water company for fire and other municipal purposes, is "becoming indebted" within the meaning of the constitutional clause prohibiting municipal corporations from becoming indebted beyond a certain limit, and, where its existing indebtedness already exceeds that limit, such contract to the extent that it creates such indebtedness is void, and it can make no difference that the debt is for necessary expenses, and might be paid out of the current revenues of the city. Prince v. Quincy, 105 Ill. 138, 44 Am. Rep. 785, 105 Ill. 215.

Again, it held that a provision in a contract whereby a municipal corporation agrees to pay a water company a certain water rent for its water supply in monthly instalments from the time the water is turned on creates a municipal indebtedness within the meaning of the constitutional inhibition against the assumption by municipal corporations of an indebtedness beyond a certain limit; and, such municipality being already indebted up to that limit, the contract to that extent is void, and the municipality cannot be held liable in tort for its refusal to pay such rent, as one of the current supplies, out of the current revenue, on the ground that if so paid when due no indebtedness within the meaning of the Constitution would have arisen, but that by its refusal so to pay it when due it became such an indebtedness and therefore nonpayable; since such rent was not legally payable out of the current revenue or otherwise, and the instalments, as they become due, would be, even if paid at the time, an indebtedness within the constitutional meaning. Prince v. Quincy, 128 Ill. 443, 21 N. E. 768, Affirming 28 Ill. App. 490. The court said, it clearly did not contemplate any payment in

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cept by levy of taxes. It is admitted that if the scheme contemplated the payment of the bonds only from a 2-mill tax, which was agreed to be levied year by year for their payment, an indebtedness of the city would be created; but it is contended that by making one levy now of an annual 2-mill tax, to be collected of the taxpayers year by year for fifty years, or till the bonds are paid, and from which fund only they are to be paid, no indebtedness is created, and that the borrowing of the money for which the bonds are negotiated is but a simple method of anticipating for present use the future revenue, which will come from the tax so levied covering the future years. We think the taxpayer in future years will regard this scheme as a subterfuge to deprive him of the protection of the Constitution, and that the thought will force itself upon him that a city creates an indebtedness when it borrows money to be paid, with interest, from taxes in the future, whether such taxes are formally levied at one time, covering that future, or yearly, to meet the payments when about to mature.

The creation of an indebtedness by an individual is often effected by borrowing money for his present uses, and always in anticipation of his future revenues and resources, whether he has a reliable source of revenue, or it is only uncertain and hoped for. If he has a reliable fixed income in property rentals, for example, and agrees with the lender that he will devote and set apart and apply in satisfaction of the loan all the rents — already fixed in amount — which he will receive and collect from a specified building or estate, yearly, as he shall collect the same, and the lender agrees to be content with that arrangement, and that he will not seek to otherwise recover the sum loaned, is it not clear that the borrower is indebted to the lender until the loan is satisfied by payment? The rents agreed to be applied are owing by the tenants to the borrower. When paid by the tenants, the money belongs to their landlord, the borrower, and never belongs to the lender until paid over to him by the borrower; and then, and not before, it is applied to the satisfaction of the loan. If the borrower should, after receiving such rents, fail to pay the same to the lender, the latter would become released from his agreement to wait for the rents, and could proceed against his debtor generally. This supposed case is precisely analogous to the scheme of the city of Ottumwa which we are considering. If the proposed bonds are issued and negotiated, the city will borrow from each bond purchaser the amount he pays for the bonds so purchased. The bonds constitute and embody the agreement and obligation of the city to pay the sums so borrowed and interest, but only from the collections of a particular tax which it has levied once for all, covering the future, year by year, and which it obligates itself to collect, year by year, and apply to the payment and satisfaction of the interest and principal of the bonds. The bondholders have no interest in

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advance, but that a claim against the city would be constantly accruing, payable from month to month, for water previously furnished, "from the time water is turned on;" and that, having been furnished, the obligation to make these payments at the times specified would be absolute and wholly irrespective of its ability or actual possession at such times of cash wherewith to make them. Thus, some credit was contracted, and not upon the faith of money in hand when performance by appellant was begun, but of money expected to be in hand when it should be completed; and under the charter limitation of the amount of annual taxes to be levied, and the known method of their collection, some risk of its unavoidable extension beyond the fiscal year was necessarily incurred.

Just prior to that decision, however, the appellate court had held that a contract entered into by a municipal corporation to pay a stated sum per annum for a term of years as rental for hydrants from a water company is not the creation of a present indebtedness for the whole amount, within the meaning of the constitutional prohibition against the assumption by municipal corporations of an indebtedness beyond a certain limit. Carlyle Water, Light & P. Co. v. Carlyle, 31 Ill. App. 325. That court said: The contract was for furnishing an article of daily consumption during a period of twenty-one years, fixing the price per hydrant. It was within the power of the city to contract to have the water. It did not, by the contract, provide for any indebtedness except for water furnished. When the works are kept in such a condition as to keep up a supply of water, then, and only then, does the indebtedness accrue, at the contract rate; but to keep the standpipe and entire system in such a condition as to supply water to the city, as required, involves labor and expense to the appellant, in the payment of employees, the wear and tear of machinery, and the consumption of fuel, besides the cost of repairs; such is the burden upon appellant to keep itself in a condition to furnish water under the contract before being entitled to pay. There was no indebtedness by the contract at the time the contract was made. Nor was there any indebtedness at the time the city found that the works contracted for were completed in accordance with the contract. When the works were completed and the water kept to the required height in the standpipe, with engine fires kept banked and ready, and mains and hydrants in good repair and ready for service during a period stipulated in the contract, then, and only then, a liability to pay under the contract was incurred by the city, if incurred at all, and then only for such term as had already expired.

In accord with the Illinois supreme court are the following cases:

A contract by a municipal corporation for a water supply for a series of years, to be paid for as furnished annually, creates an indebtedness for the aggregate amount of the contract for the purpose of determining whether it exceeds the constitutional limitation of indebtedness. Beard v. Hopkinsville, 95 Ky. 239, 23 L. R. A. 402, 24 S. W. 872.

A municipal corporation prohibited from incurring any indebtedness beyond a specified amount is prevented, when in debt to that amount, from incurring obligations to a water company by contract to take water at an annual charge for an undefined time, when the money to meet such obligations is not provided for, either by being legally ordered to be raised by taxation and appropriated for the purpose, or pursuant to some positive direction of the leg-

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or dominion over this tax so levied, and cannot collect it, or in any way coerce the taxpayers. The city alone can collect such tax, with its other taxes. When paid by the taxpayers, the money goes into the treasury of the city and belongs to the city, like all other moneys raised by general taxation levied for specific purposes, as for the construction of streets, bridges, sewers, or support of schools. The money so collected from the taxpayers by the city never belongs to the bondholders till it is actually paid over to them by the city. If the city should fail to pay it over, its contract with the bondholders, expressed in the bonds, would be broken, and the bondholders released from the limitation requiring them to await the accumulation of moneys in a particular fund to be so raised by taxes for the payment of the city's indebtedness on the bonds. The proposed mortgage of the waterworks to secure the payment of the bonds emphasizes the fact that the city is indebted in the amount of the bonds by such pledge of the city's property for their payment. A mortgage which is to be discharged by the payment of money secures an indebtedness, and cannot exist without the existence of a debt. Even if the creditor's remedy is limited by the contract to the property of the debtor which is covered by the mortgage, the relation of the debtor and creditor exists, and the debtor pays the debt when his mortgaged property is converted into money to discharge it, just as certainly as if, in the absence of any mortgage, his same property were sold under execution for the same purpose.

Appellant's contention amounts to this: That, notwithstanding the constitutional limitation referred to, and that the city, being already indebted beyond that limit, has no power, even with legislative sanction, to incur any new indebtedness to the amount of a single dollar, it may, nevertheless, borrow money to the extent of $400,000, issuing its negotiable bonds therefor, with interest, contracting to pay the same at specified dates; and that this will not create any indebtedness, if it shall at the same time levy taxes to be collected annually from the taxable property of the city for a long term of years, or indefinitely, till the sum borrowed is paid therefrom, and provide that the bonds shall only be paid from the taxes so specially levied. If this may be done to build waterworks, the city may go on, and in the same way borrow and issue its bonds for an equal amount to build public buildings, and for another equal amount to construct a system of sewers, and for another equal amount to construct modern schoolhouses, and an unlimited amount as bonus to some railroad, taking care in each case to levy once for all a sufficient annual tax to meet the maturing bonds; and, though the property of the taxpayers may be thus practically confiscated, by being loaded down with taxes beyond any income which the property can produce, and for periods beyond any expectation of life which the taxpayers can indulge in, still those taxpayers,

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islature that it shall be so raised and appropriated; hence, municipal ordinances, made prior to the act of 1881, which authorized contracts for a term of ten years to be made with water companies for annual payments to be raised by taxation, and therefore not pursuant thereto, where there were no provisions to raise by taxation the money to be paid upon the contracts under them and the limit of municipal indebtedness had been reached, operate to increase indebtedness, and are *ultra vires* and void. State, Read, Prosecutor, v. Atlantic City, 49 N. J. L. 558, 9 Atl. 759, Affirmed by an evenly divided court in 50 N. J. L. 665, 15 Atl. 10.

A contract for water supply, binding a municipality to pay a specified sum per annum for a period of years in quarterly instalments, amounting in the aggregate to many times a charter limitation against the creation of any debt or liability which singly or in the aggregate shall exceed a specified amount, is void as creating a present liability to make future payments in excess thereof. Salem Water Co. v. Salem, 5 Or. 30. It was contended that the question whether there was a debt or liability depended upon the financial condition and ability of the city to raise the amount agreed to be paid, and not on the terms or conditions of the contract; but this contention did not prevail.

A proviso in a clause of a city charter authorizing the issuing of bonds to provide funds for public purposes, which limits the power of the city council to issue bonds and all indebtedness and liability to the city for any and all purposes to a sum not to exceed a fixed amount, applies to a contract which binds the city to take water from a contractor at a fixed annual rental for a term of years, and renders the contract void where that limitation as to indebtedness or liability has already been reached, whether such contract be considered as a debt or a liability. Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

Under a statute requiring the question of making an expenditure exceeding $10,000 for water supply to be submitted to the voters before it shall be authorized, the commissioners cannot enter into a contract for lease of land for such a purpose, the aggregate rental for which will greatly exceed that amount, although the annual rental is much less, without submitting the question to the voters. Smith v. Newburgh, 77 N. Y. 130.

A contract which binds a city to take water from a contractor at a fixed annual rental for a term of years, without any special fund being provided or on hand out of which the same can be paid when due, creates an indebtedness within the meaning of a legislative act limiting the power of the city council "to incur any indebtedness" in excess of a certain sum; and, when that limit has already been reached, the contract is void; and, in view of the fact that a levy of the maximum rate of taxation would not suffice to provide for the payment of the annual rental, a clause requiring the city to levy annual taxes sufficient to meet the water rents cannot be said to be a providing for a special fund for that purpose. *Ibid.*

No recovery can be had from a municipal corporation which has already exceeded its constitutional debt limit for water furnished under an ordinance providing for furnishing for a certain period at a certain price, payable monthly, appropriating out of the city's yearly revenues sufficient money to pay for it, and ordering the city council for such term to levy only taxes sufficient to meet the appropriation, where the contract creates an entire, and not

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while groaning under such special levies, fixed upon them and extending hopelessly into the future, will have the happiness and satisfaction of knowing that they live in a city which has no municipal indebtedness large enough to cause uneasiness.

The fact that these proposed bonds are to bear interest at 4½ per cent cannot be overlooked. Why should the city pay interest—that constant, distinguishing most irksome, and disagreeable feature of indebtedness—upon money which it does not owe; money which belonged to it before it was received; being only its own fixed revenues, gotten hold of for present use, a little in advance, by "anticipation," and in no wise by incurring indebtedness? Up to the time when the circuit court granted in this suit the injunctions which are the subjects of these appeals, there was no decision of the supreme court of Iowa adjudging that a city could issue and negotiate bonds like the proposed issue under consideration, without creating any indebtedness, by merely making such bonds payable only out of the proceeds of a special tax, at the same time levied on the taxable property of the city, and payable yearly, during a long term, by the taxpayers of the whole city, like all other taxes. The cases in that state bearing on the subject were all reviewed in *Windsor* v. *Des Moines*, 110 Iowa, 175, 81 N. W. 476, and it must be admitted that there are loose *dicta* of judges in some of them which tend in that direction. In other states having like constitutional provisions such attempted evasion of the Constitution has not generally been sustained. *Prince* v. *Quincy*, 128 Ill. 443, 21 N. E. 768; *Joliet* v. *Alexander*, 194 Ill. 457, 62 N. E. 861; *Earles* v. *Wells*, 94 Wis. 285, 68 N. W. 964; *Brown* v. *Corry*, 175 Pa. 528, 34 Atl. 854. But the supreme court of Iowa, in *Swanson* v. *Ottumwa*, *post*, 620, 91 N. W. 1048, by its decision filed October 25, 1902, since the hearing of this cause in this court, sustains in full the contention of the appellant in this cause; holding that the proposed issue of bonds by said city to the amount of $400,000 will not, for the reasons urged by appellant, and fully stated above, create any indebtedness against the city of Ottumwa. This decision does not rest upon any peculiar construction of the Constitution or statutes of Iowa. It holds in terms, as we do, that the provision of the Iowa Constitution absolutely prohibits municipalities from contracting indebtedness in any manner or for any purpose in excess of the 5 per cent limit. And we agree with its holding that the Iowa statutes authorizing cities to levy a continuing 2-mill sinking fund tax for the purchase or erection of waterworks, and to pledge the proceeds of such tax and the net revenues to be derived from the waterworks, and the surplus of the annual tax not exceeding 5 mills, to meet operating expenses, to the payment of the purchase price or cost of construction of such works, and satisfaction of any bonds or mortgage for the security of such payment, and by contract restricting payments to moneys produced from

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a special, indebtedness, and the Constitution provides that no city shall be allowed to become indebted in any manner, nor for any purpose, beyond a certain amount. State *ex rel.* Helena Waterworks Co. v. Helena, 24 Mont. 521, 55 L. R. A. 336, 63 Pac. 99.

The making of a contract or agreement by municipal authorities for the supplying of water for a term of years providing for annual payments, is a debt within the meaning of the Constitution, the aggregate amount of which is the sum of the annual rentals therein stipulated to be paid, for the authorization of which the submission to the qualified voters of the question whether the debt shall be incurred is essential to render it legal and binding, except for the first and any subsequent years in which the municipality sees proper to receive at the hands of the waterworks company the benefit which it might derive from the contract. Dawson v. Dawson Waterworks Co. 106 Ga. 696, 32 S. E. 907.

b. *Provision of fund for payment.*

The Constitution of Texas requires the provision of a fund for payment at the time the debt is created, and it was held that where the Constitution limits the amount of a debt which a city may incur, and provides that no debt shall be created by a city without at the same time providing for the levy and collection of a tax for its payment, negotiable bonds issued by a city for the construction of waterworks are invalid where the bonds create a debt in excess of that allowed by the Constitution, and where no legal provision for the payment of interest on the bonds and the principal was made at the time the issuance of the bond was authorized. Citizens' Bank v. Terrell, 78 Tex. 450, 14 S. W. 1003.

Upon the principle embodied in that constitutional provision, it has been held by other courts that, if a fund is created to meet the obligations as they accrue, no indebtedness is created. This may or may not be true according to the source of the fund. If the fund is to come from a source for which the municipality is not responsible, no liability against it is created; but if it is to come from a special tax on the inhabitants of the municipality, no distinction is perceived between such fund and one created by general taxation.

A contract between a city and a water company, made for the period of thirty years for the furnishing of hydrants for city use, upon a monthly rental for each hydrant in good order during the preceding month, such rental to be provided for by a tax levied and collected, does not create an indebtedness against the city at the time of its execution within a constitutional limitation. Kiehl v. South Bend, 36 L. R. A. 228, 22 C. C. A. 618, 44 U. S. App. 687, 76 Fed. 921.

An indebtedness for the entire contract price within the constitutional prohibition is not created by a municipal contract for a water supply extending over a series of years, where the Constitution provides for collection of taxes to pay interest and a sinking fund, and the contract provides for no interest or principal to be paid at the completion of the contract. Saleno v. Neosho, 127 Mo. 627, 27 L. R. A. 769, 30 S. W. 190.

General power given to a municipal corporation to provide waterworks is subject to the provision in its charter that appropriations must be made during the first quarter of each fiscal year; that nothing shall be added to the expenses of the municipality above the amount provided in the appropriation bill; and that no

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such revenues, are constitutional; as, consistently with the Constitution, they will apply to municipalities which are not indebted, or where the indebtedness to be incurred for such waterworks will not increase the total indebtedness of the municipality beyond the 5 per cent limit. There is nothing on the face of these statutory provisions which can stamp them as a legislative evasion of the constitutional limitation in respect to municipal indebtedness. And it must be held that such statutory powers can only be exercised in cases where their exercise will not conflict with any constitutional restriction. The Iowa supreme court, after referring to these statutes, quotes the constitutional limitation above set forth, and very justly adds: "The statute we have under consideration does not, in terms, or by necessary implication, provide for the creation of any indebtedness by a city in excess of the limit here named, and therefore cannot be said to be void for unconstitutionality."

To this statement we fully agree, and we concur entirely in the statement by that court of what is the vital and only question in the case, as follows: "But the finding of the constitutionality of the statute does not necessarily imply the validity of all contracts made thereunder; for, if the obligation assumed by the city in such an enterprise is a 'debt' within the meaning of the Constitution, it is valid only when such debt is within the 5 per cent limit. Here we have indicated the vital question in the case before us. Does the contract create an indebtedness against the city? If answered in the affirmative, the judgment of the trial court is right, and must be affirmed; but, if answered in the negative, the judgment should be reversed, and the injunction dismissed."

This question,—whether the proposed contract of the city for the construction of waterworks to be owned by it, and the issue and sale of its bonds to borrow nearly $400,000 to pay for such construction, will create an indebtedness against the city,—if not answered by its bare statement, must be solved by reference to the law applicable to contracts in general, and to negotiable bonds in particular. And, while we agree with the Iowa supreme court in its construction of its Constitution and statutes, we are not bound by the opinion of that court that the proposed contract and issue of bonds will not violate the provisions of the Constitution thus construed. What is said by Judge Thayer in the recent case of *Casserleigh* v. *Wood*, 119 Fed. 308, is pertinent here: "But we are of opinion that, when it becomes necessary to apply the statute, as thus construed by the local courts, to a particular contract, and determine, upon a consideration of all of its provisions, whether it is violative of the statute, a Federal court is entitled to express an independent judgment. In the case last supposed the question to be determined is one of general law, rather than of statutory construction, and the decision of the Federal court thereon ought to be something more than a mere

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contract shall be made, or expense incurred, unless an appropriation shall have been previously made concerning it. Henry A. Keith & Co. v. DuQuoin *ex rel.* Parks, 89 Ill. App. 36.

Payment out of revenues of plant.

The trustees of a city waterworks system will not be enjoined from carrying out a contract entered into by them for the repair and enlargement of such system, which they have authority to make and pay for out of revenues from the system, on the ground that such improvements will create a large floating indebtedness, or result in pledging the revenues of the system for an indefinite length of time, for the payment of which they have no power to levy taxes, where it does not appear that the entire cost of the works, as well as other obligations required to be paid out of the water rents, cannot be met from such fund when due, so as to render it unnecessary to levy any taxes. Donahue v. Morgan, 24 Colo. 389, 50 Pac. 1038.

The fact that a special fund to be provided out of a certain percentage of the gross receipts of a waterworks system for the construction thereof is not in existence does not make expenditures incurred on the credit of that fund, and payable solely therefrom, an indebtedness against the city within the constitutional prohibition of municipal indebtedness. Faulkner v. Seattle, 19 Wash. 320, 53 Pac. 365.

A contract entered into by a municipal corporation with one advancing money to it for the completion of its waterworks system, whereby a special fund for the repayment of such advancements is to be created out of a certain percentage of the receipts of the waterworks, without making the city in any manner liable to pay the same except out of such fund, is not the creation of an indebtedness within the constitutional limitation of municipal indebtedness, where the proceeds of the waterworks will, in addition to providing such fund, pay all expenses incident to their operation. Winston v. Spokane, 12 Wash. 524, 41 Pac. 888.

The issuance of bonds for the construction of a waterworks system payable from a fund to be created from a certain percentage of the gross revenues of the system does not create a debt against the city, although the remaining revenues therefrom, set aside for operating expenses of the plant, may ultimately prove inadequate for that purpose, where it is not apparent that the excess, if any, could not be met in some lawful manner without the creation of an additional indebtedness. Faulkner v. Seattle, 19 Wash. 320, 53 Pac. 365.

But an indebtedness within the meaning of the constitutional limitation is incurred by the provision for the extension of a waterworks system upon condition that the income from the entire system shall constitute a fund to be used exclusively to meet the expenses of the system, and provide the extension certificates, where the income is an existing fund belonging to the municipality, the benefit of which it loses by applying it in satisfaction of the indebtedness. Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861.

So, a municipal corporation cannot exceed the constitutional limitation of indebtedness in the construction of waterworks by attempting to accomplish it indirectly through a contract providing for the construction of such works by third persons, the leasing thereof by the municipality, and the practical assumption and payment of the indebtedness by the municipality by the application of the excess of rentals over interest on the investment to the extinguishment of the indebtedness, the municipality be-

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echo of a previous decision of the same question by a court of co-ordinate jurisdiction, although such a decision is entitled to the highest respect, and should be regarded as persuasive authority."

We have examined carefully the opinion in *Swanson* v. *Ottumwa* and the cases which are supposed to give support to its conclusions. It will not be profitable to review in detail the reasoning employed to reach the result arrived at. To our minds it is not persuasive, and we decline to be guided by it. Its citations exhibit the unceasing attempts in that state and some others to nullify and evade wholesome constitutional limitations upon the power of municipalities to create indebtedness, and thus place intolerable burdens on the taxpayers; and its reasoning but adopts the ingenious, but obviously untenable, arguments by which such attempts have ever been supported. In the case of *Swanson* v. *Ottumwa* the supreme court of Iowa holds, in accord with the contention of the appellant in this case, that the city of Ottumwa, though already indebted beyond the constitutional limit, may now borrow $400,000 to construct waterworks, by the issue and sale of its negotiable, interest-bearing bonds to that amount, to be paid by taxation on the taxable property of the city collectible year by year for fifty years; and that the city will not thereby create any indebtedness if, at or before the issuing of such bonds, it levies, once for all, this continuous yearly tax, and bargains with the bondholders that the bonds are to be paid only from the fund which shall be produced or accumulated from the proceeds of this continuous yearly tax, with a vague possibility of re-enforcement from a surplus of water rentals over and above the cost of operating, maintaining, and extending the waterworks. But the whole reasoning of the Iowa supreme court drives it to this admission: That if the bondholders are not confined to such provided fund, and have the right to go beyond that, and under any circumstances require that the city shall in any future year levy any tax to make payment on the bonds, then an indebtedness is created by the issue and sale of the bonds, and the Constitution violated. And that court overlooks or ignores the fact that future taxation for the payment of the bonds under specified circumstances and if the provided fund shall happen to be in any year insuffi-

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ing a party to the bonds given by the contractors and responsible for their payment. Earles v. Wells, 94 Wis. 285, 68 N. W. 964.

Where the current revenues of a city are devoted by the state Constitution to the support of the city government, and are always under the control of the council for that purpose, and the city has no right to pledge or appropriate any part of the current revenues to the payment of the principal or interest of a debt, the net proceeds from waterworks owned by the city are likewise under the control of the council, and cannot be made a basis for the creation of a debt. Citizens' Bank v. Terrell, 78 Tex. 450, 14 S. W. 1003.

Special assessments.

Where a local improvement is to be made, to be paid for by a special assessment on the district, there is reason for holding that the fund is distinct from the revenues of the city, and that the contract is valid.

A contract entered into by a city for the construction of a sewer, by which the contractor agrees to accept, in full satisfaction for his work, certificates of assessment upon the property liable, is not an indebtedness within the meaning of a constitutional limitation thereof, since no liability exists against the city on the contract. Davis v. Des Moines, 71 Iowa, 500, 32 N. W. 470.

A constitutional limitation of the indebtedness of a municipal corporation for supplying the same with water, artificial light, and sewers, of 5 per cent additional to the amount allowed for general indebtedness, does not prevent the creation of local assessment districts for constructing water mains. Smith v. Seattle, 25 Wash. 300, 65 Pac. 612.

A statute authorizing a city to purchase a drainage plant and franchises, and discharge the price in drainage warrants payable exclusively out of drainage assessments, does not authorize a new indebtedness, when the warrants are issued, not only for the price of the plant, but also are in settlement of an indebtedness owing by the city to the drainage company, which was in judgment; and therefore the holders of warrants are entitled to enforce the collection of the special drainage assessments so authorized to be levied. United States *ex rel.* Kilpatrick v. Capdevielle, 118 Fed. 809.

But a municipal corporation which makes a contract for a sewer, to be paid for out of the public revenues, cannot, after the completion of the sewer upon discovering that such payment will cause an unconstitutional increase of indebtedness, assess the cost on the abutting property. Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551.

The construction of a sewer system by a city, to be paid for out of a special fund, the municipality to be liable only for the levy and collection of the tax, does not create a debt prohibited by the Constitution after a city has reached its debt limit. Grunewald v. Cedar Rapids (Iowa) 91 N. W. 1059.

But the soundness of the following cases is not so clear.

A contract for the furnishing of water does not create an indebtedness within the constitutional limitation, when the city making the contract is authorized by statute to levy a special tax expressly for the payment of such contract liability. Helena Waterworks Co. v. Helena (Mont.) 70 Pac. 513.

A contract embodied in an ordinance of a municipal corporation granting a water company the exclusive right to supply it with water for a term of years at fixed hydrant rates per annum does not create a municipal indebtedness within the meaning of the constitutional limitation, by virtue of a statute authorizing cities to levy and collect an annual tax not exceeding a certain per cent for fire and water purposes, which becomes a part of the contract, and provides a special fund to which the water company must look for satisfaction of its water rents. State *ex rel.* Great Falls Waterworks v. Great Falls, 19 Mont. 518, 49 Pac. 15.

A contract between a city and a water company for the furnishing of hydrants for city use upon a monthly rental for each hydrant in good order during the preceding month for the period of thirty years, such rental to be provided for by a tax levied and collected, does not create an indebtedness against the city at the time of its execution, within a constitutional limitation. Kiehl v. South Bend, 36 L. R. A.

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cient to pay the maturing principal and interest, is distinctly provided for by the ordinances and proposed contract under consideration, which provides that there shall be levied every year after the construction of the waterworks a water tax of 5 mills on the dollar, "or so much thereof as may be necessary, together with the net proceeds of the water rents, to pay the cost of maintenance, repairs," etc., "and to pay any of the purchase price or cost of constructing said works, or bonds or mortgages issued therefor, or interest thereon, which shall not be paid from the proceeds of the 2-mill tax provided for in § 2 hereof." This quotation is from § 3 of ordinance No. 566, and will be found quoted at large near the beginning of the opinion of Judge Weaver in the Iowa case. That ordinance is the one which levies the continuing 2-mill tax, and contains the whole contract between the city and the bondholders in respect to the issue and payment of the proposed bonds. Is it not perfectly clear, under the clause of § 3 above quoted, that, if in any year a water tax of only 1 mill shall be needed, together with the net proceeds of the water rents, to pay the cost of maintenance, repairs, etc., and at the same time there is matured and due principal and interest of the bonds in excess of what can be paid from the proceeds of the 2-mill continuing tax, and enough to require the levy of the other 4 mills of water tax to discharge the same, the council must for that year levy that 4 mills for that very purpose? And, should the council refuse to make such levy, the bondholders might coerce them by mandamus. Therefore, if there were any sense or reason in the doctrine that the borrowing of money by a municipality in anticipation of a special fund, to be collected year by year from a continued tax, from which fund alone the borrowed money is to be paid, does not create an indebtedness, it is apparent that such a case is not presented here. In our judgment, the proposed bonds, if issued, will create an indebtedness against the city of Ottumwa, wholly in violation of the Constitution of the state of Iowa.

The orders appealed from are affirmed, with costs.

Rehearing denied January 19, 1903.

228, 22 C. C. A. 618, 44 U. S. App. 687, 76 Fed. 921.

c. Creation of independent corporation.

Similar to the device of a special tax to raise a fund to pay for the improvement, is the organization of the inhabitants of the municipality into another corporation for the purpose of making the improvement. How such a subterfuge could succeed in evading the constitutional provision is not clear, but in the two cases which have come before the courts it has done so.

The fact that the debt of a city already exceeds the 5 per cent limit permitted to cities and towns by the Constitution does not prevent the operation of an act under which a water district, being a quasi-municipal corporation organized by the legislature, is to proceed and acquire property by condemnation proceedings for the purpose of supplying water to said city and surrounding towns, as the indebtedness of the city cannot be held to be increased by such proceedings. Kennebec Water Dist. v. Waterville, 96 Me. 234, 52 Atl. 774.

A statute creating a municipal corporation for sanitary purposes, which partially embraces other municipal corporations, although entirely distinct from and independent of their governments and having municipal authorities of its own, is not invalid because such other municipalities have the power to make the same improvement as is contemplated by the district, but are prevented from exercising that power because their indebtedness already exceeds the constitutional limitation. Such constitutional limitation applies to each municipal corporation singly, and the sanitary district may contract corporate indebtedness without regard to the indebtedness of other corporate bodies embraced wholly or in part within its territory. Wilson v. Sanitary Dist. 183 Ill. 443, 27 N. E. 203.

V. Contract to purchase.

A contract to purchase a plant or to repay money borrowed to construct it, is entirely distinguishable from a contract for annual supply, because, although the contract may provide for annual instalments, yet the obligation to make the full payment rests upon the municipality from the time the plant is accepted or the money received, and default in any payment will only precipitate the whole liability at once; whereas, as shown above, the liability for supply accrues only as it is furnished.

A contract entered into by a municipal corporation for the construction of waterworks, by which it is to pay for the works, when completed and accepted, a certain sum, constitutes a debt within the meaning of the constitutional limitation of its power to incur indebtedness. Such indebtedness will be regarded as having been incurred from the date of the contract, and it cannot be said that it did not come into being until the work is completed and accepted by the city. Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781.

The purchase by the city of a water plant for a certain sum creates a debt against the city within the meaning of a constitutional provision that a debt cannot lawfully be created by a city unless at the same time a provision is made for a 2-per cent sinking fund, although the transaction is a compromise of a claim in favor of the water company against the city, on a liability which might accrue in the future; and, therefore, if by the terms of the contract a sinking fund is specifically excluded, the Constitution is violated. Austin v. McCall (Tex.) 68 S. W. 791.

A limitation of municipal indebtedness cannot be evaded by a contract for a water-supply plant the consideration for which shall be annual payments extending over a series of years, which are nominally hydrant rentals, but which in fact are large enough to pay a reasonable rental, and in addition thereto satisfy the principal of the debt in the time specified, since such contract will be void for unreasonableness. Hall v. Cedar Rapids, 115 Iowa, 199, 88 N. W. 448.

An agreement by a municipal corporation to pay for a waterworks system in annual instalments out of the "current revenues, and not otherwise," creates a debt within a constitutional prohibition of an indebtedness beyond certain prescribed limits. Brown v. Corry, 17?

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IOWA SUPREME COURT.

Charles SWANSON
v.
City of OTTUMWA, *Appt.*

(.....Iowa.....)

1. **The issuance of bonds by a municipality to procure funds for a water supply,** which are payable out of a sinking fund to be provided by a special tax upon the property within the municipality, and for which there can be no general liability on the part of the city, does not create an indebtedness within the meaning of a constitutional limitation of municipal indebtedness.
2. **Provision for a mortgage on a waterworks system to be obtained with the proceeds of bonds** which the mortgage is to secure does not imply an indebtedness on the part of the mortgagor within a constitutional provision limiting municipal indebtedness, when the bonds are to be paid out of a sinking fund to be provided by a special tax on the property within the municipality.

(October 25, 1902.)

APPEAL by defendant from a judgment of the District Court for Wapello County in plaintiff's favor in an action to enjoin the issuance of bonds for the acquisition of a water-supply system. *Reversed.*

The facts are stated in the opinion.

Messrs. **Jaques & Jaques** and **Mitchell & Hunter** for appellant.

Mr. **Seneca Cornell** for appellee.

Weaver, J., delivered the opinion of the court:

The facts upon which this litigation depends are not in dispute. The defendant city, being already indebted nearly or quite to the full constitutional limit of 5 per cent of all its taxable property, and being

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Pa. 528, 34 Atl. 854, Affirming 4 Pa. Dist. R. 645.

The mere option given a municipal corporation to purchase a plant for water supply at the end of a period of time during which it has contracted for a water supply does not create an indebtedness within the meaning of a constitutional provision limiting the amount of indebtedness. Stedman v. Berlin, 97 Wis. 505, 73 N. W. 57.

A common council authorized to make repairs upon existing waterworks, but prohibited from making loans in any year in excess of certain amounts prescribed, has no power to enter into a contract to purchase waterworks appliances to be paid for in the future and beyond the current fiscal year. Trump Mfg. Co. v. Buchanan, 116 Mich. 113, 74 N. W. 466.

A municipality has no authority to issue bonds for waterworks, when the statute limits the levy of a tax for that purpose to an amount not exceeding 5 mills on the dollar in any one year on all the property within the city issuing bonds, the interest on which will be in excess of this limitation. State *ex rel.* York v. Babcock, 20 Neb. 522, 31 N. W. 8.

A city may pass an ordinance whereby it authorizes a corporation to construct waterworks, and reserves the right whenever its finances may permit it to purchase the system of waterworks without violating the constitutional provision forbidding "incurring indebtedness." The ordinance does not provide for the assumption of the obligations which will ripen into a debt. Burlington Water Co. v. Woodward, 49 Iowa, 58.

The decision in SWANSON V. OTTUMWA is foreshadowed in Burlington Water Co. v. Woodward, 49 Iowa, 58, where it was held that a city may provide a tax, not exceeding $.005 per dollar, for the maintenance of waterworks and a sinking fund to reduce the debt thereon, and, although thereby the city may become the owner of the waterworks, the provision does not violate the constitutional prohibition against incurring an indebtedness, when it is provided that the tax, together with the income of the waterworks company shall pay the obligations assumed by the city.

The matter of providing water and sewers for the inhabitants of a city is strictly a municipal purpose, within a constitutional provision limiting the incurring of municipal indebtedness to

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such purposes. Metcalfe v. Seattle, 1 Wash. 297, 25 Pac. 1010.

VI. *Other matters.*

Where a city contracts for water to be furnished for fire purposes for two years at a specified amount per hydrant per year, and the number of hydrants to be used is left to the discretion of the common council of the city, the city does not thereby create a "debt" within the meaning of Tex. Const. art. 11, and the contract is not void because there is no provision made for assessing and collecting a sufficient sum to pay the interest and 2 per cent sinking fund, it appearing that there is no fund in the treasury out of which it can be paid. The expense of supplying water for fire purposes is a liability which is to be satisfied out of the current revenues, and to this class of expenses such constitutional provision does not apply. Cleburne v. Cleburne Water, Ice, & Lighting Co. 14 Tex. Civ. App. 229, 37 S. W. 655.

A contract for a municipal water supply at a sum to be paid annually, without any provision for the funds with which to make the payments, is within a statute rendering it criminal for city officers to incur any obligation in excess of the appropriation and limit of the expenditure provided by law. Atlantic City Waterworks Co. v. Read, 50 N. J. L. 665, 15 Atl. 10.

A municipal corporation cannot contract with a water company for the supplying of water for a period of thirty years with annual payments without submitting to the legally qualified voters of the city the question whether the debt shall be incurred, and without having previously made provision for payment, as required by the Constitution and laws of the state; and a contract so made is operative only from year to year, so long as neither party renounces or repudiates it. Cartersville Waterworks Co. v. Cartersville, 89 Ga. 689, 16 S. E. 70.

A contract between a municipal corporation and a water company for the furnishing of water to the former for a term of years at a fixed price does not create an indebtedness to pay for water until the company has completed its plant, and is in condition to furnish the same, and its liability then is for such term only as has already expired; and, therefore, no appropriation is necessary at the time of, or be-

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desirous of constructing a system of waterworks, undertook to effect that purpose in the manner provided for in chapter 5 of title 5 of the Code, and to that end the city council enacted certain ordinances, the provisions of which, so far as material, are as follows (ordinance No. 566):

"Be it ordained by the city council of the city of Ottumwa, Iowa.

"Sec. 1. That the city accepts and elects to exercise the powers granted it by chapter 5, title 5, of the Code of Iowa of 1897, and amendments thereto, and to acquire by purchase or erection, under the provisions of said law, a system of waterworks for the purpose of supplying the city and its inhabitants with water.

"Sec. 2. That for the purpose of creating a sinking fund to be used in the purchase or erection of a system of waterworks, there is hereby levied for the year 1899, and each year thereafter until the purchase price or contract price of said system of waterworks is fully paid, a tax of two (2) mills on the dollar upon all property within the corporate limits of the city of Ottumwa, excepting lots greater than 10 acres in area used for horticultural or agricultural purposes. The proceeds of such tax levy shall be used exclusively to pay the purchase price or cost of construction of such system of waterworks, and any bonds, mortgages, or other obligations issued to pay such purchase price or costs of construction, as the case may be, and the interest thereon, and shall be collected, managed, and disposed of as provided by law, and by ordinances not inconsistent therewith.

"Sec. 3. That there shall be levied each year upon all taxable property lying within the limits of benefit and protection of the waterworks purchased or constructed, from and after the purchase or construction of the same, by the city of Ottumwa a water tax of five (5) mills on the dollar, or so much thereof as may be necessary, together with the net proceeds of water rents collected from the consumers of water, to pay the

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fore, entering into the contract in order to render the same valid. Carlyle Water, Light & P. Co. v. Carlyle, 31 Ill. App. 325.

The limitation of the amount of scrip which a municipal corporation may issue in aid of a system of waterworks will not limit the amount which may be expended for such works. Foote v. Salem, 14 Allen, 87.

"The income and revenue provision for each year," which municipal indebtedness is forbidden by Constitution to exceed, includes income from license fees and all other sources. Lamar Water & Electric Light Co. v. Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756.

The constitutional inhibition against the incurring of indebtedness or liability by a city exceeding in any manner the income and revenue provided for that year means an excess of indebtedness over the entire revenue, in determining which the surplus from special funds set apart from such revenue shall, after payment of claims primarily payable therefrom, be considered as available for the payment of a claim for the reasonable value of the use of a water plant under a void lease, in the absence of any provision, charter or otherwise, prohibiting transfers of surplus from one fund to another. Higgins v. San Diego, 131 Cal. 294, 63 Pac. 470.

The amount of cash in the general fund of a city cannot be credited upon the amount of a proposed bond issue for waterworks, so as to reduce the municipal indebtedness below the constitutional limitation, where such bonds are not payable out of the general fund, but out of the proceeds of special taxes. Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059.

The issuance of bonds is not prevented from being an increase of indebtedness by the fact that a waterworks system is to be acquired with their proceeds, which will be of equal value to the amount of the loan and productive of revenue. The municipality, having become bound to pay, has incurred an indebtedness which it may be compelled to pay. Being thus bound to pay, it is in debt, no matter what amount of property it may have received in consideration of the obligation. Scott v. Davenport, 84 Iowa, 208.

A charter provision restricting the amount which a city may raise yearly by general taxation does not repeal a prior independent statute authorizing the municipal authorities to contract for a water supply, and for the time and mode of payment, and issue their obligations therefor; since, if the city avails itself of its provisions, the act stands as a part of its charter, forming a separate chapter dealing with the subject of a water supply. Menominee Water Co. v. Menominee, 124 Mich. 386, 83 N. W. 127.

A contract by a municipal corporation to take water from a private waterworks system for a period of years at a fixed annual rental, the total amount of which for the entire period would exceed the statutory limitation of municipal indebtedness, is nevertheless valid where the amount so annually payable can be produced by the investment of a sum which is less than such statutory limitation, as the real measure of indebtedness is the amount which will purchase an annuity capable of producing annually a sum equal to such annual rental. Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

The assumption by a water company of a bonded indebtedness of a municipal corporation for waterworks, and its promise to pay, do not extinguish the debt as a liability against the city, where the bond holders have not accepted the promise of the water company and released the city. Gold v. Peoria, 65 Ill. App. 602.

A city desirous of purchasing the property of a waterworks company cannot avoid restrictions in its charter as to the amount of indebtedness it may incur by purchasing the property subject to liens, the amount of which would exceed the indebtedness authorized by the charter. Ironwood Waterworks Co. v. Trebilcock, 99 Mich. 454, 58 N. W. 371.

A fixing of the amount of notes, bonds, or certificates of indebtedness to be issued by a corporation in connection with the purchase of a water plant will not, of itself, limit the amount which can be paid for such plant, if the power is given to a commission to fix the amounts to be paid. West Springfield v. West Springfield Aqueduct Co. 167 Mass. 128, 44 N. E. 1063.

That a city's indebtedness exceeds the constitutional limit is no defense to an action for injuries caused by negligent construction of a gutter so as to cause injury to abutting property. Bartle v. Des Moines, 88 Iowa, 414. H. P. F.

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cost of maintenance, repairs, and operation of said waterworks, and the cost of extensions thereof and additions, and improvements thereon, and to pay any of the purchase price, or cost, of constructing said works, or bonds or mortgages issued therefor, or interest thereon, which shall not be paid from the proceeds of the 2-mill tax provided for in § 2 hereof."

Section 4 provides for negotiations for the purchase of the works of the City Water Supply Company.

Section 5 provides that upon failure to make such purchase the city engineer shall be directed to prepare plans and specifications for the erection of waterworks, and that the council, upon approval of such plans, proceed to advertise and let the contract for such improvement to the lowest bidder.

"Sec. 6. (As amended by ordinance No. 594.) That, for the purpose of creating a special fund to be held by the city in trust for the sole purpose of paying the cost of erecting a system of waterworks as contemplated by ordinance No. 566, in the event that the electors of the city of Ottumwa shall, at a special election called for that purpose, cast a majority of their votes in favor of the approval of a contract by the city entered into for the construction of such waterworks, the city shall issue, in the manner prescribed by chapter 5 of the Code of Iowa of 1897, a sufficient number of bonds, which, together with the sinking fund on hand, will be sufficient to pay the contract price for the erection and completion of said system of waterworks and all other expenses connected with the completion and the putting of said plant into successful operation. Said bonds shall be issued in denominations of not less than one hundred ($100) dollars, nor more than one thousand ($1,000) dollars, each to bear interest at a rate not exceeding 4½ per cent per annum, interest payable semiannually. The bonds shall be payable as follows: Five thousand ($5,000) dollars, at the end of two years from the date thereof; five thousand ($5,000) dollars at the end of each succeeding year thereafter for a period of twenty-two (22) years, and at the end of which time the city reserves the right to refund all of the outstanding bonds; and after a period of twenty-two (22) years from the date thereof said bonds shall be payable in the sum of not less than ten thousand ($10,000) dollars per year for not exceeding fifty years from the date thereof, unless there shall be a fraction thereof only left, in which event bonds shall only be issued for such fraction. The payment of said bonds and the interest thereon shall be secured by a mortgage on said system of waterworks, and to the payment thereof shall be pledged the entire proceeds of the 2-mill sinking fund tax provided for in § 2 of said ordinance No. 566, and so much of the proceeds of the water rates and rentals collected from consumers and of the water tax provided for in § 3 of said ordinance No. 566, as shall not be needed for the maintenance and operation, repairs and proper and necessary extensions, additions, and improvements of said waterworks. Said bonds to be sold in the market for not less than par, and the money received therefrom shall be held by the city of Ottumwa as a special and trust fund for the sole purpose of paying expenses of the construction and completion of said waterworks plant. The contract for the erection of the same shall specifically provide that the payment for said plant shall be made out of said funds only, and out of the 2 per cent sinking fund on hand at the time the contract is made, and that the city will assume no other obligation than that of negotiating and selling said bonds and holding said fund for the purpose of paying for said plant, and said fund shall not, under any circumstances, be devoted to any other purpose than the payment for said waterworks. Said bonds may be negotiated and sold either as a whole prior to the commencement of said work and after the ratification of the contract by the city entered into for the construction of said waterworks by the electors of said city, or they may be negotiated and sold as the work progresses in sums sufficient to pay the monthly estimates on said work, or they may be turned over to the contractor in payment for the work as it progresses if the contract for the works shall so provide and the city shall have the right to so contract.

"Sec. 7. No part of the cost of said waterworks, or any of the bonds issued therefor as hereinbefore provided for, or of the interest thereon, shall ever be paid out of the general funds of said city, or out of any fund or the proceeds of any tax, other than the property and funds specifically named and pledged in § 6 hereof, and this provision and limitation shall be recited in said bonds."

Pursuant to said ordinances the council caused the necessary plans and specifications to be prepared, and thereafter entered into a contract with the Fruin-Bambrick Company for the construction of a system of waterworks at an expense of about $400,000. The provisions of said contract, so far as pertinent, are as follows: "This article of agreement, made and entered into by and between the city of Ottumwa, Iowa, . . . party of the first part, and the Fruin-Bambrick Construction Company, . . . as party of the second part, witnesseth: That for and in consideration of the sum of three hundred and ninety-eight thousand nine hundred and ninety-one ($398,991.00) dollars, to be paid by the party of the first part at the time and in the manner provided for by the plans and specifications and by the ordinances and resolutions passed and adopted by the city of Ottumwa in relation to the construction of said waterworks, second party hereby agrees to erect for the city of Ottumwa, Iowa, and complete and put into successful operation in all its parts and all of its details, a complete system of waterworks according to the plans and specifications heretofore adopted by the city council, together with the amendments thereto. Said plant to be paid for in detail according to

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the bid of the said party of the second part as accepted by the city council. [Here follow the various items making up the entire work to be performed, and the separate prices of values attached to each, making up the aggregate of $398,991.] The city, on its part, agrees to pay the sum above mentioned to the party of the second part at the time and in the manner provided for in the plans and specifications out of a trust fund to be created therefor by mortgaging said plant and pledging the 2-mill water levy for sinking fund, the regular water levy and the surplus, if any, of the earnings of said plant, as provided for in chapter 5 of the Code of Iowa, 1897, to secure the payment of waterworks bonds in the sum of not exceeding four hundred thousand ($400,000) dollars. Said mortgage and bonds to be executed and negotiated as soon as practicable after the approval of this contract by the electors of said city at a special election to be called for that purpose, and the money so realized therefrom shall be and remain a special and trust fund to be used solely for the payment for said waterworks and the putting of it into successful operation, and for no other purpose. The city and the parties of the second part both agree that the city shall not in any manner become liable for the payment for said waterworks out of its general fund or general revenue, but that the contractor shall look alone to the special fund to be created as hereinbefore provided for payment, and the city assumes no other or further liability or obligation than the creation and execution of said trust and the faithful application of the trust fund to the payment for said waterworks plant as provided for by the ordinances of said city and its plans and specifications."

Thereafter, at an election called for that purpose, as provided by law, this contract was ratified and approved by the vote of the people. Upon these conceded facts the plaintiff, who is a citizen and taxpayer of the city, brings this action, alleging that the effect of said contract, and of the ordinances under which it was executed, is to create an indebtedness against said city in excess of the constitutional limit, and should, therefore, be enjoined.

1. The Code provisions under which defendant justifies its contract are found in the following sections:

"Sec. 742. Tax-sinking fund. Cities of the first class shall have power to levy, in addition to the regular water tax authorized by law, a tax of 2 mills upon the dollar upon all the property within the corporate limits of said cities, excepting lots greater than 10 acres in area, used for horticultural or agricultural purposes, for the purpose of creating a sinking fund, to be used as provided in this chapter, for the purchase or erection of waterworks in such cities. . . .

"Sec. 743. Diversion of fund. Any member of the city council, or any officer of any city levying and collecting taxes under the provisions of this chapter, who shall in any manner participate in or advise the diversion of any part of said tax to any other purpose than that provided for in this chapter, shall be deemed guilty of the crime of embezzlement, and shall be punished accordingly.

"Sec. 744. Cities of the first class are hereby authorized to purchase or erect waterworks, under the provisions of this chapter, for the purpose of supplying said cities and the inhabitants thereof with water, and are authorized to continue the levy of the 2-mill tax herein provided for, until the purchase price, principal and interest, or the cost incurred in the erection of said works, is fully paid and discharged."

Section 745, as amended by chapter 23, Acts 27th Gen. Assem.: "Cities levying such sinking-fund tax are hereby authorized to contract for the purchase or erection of waterworks, and, upon the approval and adoption of such contract as hereinafter provided, to apply such sinking fund upon the cost thereof, and cities so purchasing or constructing and those now owning such waterworks are authorized to pledge the proceeds of the continuing 2-mill levy provided for in this chapter, and the regular water levy and the net revenues derived from the operation of the waterworks, and shall have the right to mortgage or bond such works, to secure the payment of the purchase price or the cost of constructing such waterworks, but no part of the general fund of such cities shall be applied upon such contracts, bonds, or mortgages. In the payment thereof, the city and holders of said contracts, bonds, or mortgages shall be restricted to the proceeds of the said taxes and the net revenues of the said waterworks, as hereinbefore provided; and such contract or bonds shall not bear a higher rate of interest than 5 per cent per annum, payable semi-annually."

"Sec. 894. Any city shall have power to levy annually the following special taxes: . . . (5) A tax not exceeding, in any one year, 5 mills on the dollar, which, with the water rates or rents authorized, shall be sufficient to pay the expenses of running, operating, and repairing waterworks owned and operated by any city or town and the interest on any bonds issued to pay all or any part of the cost of the construction of such works; but such tax shall not be levied upon property which lies wholly without the limits of the benefit and protection of such works, which limits shall be fixed by the council each year before making the levy."

These sections indicate beyond all question the intention of the legislature to empower cities of the first class to purchase or erect waterworks, and to provide a plan by which the cost of such improvement may be met. An examination of the ordinances and contract in controversy make it equally clear that the defendant city has kept within the powers sought to be conferred by the statute above quoted. It follows that the contract is valid; and its performance cannot be enjoined, unless we find it void by reason of the provision in our state Constitution which reads as follows (§ 3, art. 11): "No county or other political or municipal

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corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding 5 per centum on the value of the taxable property within such county or corporation." The statute we have under consideration does not, in terms or by necessary implication, provide for the creation of any indebtedness by a city in excess of the limit here named, and therefore cannot be said to be void for unconstitutionality.

2. But the finding of the constitutionality of the statute does not necessarily imply the validity of all contracts made thereunder, for, if the obligation assumed by the city in such an enterprise is a "debt" within the meaning of the Constitution, it is valid only when such debt is within the 5 per cent limit. Here we have indicated the vital question in the case before us. Does the contract create an indebtedness against the city? If answered in the affirmative, the judgment of the trial court is right, and must be affirmed; but, if answered in the negative, the judgment should be reversed, and the injunction dismissed. Many of the state Constitutions contain a restriction upon municipal indebtedness substantially like that above quoted from our own, and, where such provision is not ingrafted upon the Constitution, restraint of like nature is generally exercised by legislative enactment. Given its plainest and most literal signification, the word "indebtedness" includes every obligation by which one person is bound to pay money, goods, or services to another. Webster Dict. *Debt*. Such is undoubtedly the meaning of the word in the common usage of English-speaking people, and there are not wanting authorities which extend it to mere moral obligations arising from contracts unenforceable at law. *Baltimore* v. *Gill*, 31 Md. 375. As applied to a municipal corporation, "debt," if given its broadest signification, would include, not only obligations for extraordinary expenditures, but every outstanding warrant upon the treasury, the accruing salaries of officers, and expenses daily arising for water supply, street lighting, street repairs, and other like legitimate purposes. It can be readily seen that such rigid literal interpretation of the word in construing the constitutional provision would completely paralyze municipal power in every city whose debt has reached the prescribed limit, and, while courts have propounded the general proposition that the language of the Constitution in this respect is "exceedingly broad, and should have no narrow or strained construction" (*French* v. *Burlington*, 42 Iowa, 614), and must be given "its fair and legitimate meaning and general acceptation" (*Grant* v. *Davenport*, 36 Iowa, 401; *Springfield* v. *Edwards*, 84 Ill. 626), a careful examination of the decisions discloses the fact that in substantially every jurisdiction the word "debt" or "indebtedness," as used in the limitation placed upon municipal power, is given a meaning much less broad and comprehensive than it bears in general usage. This tendency has been more marked in some states than in others, with the result that the decisions are sufficiently at variance to fairly justify the statement of an eminent court that, "in view of the warring among the adjudged cases, it is not easy to affirm that the word 'debt' has a firmly settled meaning." *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416. That "debt" has not a fixed or invariable signification is illustrated by the following authorities: Bouvier defines it as "a sum of money due by certain and express agreement." See also, to the same effect, 1 Jacob, Law Dict. 197, 198. But Bouvier further says that "in an enlarged sense the term denotes any kind of just demand," which latter definition is broad enough to include claims based upon tort as well as contract. In *Stokes* v. *Mason*, 10 R. I. 261, "debt" is held to be equivalent to "claim" or "demand;" but in *Cable* v. *McCune*, 26 Mo. 382, 72 Am. Dec. 214, the contrary doctrine is held. An obligation which is not yet due and payable has been held not to constitute an "indebtedness." *Lum* v. *The Buckeye*, 24 Miss. 565. See also *Trowbridge* v. *Sickler*, 42 Wis. 419; *Slutts* v. *Chafee*, 48 Wis. 618, 4 N. W. 763. To the contrary, see *Yocum* v. *Allen*, 58 Ohio St. 280, 50 N. E. 909. A contingent liability to pay is not an "indebtedness." *Wentworth* v. *Whittemore*, 1 Mass. 471; *People* v. *Arguello*, 37 Cal. 524; *May* v. *Hammond*, 144 Mass. 151, 10 N. E. 751. To the contrary, see *Berg* v. *Radcliff*, 6 Johns. Ch. 302; *State* v. *Medbery*, 7 Ohio St. 535; *Springfield* v. *Edwards*, 84 Ill. 632. Fines and penalties are not debts. *State* v. *Mace*, 5 Md. 337; *Robertson's Case*, 27 Tex. App. 628, 11 S. W. 669. To the contrary, see *Re Shaner*, 39 Fed. 869. An equitable obligation to pay is a debt. *Longworth* v. *Mitchell*, 26 Ohio St. 334; *Thompson* v. *Thompson*, 4 Ohio St. 351. To the contrary, see *People ex rel. Stephens* v. *Halsey*, 37 N. Y. 344. These illustrations might be continued almost indefinitely.

The extent to which it has been held that cities may assume "obligations" without incurring "debt" within the meaning of the Constitution may be seen by reference to a few illustrative cases. In *Dively* v. *Cedar Falls*, 27 Iowa, 227, we held that, if a city has the means in its treasury to meet its indebtedness, the issuance of warrants in excess of the 5 per cent limit is not a violation of the constitutional prohibition. Going a step farther, it has been held that a city may "anticipate" the collection of taxes, and in defraying ordinary expenses may make appropriations and incur valid obligations to pay "in advance of the receipt of its revenues," even though the treasury be empty, and the city be otherwise indebted to the full limit. *Grant* v. *Davenport*, 36 Iowa, 396. Warrants issued in anticipation of the revenue do not come within the constitutional restriction, notwithstanding the revenue impliedly pledged to their payment is wrongfully diverted to other uses. *Phillips* v *Reed*, 107 Iowa, 331, 76 N. W. 850, 77 N. W 1031; *Cedar Rapids* v. *Bechtel*, 110 Iowa, 198, 81 N. W. 468. The city may enter into a valid contract covering a long term of

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years for water, lights, and other similar expenses, agreeing to pay therefor in installments as furnished, although the aggregate of payments thus to be made is largely in excess of the 5 per cent limit; the explanation assigned for this holding being that the debt for each year is not to be considered as accruing until the service for that year has been rendered. *Grant* v. *Davenport*, 36 Iowa, 396; *McBean* v. *Fresno*, 112 Cal. 159, 31 L. R. A. 794, 44 Pac. 358; *Saleno* v. *Neosho*, 127 Mo. 627, 27 L. R. A. 769, 30 S. W. 190; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416. Salaries of public officers, court expenses, and other money obligations imposed upon municipalities by the Constitution or by statute are not rendered uncollectible by reason of a general indebtedness to the constitutional limit. *Lewis* v. *Widber*, 99 Cal. 412, 33 Pac. 1128; *Rauch* v. *Chapman*, 16 Wash. 568, 36 L. R. A. 407, 48 Pac. 253; *Grant County* v. *Lake County*, 17 Or. 453, 21 Pac. 447. The same doctrine is impliedly indorsed by this court, *arguendo*, in *Grant* v. *Davenport*, 36 Iowa, 396. A contrary view is indicated in *People ex rel. Seeley* v. *May*, 9 Colo. 98, 10 Pac. 641, but the same court has so far departed from its rule of strict construction as to hold that a county indebted to the full constitutional limit may lawfully assign its annual revenue accruing from uncollected taxes, provided such assignments are not in excess of the annual levy. *People ex rel. Seeley* v. *May*, 9 Colo. 404, 12 Pac. 838. This rule also prevails in Illinois, where the court is disposed to construe the restriction upon indebtedness very strictly against all municipal corporations. It is there held, in effect, that city warrants issued in anticipation of its revenues are to be treated as assignments to the holder. It is further held that the holder of such warrants assumes the risk of the taxes proving sufficient for their payment, and that such instruments do not represent any municipal debt. *Springfield* v. *Edwards*, 84 Ill. 632. In *Dively* v. *Cedar Falls*, 27 Iowa, 227, this court said: "If A should undertake to build a courthouse within three years, doing so much, and to be paid accordingly, each year, the obligation of the contract would arise when executed, but the indebtedness, under the Constitution, . . . would be measured by that to be paid each year." The point thus illustrated not being directly involved in that case, the language quoted has been called "pure *dictum*." *Windsor* v. *Des Moines*, 110 Iowa, 188, 81 N. W. 476. The principal announced in the *dictum* just quoted is approved by the supreme court of California as good law. In an action upon a contract for the building of a courthouse the county sought to avoid liability on the ground that the contract price of the work was in excess of the revenue for the year in which the contract was made, and therefore in violation of the Constitution prohibiting such indebtedness. The court refused to sustain this objection, and held that the contract did not, at the time of the execution thereof, create any liability, but the debt was one which arose from year to year in separate amounts. *Smilie* v. *Fresno County*, 112 Cal. 311, 44 Pac. 556. See also 1 Dill. Mun. Corp. 3d ed. 135, and *Weston* v. *Syracuse*, 17 N. Y. 110.

There are yet other obligations more analogous to the contract in the present case, which are usually held not to create municipal indebtedness in the constitutional sense of the term. Among these are contracts for the construction of sewers, street improvements, and other works, the expense of which is by special assessment laid upon certain specific property or districts supposed to receive special benefits from the work so performed. In such cases, though the money may be payable through the general treasury, and though the city may have issued certificates, warrants, or bonds therefor, yet, if the contract be such that its nonpayment will not justify a judgment against the city, or the enforcement of a charge against its assets, or a resort to general taxation, it does not create an indebtedness of the city. *Quill* v. *Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Davis* v. *Des Moines*, 71 Iowa, 500, 32 N. W. 470; *Clinton* v. *Walliker*, 98 Iowa, 655, 68 N. W. 431; *Baker* v. *Seattle*, 2 Wash. 576, 27 Pac. 462. In connection with these special assessment cases, it may also be remarked that we have lately held the city liable generally to the contractor for a failure to make proper special assessments for the work done, and that the liability thus incurred is not affected by the constitutional limitation. *Ft. Dodge Electric Light & P. Co.* v. *Ft. Dodge*, 115 Iowa, 568, 89 N. W. 7. But the doctrine that an obligation payable out of a special fund, and not enforceable against the municipality generally, is not a municipal indebtedness within the meaning of the constitutional limitation, has not been confined to the matter of special assessments. It is true there are many cases in which, notwithstanding the creation of a special fund for the payment of the claim, the courts have held the contracts void, as being in violation of the Constitution; but, as we shall hereinafter see, these holdings are largely based upon the fact that, notwithstanding such special fund, the contracts have been so framed as to provide, also, for a general liability upon part of the city. Illustrative of this statement, we may cite *State, Read, Prosecutor*, v. *Atlantic City*, 49 N. J. L. 558, 9 Atl. 759. Under the law of New Jersey the city had no power to incur indebtedness in excess of $35,000. The city having undertaken to make improvements in excess of the limitation and in excess of the current revenues, the contract was held void. In pronouncing the law of the case, the court, after referring to the authorities, proceeds: "It is impossible, perhaps, to entirely reconcile these cases. The true interpretation of such restrictions on municipal indebtedness, in my judgment, lies between the extremes they exhibit. The plain object of such restrictions is to require that all moneys which are to be paid for municipal expenses after the debt has reached the fixed limit shall be raised by taxation. In view of this object, it is

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clear (and all the cases agree in this) that prohibitions . . . are not to be construed as limited to obligations which are debts *eo nomine*, but are to be extended to all contracts for the payment of money, or contracts whereon the payment of money may be enforced. But where the money to be paid upon such contracts is provided for to be raised by taxation under some fixed and definite scheme, such contracts are not, in my judgment, within such prohibitions. Where, however, the money required to meet such contracts is not provided for, either by being legally ordered to be raised by taxation and appropriated for that purpose, or by some legislative scheme which positively prescribes that it shall be raised by taxation and appropriated for its payment as needed, then such contracts do increase the indebtedness . . . within the meaning of such prohibitions." The same idea is announced by the supreme court of Indiana in *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467, where it is said: "By 'indebtedness,' in this connection, we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement." This language is quoted with apparent approval in *Beard v. Hopkinsville*, 95 Ky. 239, 23 L. R. A. 402, 24 S. W. 872, a leading case usually cited in support of the doctrine of strict and literal construction of the Constitution. See also *People ex rel. McCullough v. Pacheco*, 27 Cal. 175. It has also been decided that a contract by a city for the construction of a system of waterworks, whereby 75 per cent of the income from such works is to be set aside as a special fund for the payment of the expense thus incurred, and the contractor undertakes and agrees to look to such fund alone for his compensation, and obtains no right of recovery out of the general funds of the city, does not create any municipal indebtedness. *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365. It has been said by some courts that it is not essential to the existence of debt that the creditor shall have any remedy at law or in equity for its enforcement. *Baltimore v. Gill*, 31 Md. 375; *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854. On the other hand, it is held by the supreme court of Wisconsin that debt "denotes, not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment." *Perrigo v. Milwaukee*, 92 Wis. 236, 65 N. W. 1025; *Milwaukee v. Milwaukee County*, 95 Wis. 424, 69 N. W. 819; *Burnham v. Milwaukee*, 98 Wis. 128, 73 N. W. 1018. The cases last cited, though not parallel in fact, have a direct and important bearing upon the question as to the effect of a contract with a city whereby the municipality, although undertaking the expenditure of money, is expressly exempted from liability to suit or judgment for the enforcement of the agreement. Wisconsin has a constitutional limitation upon municipal indebtedness much like our own. By an act of its legislature power was given to cities to "purchase upon credit" lands for public parks, and to that end it was provided that "for that purpose the proper officers of said city may execute and deliver to the vendor of such land . . . an instrument creating a lien thereon . . . for such purchase money, without creating any corporate liabilities therefor, to secure the whole or any part of the price in instalments." Acting under the authority thus conferred, the city of Milwaukee purchased lands on credit to a large aggregate amount. These contracts provided that, in case the city should make a certain payment in cash at the execution of the contract, and the remainder of the agreed price in specified future instalments, then the seller would, on demand, convey the said land to the city by deed with the usual covenants. In the meantime the city was entitled to the use and possession of the premises, but in case of failure to make the payments as agreed the seller should have the right by action at law or in equity to foreclose the city's right of redemption, and sell the land to make his claim. It was further agreed that the unpaid portion of the purchase price should not create a corporate liability against the city in any manner or form. These contracts were the subject of litigation in the three cases last mentioned, and in each instance were held to create no municipal indebtedness. The authority of these holdings has been expressly recognized by this court. See *Windsor v. Des Moines*, hereinafter referred to. The Montana court in a recent case, after reviewing its former decisions and other precedents, states the rule as follows: "When a municipality has exceeded the constitutional limit of indebtedness, a contract for a water supply under which the city is liable generally is the incurring of an indebtedness within the meaning of the Constitution." In such case the liability is general, and is payable out of all its revenues. But when the liability is special, and is limited to the amount of the special tax, the levy of which is expressly authorized by law, it is not such an indebtedness. *State ex rel. Helena Waterworks Co. v. Helena*, 24 Mont. 521, 55 L. R. A. 336, 63 Pac. 104.

Of the leading cases cited in opposition to the general line of authorities we have cited, perhaps none are more nearly in point than the following, already mentioned: *Baltimore v. Gill*, 31 Md. 375; *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854; *Springfield v. Edwards*, 84 Ill. 632; *Beard v. Hopkinsville*, 95 Ky. 239, 23 L. R. A. 402, 24 S. W. 872. Of these it may be said that none pass directly upon the question as to the effect of a contract in which corporate liability is expressly waived, and the source of payment is limited to a special fund or special tax provided for by law for that express purpose. In *Baltimore v. Gill* the city was the owner of certain securities, which it undertook to put up as collateral to a loan, and sought to avoid the constitutional limitation by providing for a sale of the collateral, instead of an action against the city, and the court very

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properly held the contract void. With this result we may readily agree without feeling bound to adopt all the reasoning made use of in the opinion. It is enough to say the decision is not here in point. Of *Brown* v. *Corry* it may be said that one of the points most forcibly made by the court was that the contract there invalidated did in fact impose a general liability upon the city. In *Springfield* v. *Edwards* the question turned upon the right of the city to anticipate taxes for the current year, and the opinion expressly declines in part to follow the precedent already set by the Iowa cases. *Beard* v. *Hopkinsville* involved a matter of water rentals and street lighting, for the expense of which no special fund or special tax was provided.

If, now, we turn to our own decisions, we find that the principle involved in the present appeal has been more or less directly considered by us on several occasions. As already shown, we are firmly committed to the doctrine that bonds or certificates made payable from the proceeds of special assessments upon property or districts for local improvements are not evidences of city indebtedness. *Davis* v. *Des Moines*, 71 Iowa, 500, 32 N. W. 470; *Clinton* v. *Walliker*, 98 Iowa, 655, 68 N. W. 431; *Tuttle* v. *Polk*, 92 Iowa, 433, 60 N. W. 733. This is equally true as to the right of the city, indebted to the constitutional limit, to anticipate its revenues for current expenses. *Grant* v. *Davenport*, 36 Iowa, 396; *Tuttle* v. *Polk*, 92 Iowa, 433, 60 N. W. 733. We have also given our adherence to the doctrine that under a contract for water rentals for a series of years no indebtedness arises except as the service contracted for is rendered. *Grant* v. *Davenport*, 36 Iowa, 396; *Creston Waterworks Co.* v. *Creston*, 101 Iowa, 687, 70 N. W. 739. We have held that a city may, under some circumstances, "assume an obligation to pay money without incurring a debt in the constitutional sense." *Tuttle* v. *Polk*, 92 Iowa, 433, 60 N. W. 733. In *Dively* v. *Cedar Falls* we said, in effect, that, if the city had funds applicable to their payment, warrants drawn in excess of the 5 per cent limit do not represent an indebtedness as the word is used in the Constitution. In *Grant* v. *Davenport* we reasserted that doctrine, and further held that, even if there be no money in the treasury, yet current expenses incurred in anticipation of the collection of taxes duly levied do not constitute such indebtedness. The theory upon which this holding is justified is said to be that, while the right to use the current revenues actually in the treasury for current expenses, even as against the claim of creditors, "is absolutely necessary to the life of the municipality and to the successful accomplishment of the purposes of its creation," it is equally legitimate to make such appropriation "in advance of the receipt" of the revenues, 'because that the revenues will be received is a legal certainty." In this proposition, so clearly stated by Cole, J. (*Grant* v. *Davenport*), is to be found, in our judgment, the principle which underlies all the cases which hold that obligations incurred in anticipation of revenues yet to be collected and those incurred in anticipation of or reliance upon a special fund pledged to their payment are not to be regarded as "debts" in applying the constitutional limitation. Moneys the receipt of which is thus assured are regarded as for all practical purposes already in the treasury, and contracts made upon the faith thereof are treated as cash transactions. No deficiency is created, and therefore no debt. In other words, so long as any particular fund has cash in the treasury, or taxes which can be legally anticipated for its benefit, no appropriation thereof within the limits of such actual and prospective revenue will have the effect to create an indebtedness. *Burlington Water Co.* v. *Woodward*, 49 Iowa, 58, presented a case where the city, acting under statutory authority, entered into a contract with a private corporation to construct certain waterworks under an agreement whereby a special tax was levied from year to year, and the moneys thus realized, together with the earnings of the system, should constitute a water fund. This fund was made to provide for the payment of the interest on bonds issued by the company, for the purchase or retirement of said bonds from time to time, for taxes and expenses, for a specified dividend to stockholders, and for the creation of a sinking fund for the extension and improvement of the works. The special tax was never to be so far diminished as to prevent the payment of the specified dividend upon the stock of the company. It was also agreed that, when the financial condition of the city would admit, it had the right to purchase and control the works by assuming the duties and liabilities of the company. The mayor of the city was required to indorse upon each bond of the company a certificate showing the assessed value of the property upon which the special tax was annually to be levied, together with a stipulation that from the water fund the city would pay the interest, and pay the farther sum of $2,000 annually into the sinking fund, before any money should be taken out of said water fund for any other purpose. It will be seen from this statement that the obligation of the city was, not only to levy the special tax for the current year, but to continue the same undiminished through a period of years in the future, for the benefit of the water fund, from which it agreed to pay the interest accruing to the bondholders, the yearly debt to the sinking fund, and dividends to the stockholders,—an obligation which would seem to contain all the essential elements of debt if we adhere strictly to the lexicographers' definition of the word. Relying upon that theory, the mayor of the city refused to make the agreed certificate upon the bonds, and, suit being brought to compel such action on his part, he answered, among other things, that, at the time the contract with the water company was entered into, the city was already indebted to an amount exceeding the constitutional limit. To this answer a demurrer was sus-

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tained, and upon appeal to this court the ruling was affirmed. This decision does not turn, as counsel for appellee seem to think, upon the rule in the *Grant Case* and *Creston Case*, to the effect that contracts for water rentals create indebtedness only as the successive instalments may be earned; but is expressly made to rest entirely upon these two propositions: (1) That the provision as to the purchase of the works provides for a mere option which the city was under no obligation to exercise, and therefore no debt was thereby incurred; and (2) that the agreement to pay the interest upon the bonds, the instalments to the sinking funds, and dividends to stockholders was limited to the special tax alone, and therefore did not create a municipal indebtedness. In reference to this latter proposition, it is said: "The tax required to be levied is clearly authorized by the statute, and such tax, together with the income of the company derived from other sources, the ordinance expressly provides shall pay all obligations assumed by the city. If it does not, neither the bondholders nor company have any claim on the city for the deficiency. The obligation of the city is to levy the tax, and see that the amount collected is applied to the specified purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city; and it is difficult to conceive that there can be such a thing as a debt which is never to be paid. No burden is created thereby, and there cannot be such an indebtedness. In a constitutional sense, the prohibited indebtedness must be a burden, and payable by the city from funds which could not constitutionally be appropriated to that purpose." This authority, reduced to briefest terms, distinctly holds that the city may levy a special tax for a public purpose whenever expressly authorized by the legislature to do so; that such special tax may be pledged or appropriated for a series of years in advance in furtherance of the purpose for which it is provided; that the city may by contract limit its liability to the mere duty of levying and collecting the special tax, and that under such contract no municipal indebtedness is incurred within the meaning of the Constitution. In *French* v. *Burlington*, 42 Iowa, 614, the court, in declaring the invalidity of certain city indebtedness, is careful to say: It must not be overlooked that the debt thus created was payable out of the current revenues of the city, and not from any special fund. In *Allen* v. *Davenport*, 107 Iowa, 90, 77 N. W. 532, on the validity of a certain paving contract and certain bonds issued by the city, to be paid only from special assessments, we found the contract void because it bound the city generally for the cost of paving, and was in excess of the constitutional limit; but the bonds were not invalidated because payable out of a special fund, and no general corporate liability was assumed. We there said, after citing the language above quoted from *Burlington Water Co.* v. *Woodward:* "From this quotation we are able to gather the true rule. If the city obligates itself to pay, no matter what its revenues from special assessments, a debt is created, which falls within the constitutional inhibition. If, however, it simply appropriates a part of its revenues, and pledges them to the payment of the obligation, or if it simply undertakes, as trustee or agent, to collect these assessments, and apply them upon the work, without liability on its part for anything further, then no debt is created. Or if it appears that it has on hand at the time the debt is created a sufficient fund to meet the indebtedness, or if the debt is payable in instalments, and it has enough in its hands at the time the instalments mature to pay them, then there is no debt in a constitutional sense." The case of *Windsor* v. *Des Moines*, 110 Iowa, 175, 81 N. W. 476, involved a contract entered into by the city for the construction of an electric-light plant, and the question which we there undertook to decide was whether such contract created a debt within the constitutional inhibition. That question was decided in the affirmative, and the contract held to be void, as creating a debt beyond the 5 per cent limit. The opinion clearly recognizes the distinction between contract obligations limited to a special fund provided for that purpose and those which are not thus secured,—a distinction which clearly differentiates the contract there under consideration from the one presented by this appeal. We there called special attention to the fact that, "at the time the . . . contract was entered into, there was no statute authorizing a special levy for the purpose of constructing electric-light plants, and the warrants, when issued, could only be paid out of the general funds;" and cited with approval the language used in *Burlington Water Co.* v. *Woodward* to the effect that, where a special tax is authorized, and the contractor agrees to look to that alone for his compensation, no corporate liability or indebtedness is created. And again, in the same opinion, after pointing out the distinction between contracts to procure lights for a city and contracts to construct plants for that purpose, and holding the latter is not such an expense as will permit any anticipation of the ordinary revenues of the city, we say: "But where the contract is for the erection of electric-light plants, or for any other improvement, and the time of payment is postponed to a later date, and no special tax for the purpose of erecting such works is authorized, the rule seems to be well settled that the sums to become due in the future must all be taken into account in estimating the . . . indebtedness of the municipality." This language, taken in connection with the entire discussion, is tantamount to an express declaration that, had there been at that time, as there is in the present instance, clear statutory authority for the levy of a special tax for such work, and the contract had exempted the city from all corporate liability except to collect and pay over such special fund, then the obligation of the city would not be municipal indebted-

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ness within the meaning of the Constitution. In the same case (p. 182, 110 Iowa, p. 478, 81 N. W.), we had occasion to pass upon a contract by the city for the purchase of cemetery grounds for a large sum of money, part of which was paid down, and the remainder to become due in instalments, but reserving to the city the option to quit paying at any time and take title to so much of the premises as had been paid for. On the authority of *Burnham* v. *Milwaukee*, 98 Wis. 128, 73 N. W. 1018, we held that this contract created no indebtedness, because the seller had no claim or demand which could be enforced against the city except to reclaim the land agreed to be sold. In so far, then, as the decision in *Baltimore* v. *Gill*, 31 Md. 375, is not in harmony with the *Burnham Case* (if in fact there be any conflict), it is to be noted that this court has declined to recognize its authority. In the *Allen Case*, already referred to, after a careful review of the cases we declared it to be "the settled rule of this state that, where the money to be paid upon contracts is provided for to be raised by taxation upon some fixed and definite scheme, such contract is not within the prohibition." The force of this declaration is not to be broken by the suggestion that we were then discussing the question of special assessments, as distinguished from special taxation, for the contract there in litigation was one by which the city undertook to pay the cost of paving out of its general revenues.

Some confusion has arisen in the cases as to the extent of the right to anticipate the collection of taxes. We think, however, it is fairly well settled that, as applied to the ordinary revenues, that right undoubtedly does not extend beyond the current year, nor can it be exercised as to such revenues for any purpose beyond the payment of ordinary expenses. This is so for the very good reason (to say nothing of other obvious objections) that the rate and levy of such taxes are matter of yearly adjustment, and the revenues to be derived from future levies, as well as the amounts which may be required, are, of necessity, uncertain. *Windsor* v. *Des Moines*, 110 Iowa, 193, 81 N. W. 476. For the current year, the rate having been fixed, and levy made, the receipt of the revenue, as we have said, is "legally certain," and is treated as cash actually in the treasury, and therefore, under the rule in the *Divcly Case* and *Grant Case*, an appropriation thereof in advance of the receipt creates no debt. If, then, a city enters into a contract for an extraordinary expenditure within the scope of its power, and under express statutory authority provides a special or extraordinary fund, either by tax contemporaneously levied for that purpose alone and for the full amount, or by some "fixed and definite plan" of special taxation extending over a period of years, is not the receipt of such revenue "legally certain," and subject to appropriation, in advance of its actual collection, without the incurring of an indebtedness? If there be any soundness in the reasoning upon which the *Dively Case* and the *Grant Case* are made to rest, it applies with no less persuasive force to the case we have just supposed, which is, in substance, the case at bar. It must be borne in mind that the limit provided by the Constitution is upon the power to contract indebtedness, and not upon the power of taxation. It will doubtless be conceded that it would be competent for the legislature to authorize a city to levy in a single year a special tax sufficiently large to construct a suitable system of waterworks. Suppose, then, that under such a statute the city levies the necessary tax, and proceeds at once to let the contract in anticipation of the revenue thus provided. Can it be urged, in the light of the authorities, that this contract creates a municipal debt? We think not. Nor can we conceive that the fact of the tax being extended over a period of years, instead of being all levied in a single year, affects the application of the principle. The plan of taxation is fixed and definite, and its levy and collection from year to year is subject to no discretion, and is as certain in every legal sense as if levied in a single instalment. As tending in some respects to support this conclusion, see *Burlington Water Co.* v. *Woodward*, 49 Iowa, 58; *Witter* v. *Polk County*, 112 Iowa, 380, 83 N. W. 1041. If, to carry the illustration a little farther, and make its aptness to the present case more apparent, we suppose that by the terms of the statute authorizing such taxation, and by the terms of the city ordinance and of the contract entered into thereunder, no suit can, in any event, lie against the city to recover from its general revenues the amount to be paid for the work done, we are then brought within the principle controlling the decisions in *Winston* v. *Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner* v. *Seattle*, 19 Wash. 320, 53 Pac. 365; *Perrigo* v. *Milwaukee*, 92 Wis. 236, 65 N. W. 1025; *Burnham* v. *Milwaukee*, 98 Wis. 128, 73 N. W. 1018; *Burlington Water Co.* v. *Woodward*, 49 Iowa, 58.

The Illinois court, in *Springfield* v. *Edwards*, 84 Ill. 632, in effect announces the same doctrine. It is there said, in substance, that the collection of revenues may be anticipated by warrants drawn in favor of creditors of the city, provided that circumstances are such that the creditors may be regarded as accepting such warrants and the anticipated funds as a complete discharge of their claims, and as waiving all other resort against the municipality. After referring to other decisions, the court proceeds: "The principle, as we understand, is, there is in such case no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made, and the warrant or order . . . is issued and accepted, the transaction is closed on the part of the corporation, — leaving no future obligation, either absolute or contingent, upon it, whereby its debt may be increased." It is true the court confines its application of this rule to cases where the tax is actually levied before the appropriation is made, and not to taxes to

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be levied in the future; but it was there dealing with general or ordinary taxes alone, and, in our view, where a specific and definite tax for a period of years is legally provided for, and the revenue thus certainly assured cannot legally be used or applied to any other purpose, the rule thus announced is fairly in point. The money is in fact provided for, and, under the doctrine of *Springfield* v. *Edwards*, its appropriation in advance of its receipt operates, in effect, as an assignment of the city's interest therein,—"an exchange of one thing for another,"—with no resulting increase of the municipal debt; and if, for any reason, the special fund proves insufficient to satisfy the claim made thereon, the loss is the loss of the contractor, and not of the municipality.

The record before us presents a case fairly within the limit of permissible contracts as indicated in the authorities we have here discussed. The statute expressly authorizes the appellant city to construct waterworks. It also authorizes the creation of a special fund from which the expense of such works shall be met. It exempts the city and its general revenues from all liability for such expense. The city has formally accepted the terms of the statute, and let the contract for the construction of the works. The special fund authorized by the statute has been duly created. The scheme or plan of taxation for the benefit of said fund is fixed, definite, and certain, and the diversion of the moneys thus arising to any other purpose is strictly prohibited. The electors of the city have ratified the contract by popular vote. The end sought to be accomplished by such enterprise is one of public utility, and we find no good reason to condemn it as an unconstitutional exercise of municipal power. In reaching the conclusion we do not overlook or minimize the importance of observing every provision of the Constitution according to the evident meaning of the language employed. No rule of construction is better established, nor can the courts be justified in departing therefrom either to avoid apparent hardship or to promote a desirable end. But in this, as in every case where words are to be judicially applied, we are not justified in looking to the dictionaries alone, nor to common parlance alone, for the meaning to be given them. As held by us in *Allen* v. *Clayton*, 63 Iowa, 11, 50 Am. Rep. 716, 18 N. W. 663, we may, in a proper case, look beyond the mere form of words employed, and consider the evil intended to be remedied, the contemporaneous legislative construction and practical construction adopted by the people; and under that rule we held that the words "every stockholder in a banking corporation or institution"—words broad enough to include every banking corporation in the state—should be held to refer to banks of issue alone, and not to banks of deposit or discount. In determining whether a statute or contract is in violation of a constitutional provision, "the court looks at the essence as well as the form." *Clark's Case*, 65 Conn. 17, 28 L. R. A. 242, 31 Atl. 522; *State* v. *Conlon*, 65 Conn. 478, 31 L. R. A. 55, 33 Atl. 519. It is easy to say, in the language of some of the books, that "every word is to be expounded in its plain, obvious, commonsense meaning," but the words are very few which require no construction whatever. What is "plain and obvious" to one mind is not always equally clear to another, and the fact is no impeachment of the "common sense" of either. The wide difference of views manifested in the authorities we have mentioned demonstrates that "debt" is no exception to this rule. Were we to give the word the broad significance that some of the authorities would justify, we should destroy the corporate life and efficiency of every municipality which reaches the allowed limit of indebtedness. But the construction we give it has strong support in the decisions of the courts of other states, is in strict line with the opinion we have heretofore frequently expressed, and preserves the integrity of the Constitution according to its evident meaning and intent, while entailing no disastrous consequences to the city or to its citizens. The right of a city to construct and own works of public utility, if such right exists, is one of great importance, and should not be embarrassed or rendered nugatory by strained or technical construction of the Constitution or of the statutes. Its importance is not so much in the fact that public ownership is in itself wise or desirable (concerning which there may be much difference of opinion) as in the fact that with such power in reserve municipalities are placed in position to deal with private owners on equal terms, and avoid exactions which their helplessness might otherwise invite.

3. It is further said that the giving of a mortgage, as provided in this case, is in itself an evidence of indebtedness, and we are cited to the case of *Joliet* v. *Alexander*, 194 Ill. 457, 62 N. E. 861. The authority of that decision upon the question there decided may be conceded without in any manner modifying the opinion we have expressed. The city of Joliet, being already the owner of a system of waterworks with an established revenue of $10,000 per year, undertook to mortgage said property and pledge its revenues to secure bonds or certificates for a large amount of money with which to extend said system. The court held that, even though there was no right to recover a general judgment against the city, yet, as its existing property was pledged to the payment of the certificates, it constituted a debt,—a holding which is in accord with *Baltimore* v. *Gill*, 31 Md. 375. The decision proceeds, however, to draw a vital distinction, which should not be overlooked, in applying the constitutional restriction upon municipal indebtedness. It says: "What is said relative to mortgaging property owned by the city or pledging its existing income is not intended to apply to a mortgage purely in the nature of a purchase-money mortgage payable wholly out of the income of property purchased, or by resort to such property." Recognizing the same distinction, see *Kelly* v. *Minneapolis*, 63 Minn. 125, 30 L.

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R. A. 281, 65 N. W. 115; *Perrigo* v. *Milwaukee*, 92 Wis. 236, 65 N. W. 1025. In the case before us the mortgage is essentially a purchase-money mortgage. It covers no property already owned by the city, and in no manner involves the city in liability to lose any item of property or of income owned or held by it at the execution of such instrument. It must, therefore, be regarded as an exception to the general rule that a mortgage implies a debt upon the part of the mortgagor. *Burnham* v. *Milwaukee*, 98 Wis. 128, 73 N. W. 1018.

4. It is urged in behalf of the appellee that many of the cases adhering to the so-called "special fund" rule involve only the matter of special assessments for local improvements made by or upon order of a city, and therefore are not in point in this discussion. That the two lines of cases are distinguishable in their facts is clear, but that they are unlike in principle is not so apparent. Whether an improvement ordered be for a single street or for the entire city, it is in either case an exercise of the taxing power. *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625. By virtue of that power, the expense thus incurred may, under our statute, in most cases be assessed against all taxable property within the city, and paid out of the general revenue; or it may be assessed against the property in the immediate locality of the improvement. The improvement is not made for the benefit of the adjacent or abutting property, but for the benefit of the city generally; yet, in view of the incident increase in the value of such property, it is deemed just to charge it with the cost of the work, and leave the burden to be equalized by similar assessments against other property as such work shall from time to time be extended. The city orders the improvement, makes the necessary contracts therefor, and determines what form of taxation shall be employed to provide for the expense. If it undertakes the payment from the general revenue, and the expense is in excess of the amount which can properly be appropriated for that purpose from moneys on hand and in course of collection, then a "debt" is incurred to the amount of such excess; but if it creates a special fund by ordering the expense charged to the local district, and limits its liability to such fund alone, no debt is created,— not because there is any magic in the term "special fund," nor because one is charged against the entire city and the other against a part only, but because in the former case a deficiency is created in the funds applicable to such payment, and in the latter there is none. If, then, acting under proper legislative authority, the city, instead of charging itself generally with the cost of a public improvement and assuming the risk of any deficiency in its current revenues, provides a special tax upon all the property within its jurisdiction for the amount thus required, and pledges or appropriates it to that purpose without further liability on its part, is not the latter expedient to all intents and purposes within the letter and spirit of the rule which we apply to local assessments? Certainly it satisfies the requirement of *Allen* v. *Davenport*, 107 Iowa, 90, 77 N. W. 532, and *State, Read, Prosecutor*, v. *Atlantic City*, 49 N. J. L. 558, 9 Atl. 759, for the "money to be paid is provided for to be raised under a fixed and definite scheme of taxation." It is equally in accord with *Sackett* v. *New Albany*, 88 Ind. 473, 45 Am. Rep. 467, for "suitable provision has been made for the prompt discharge of the obligation."

The views above expressed render unnecessary any discussion of other questions argued by counsel.

The judgment below must be reversed, and cause ordered remanded for further proceedings in harmony with this opinion.

ILLINOIS SUPREME COURT.

CHICAGO UNION TRACTION COMPANY, *Appt.*,
v.
City of CHICAGO.

(199 Ill. 484.)

1. **Power to prescribe the compensation of horse car companies** is conferred on a municipality by charter authority to regulate hackmen, omnibus drivers, cabmen, "and all others pursuing like occupations, and to prescribe their compensation."

2. **Power to require the giving of transfer tickets** between street-car lines operated by one company is included in charter authority "to prescribe the compensation" of such companies.

3. **To entitle a company operating a system of street railways** which were originally constructed under charters granted to separate companies, to the benefit of contracts between the municipality and such companies fixing the rates of fare to be charged by them, it must show the assignment of such contracts to itself.

4. **An ordinance providing that the fare to be charged by a company au-**

NOTE.—For other cases in this series as to municipal regulation of street-railway fares, see Sternberg v. State (Neb.) 19 L. R. A. 570, and cases in *note* thereto; Rice v. Detroit, Y. & A. A. R. Co. (Mich.) 48 L. R. A. 84; and People *ex rel.* Jackson v. Suburban R. Co. (Ill.) 49 L. R. A. 650.

As to validity of ordinance requiring tickets to be kept for sale on street cars, see Detroit v. Ft. Wayne & B. I. R. Co. (Mich.) 20 L. R. A. 70.

As to power of legislature to fix street-railway rates, see *note* to Winchester & L. Turnp. Road Co. v. Croxton (Ky.) 33 L. R. A. 177.

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thorized to construct street railways within certain divisions of the municipality shall not exceed a certain rate "for any distance" does not give a right to charge a full fare upon every car, but entitles the passenger to travel any distance within such divisions for one fare, although in so doing it is necessary for him to change cars.

5. **Authority to a street car company to lease its franchises** and property does not include the right to transfer a privilege to fix the rates of fare to be charged, not exceeding a specified rate.

6. **Any doubt as to the right of a street railway company to fix its fares** within a specified limit will be resolved against such right.

7. **A corporation organized for the purpose of leasing street railroads** under the provisions of a general incorporation law which makes it subject to such regulations as the legislature may deem advisable is bound by a statute conferring on the municipality power to regulate its rates of fare, notwithstanding contract rights of the leased roads upon that subject.

8. **A street car company, by leasing its road and franchises, impliedly agrees that the lessee shall operate them** in accordance with the provisions of its own charter, so far as the provisions of the two charters are in conflict.

9. **An ordinance regulating the rate of fare** "to be charged" by street railway companies, and providing for transfers between lines which do "now or shall hereafter" join, connect, etc., is not limited to roads in existence at the time of its passage.

10. **Only when rates of fare are so unreasonable as to make the enforcement of the law** establishing them equivalent to taking property without compensation, will the corporation be held to have been deprived of its property without due process of law, or denied the equal protection of the laws.

(October 25, 1902.)

APPEAL by defendant from judgments of the Criminal Court for Cook County in plaintiff's favor in actions brought to recover penalties for defendant's refusal to give transfer tickets. *Affirmed.*

Statement by **Magruder**, Ch. J.:

Eleven actions were commenced by appellee, the city of Chicago, against appellant, the Chicago Union Traction Company, before a justice of the peace of the city of Chicago, in December, 1901, to recover penalties for the refusal by appellant to give to passengers on certain of its street-car lines transfer tickets entitling such passengers to rides upon certain other of its street-car lines. The first of these actions was to recover a penalty for the refusal by appellant to give to a passenger on its North Clark street-car line, running and operated in the North division of the city of Chicago, a transfer ticket entitling such passenger to a ride upon its Madison street-car line, running and operated in the West division of the city of Chicago. The second of these actions was brought to recover a penalty for the refusal by appellant to give to a passenger on its Madison street-car line, running and operated in the West division of the city of Chicago a transfer ticket entitling such passenger to a ride upon its North Clark street-car line, running and operated in the North division of the city. The third of these actions was brought to recover a penalty for the refusal by appellant to give to a passenger on its Van Buren street-car line a transfer ticket entitling such passenger to a ride upon its Halsted street-car line, both of said last-named car lines (one on Van Buren and the other on Halsted street) running and being operated in the West division of the city of Chicago. It is conceded that the street-car lines thus running upon the North and West sides, involved in the three actions thus named, are operated by the appellant, the Chicago Union Traction Company. These three actions, involving principally questions of law, and not questions of fact, were taken by this court at the June term, 1902, under one *agenda* number. They involve substantially the same questions, and are considered together as though they were one case. The other eight actions relate to transfer tickets from and to other lines than those already mentioned, alleged by the appellee to be operated by the appellant, and involve certain disputed questions of fact, not in controversy in the first three cases above named. Accordingly the eight actions, excepting and excluding the first three already named, were taken by the court at the June term under one *agenda* number, as one case, and are hereafter considered separately in another opinion.

All the actions are based upon §§ 1723 and 1725 of the Revised Code of Chicago, passed by the common council of that city on April 8, 1897; being a mere re-enactment of an ordinance passed by said council on June 2d, 1890. They have been brought for the purpose of testing the question as to the liability of appellant for refusing such transfers. In each of the three actions first above named, judgment was entered by the justice against appellant for $50 and costs, and from each of said judgments appeals were duly prayed and perfected to the criminal court of Cook county. In the criminal court of Cook county, jury was waived by agreement, and the causes were submitted to the court for trial on February 10, 1902. On March 19, 1902, the court found the appellant (defendant below) guilty in each of the three cases. In each case on April 7, 1902, judgment was rendered against appellant for $50 and costs, to which appellant then and there excepted. The present appeals are prosecuted from the three judgments, thus entered by the criminal court of Cook county, to this court.

Section 1723 is as follows: "The rate of fare to be charged by any person, firm, company, or corporation owning, leasing, running, or operating street cars or other vehicles for the conveyance of passengers on any street railway within the limits of the city of Chicago for any distance within the city limits, shall not exceed 5 cents for each passenger over twelve years of age, and half

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fare for each passenger over seven and under twelve years of age, for one continuous trip, except when such street cars or other vehicles shall be chartered for a specific purpose. And, at any point where any line of any street railway owned, leased, or operated by any person, firm, or corporation does now or shall hereafter, within the limits of the city of Chicago, join, connect with, cross, intersect, or come within a distance of 200 feet of any other line of street railway owned, leased, or operated by the same person, firm, company, or corporation, any passenger who shall have paid his fare on any street car or other vehicle run or operated on such first-mentioned line shall, on his request, be entitled to demand and receive from the person or persons in charge of such street car or other vehicle upon which he has so paid his fare, a transfer ticket, which transfer ticket shall entitle such passenger, without further charge, to be carried on any other one line adjoining, connecting, crossing, and intersecting, as aforesaid, and owned, leased, or operated by such person, firm, or corporation, for a continuous trip of any distance within the limits of the city of Chicago, if used within one hour after the same is issued at the point or place for which such transfer ticket was issued." Section 1725 is as follows: "For each and every violation of the provisions of the two last preceding sections, the person, firm, company, or corporation owning, leasing, or operating said street cars or other vehicles within said city shall be subject to a penalty of not less than $50.00, nor more than $200.00." 1 Chicago Rev. Code 1897, pp. 363, 364.

On August 16, 1858, the common council of the city of Chicago passed an ordinance entitled "An Ordinance Authorizing the Construction and Operation of Certain Horse Railways in the Streets of the City of Chicago." By § 1 of this ordinance "there is hereby granted to Henry Fuller, Franklin Parmelee, and Liberty Bigelow, and such other persons as may hereafter become associated with them, and to their executors, administrators, and assigns, permission, authority, and consent of the common council to lay a single or double track for a railway, with all necessary and convenient tracks for turn-outs, side tracks, and switches, in and along the course of certain streets in the city of Chicago hereinafter mentioned, and to operate railway cars and carriages thereon in the manner, and for the time and upon the conditions, hereinafter prescribed: Provided, that said tracks shall not be laid within 12 feet of the sidewalks upon any of the streets." By § 2 of the ordinance said parties are authorized to lay a single or double track for a railway in and along the course of certain streets therein named, some of them being in the South division of the city of Chicago, and others being in the West division of the city of Chicago. By § 4 it is provided that the common council shall have power at all times to make such regulations as to the rate of speed and time of running said cars or carriages as the public safety and convenience may require. Section 6 of said ordinance is as follows: "The rate of fare for any distance shall not exceed 5 cents, except when cars or carriages shall be chartered for a specific purpose. By § 7 it was provided that said parties, their associates and successors, should pay one third of the cost of paving, etc., the streets on which said railways should be constructed, and should keep parts of the streets in good repair and condition, etc. By § 9 it was provided as follows: "If the said parties, their associates or successors, shall hereafter become incorporated, the rights and privileges granted to them by virtue of this ordinance shall extend to such corporation for the time and upon the conditions herein prescribed, and when such act of incorporation shall have been obtained, such corporation shall have all the rights and privileges hereby granted, as the successors of said parties without further action of the common council." By § 10 it was provided that "the right to operate said railways shall extend to the full time of twenty-five years from the passage hereof," etc. Sections 3 and 8 of the ordinance or August 16, 1858, may be found in volume 2 of the Special Ordinances of Chicago of 1898, on pages 1042, 1043, and 1044. Section 3 provides that the cars to be used upon the tracks shall be operated with animal power only, and that said railways shall not connect with any other railroad on which other power is used, and no railway car or carriage used upon any other railroad in this state shall be used or passed upon said tracks. Section 8 provides that the rights and privileges granted to said parties shall be forfeited, unless said railways shall be commenced and completed within a certain time, etc.

On February 14, 1859, the legislature passed an act entitled "An Act to Promote the Construction of Horse Railways in the City of Chicago." By § 1 of this act it is provided "that Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage, and their successors, be, and they are hereby, created and constituted a body corporate and politic, by the name of 'The Chicago City Railway Company,' for the term of twenty-five years, with all the powers and authority incident to corporations, for the purposes hereinafter mentioned." Section 2 of said act is as follows: "The said corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks, and appendages, in the city of Chicago, and in, on, over, and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the South or West divisions of the city of Chicago, as the common council of said city have authorized said corporators or any of them, or shall authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges as the said common council has, or may, by contract with said parties, or any or either of them,

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prescribe; but said corporation shall not be liable for the loss of any baggage carried on said railways, kept in and under the care of its owner, his servant or agent." Both parties treat § 2 as using the following words: "In such manner and upon such terms and conditions, with such rights and privileges, as the said common council has or may, by contract with said parties, or any or either of them, prescribe." Section 3 of said act of February 14, 1859, is as follows: "The capital stock of said corporation shall be $100,000.00, and may be increased from time to time at the pleasure of said corporation. It shall be divided into shares of $100.00 each, and be issued and transferred in such manner and upon such conditions as the board of directors of said corporation may direct." Section 4 is as follows: "All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint. The first board of directors shall consist of said Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage, and thereafter of not less than three, nor more than seven, stockholders, who shall be chosen each and every year by the stockholders, at such time and in such manner as the said corporation shall by its laws prescribe. The said directors shall hold their offices until their successors are elected and qualified, and may fill any vacancies which may happen in the board of directors, by death, resignation, or otherwise. They may also adopt such by-laws, rules, and regulations for the government of said corporation and the management of its affairs and business, as they may think proper, not inconsistent with the laws of this state." Section 5 is as follows: "The said corporation is hereby authorized to extend the said several railways herein authorized to be built in the manner aforesaid to any point or points within the county of Cook in this state; and, to enable said corporation to construct any or all the railways therein authorized, or their appendages, the said corporation is hereby vested with power to take and apply private property for the purposes and in the manner prescribed by an act entitled 'An Act to Amend the Law Condemning Right of Way, for Purposes of Internal Improvement,' approved June 22, 1852, and the several acts amendatory thereof, and may exercise all the powers conferred upon railroad corporations by the 25th and 26th sections of 'An Act to Provide for a General System of Railroad Incorporations,' approved November 5, 1849, ascertaining and making recompense for all damages sustained, agreeably to the provisions of the act hereinbefore first mentioned." Section 6 is as follows: "The said corporation is hereby authorized, with the assent of the supervisor of any township, to lay down and maintain the said railway or railways in, upon, over, and along any common highway in said township, but in such manner as not to obstruct the common travel of the public over the same. In all cases where vehicles shall meet the cars or carriages of said railway, either in the city or country, said vehicles shall give way to the cars or carriages on the railway." Section 7 is as follows: "All of the rights and privilges granted, or intended so to be, to said Franklin Parmelee, Liberty Bigelow, Henry Fuller, and their associates, in and by the ordinances of the common council and the amendments thereto, are hereby in all things affirmed, and shall pass to and become vested in the corporation hereby created." Section 8 is as follows: "Nothing herein contained shall authorize the construction of more than a single track, with the necessary turnouts, which shall only be at street crossings upon State street between Madison and Twelfth streets, except by the consent of the owners of two thirds of the property in lineal measurement, lying upon said State street between Madison and Twelfth streets aforesaid; nor shall anything herein contained be construed to authorize the company hereby incorporated to permit cars of any other railroad company whatever, propelled by steam, to be run along or upon the railway of the company hereby incorporated." Section 9 is as follows: "The said company hereby incorporated shall, within two years from the passage of this act, erect, maintain, and operate two railways; one from Lake street to the southern boundary of the city, and one from the South Branch of the Chicago river on Madison street, to the western boundary of said city; and upon failure to do so, this act, and all the privileges and franchises hereby conferred, shall cease and determine." Section 10 is as follows: "All the grants, powers, privileges, immunities, and franchises conferred upon, and all duties and obligations required of, Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage, by this act, for the South and West divisions of the city of Chicago and the county of Cook, are hereby conferred upon and required of William B. Ogden, John B. Turner, Charles V. Dyer, James H. Rees, and Valentine C. Turner, by the name of 'The North Chicago City Railway Company,' for the North division of said city and said county of Cook, as fully and effectually, to all intents and purposes, as if they had been by a separate act, incorporated with all of said grants, powers, privileges, immunities, and franchises, conferred upon them, and all of said duties and obligations imposed upon them; and the said last-named corporation may take, hold, mortgage, and convey real estate." Section 11 of said act is as follows: "This act shall be deemed a public act, and noticed by all courts as such without pleading, and shall take effect from its passage." Ill. Laws 1859, pp. 530-532.

On May 23, 1859, the common council of Chicago passed "An Ordinance Authorizing the Extension and Operation of Certain Horse Railways in the Streets of the South and West Divisions of Chicago." By § 1 of said ordinance it is provided "that, under and by virtue of an act of the legislature of the state of Illinois entitled 'An Act to Promote the Construction of Horse Railways in

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the City of Chicago,' approved the 14th day of February, A. D. 1859, constituting Franklin Parmelee, Liberty, Bigelow, Henry Fuller, and David A. Gage, and their successors, a body corporate and politic, by the name of 'The Chicago City Railway Company,' and by virtue of the powers and authority in the said common council otherwise by law vested, consent, permission, and authority are hereby unto the said, the Chicago City Railway Company, given, granted, and duly vested to lay a single or double track for a railway, with all necessary and convenient tracks for turn-outs, side tracks, and switches, in and along the course of the streets and bridges of the South and West divisions of the city of Chicago, hereinafter mentioned; and the same to keep, maintain, and use, and to operate thereon railway cars and carriages, during all the term in the said act of the 14th day of February, A. D. 1859, specified and prescribed in the manner and upon the conditions hereinafter prescribed: Provided, that said tracks shall not be laid within 12 feet of the sidewalk upon any of the streets hereinafter mentioned, in any case wherein it is practicable to be avoided." By § 2 of said ordinance the company is thereby, as above mentioned, authorized to lay a single or double track for such railways in and along the course of certain streets therein named, situated in both the South and West divisions of the city of Chicago. Section 7 of said ordinance is as follows: "The rate of fare for any distance shall not exceed 5 cents, except when cars or carriages shall be chartered for specific purposes." By § 8 of said ordinance said company is required to keep 8 feet in width along the line of said railway on streets wherein one track is constructed, and 16 feet in width along the line of said railway where two tracks are constructed, in good repair and condition during all the time which the privilege thereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof may be passed or adopted by the common council of said city. By § 11, "all the rights and privileges heretofore granted to the said Franklin Parmelee, Liberty Bigelow, and Henry Fuller, by an ordinance entitled 'An Ordinance Authorizing the Construction and Operation of Certain Horse Railways in the Streets of the City of Chicago,' or any amendment thereto, are hereby granted and confirmed to the said, the Chicago City Railway Company and its successors." Sections 3, 4, 5, 6, 9, 10, and 12 of said ordinance may be found in volume 2 of Special Ordinances of Chicago of 1898, on pages 1048, 1049, and 1050. Section 3 relates to the time of completion of the railways authorized to be constructed. Section 4 provides that the cars to be used upon said tracks shall be operated with animal power only, etc. Section 5 gives the common council power at all times to make such regulations as to the rate of speed and the time of running said cars or carriages as the public safety and convenience may require. Section 6 relates to the construction of the track. Section 9 provides for forfeiture in case the railways are not completed within the time and according to the conditions mentioned in the ordinance. Section 10 provides that rights vested in the board of water and sewerage commissioners shall not be impaired. Section 12 provides for the execution of a bond by the parties above named.

On the same day, May 23, 1859, the common council passed an ordinance entitled "An Ordinance Authorizing the Construction and Operation of Horse Railways in the North Division of the City of Chicago." By § 1 of this ordinance it is provided as follows: "That there is hereby granted to the North Chicago City Railway Company the consent, authority, and permission of the common council to lay a single track for a railway, with all necessary and convenient tracks for turn-outs, side tracks, and switches, in and along the course of certain streets in the city of Chicago hereinafter mentioned, and to operate railway cars and carriages thereon in the manner and for the time and upon the conditions hereinafter prescribed: Provided, however, that, except in turning street corners, said tracks shall not be laid within 12 feet of the sidewalk upon any of the streets." Section 2 provides that the company is authorized to lay a single or double track for a railway in and along certain streets therein named, located in the North division of the city. Section 6 of said ordinance is as follows: "The rates of fare for any distance within the city limits shall not exceed 5 cents for each passenger, except when cars and carriages shall be chartered for a specific purpose." Section 7 provides for the improvement of the streets along which the railways shall be built and for keeping certain portions of them in repair, substantially in the same terms as is specified in the other ordinance above set forth passed on the same day. Sections 3, 4, 5, 8, 9, 10, and 11 of said ordinance may be found in volume 2 of Special Ordinances of Chicago of 1898, on pages 1416, 1417, and 1418. Section 3 provides that the cars upon said tracks shall, within the limits of the city, be propelled by animal power only, etc. Section 4 relates to the power of the common council to make regulations as to the rate of speed and the time or times of running cars or carriages, as the public convenience and safety may require. Section 5 provides for the mode of laying the tracks. Section 8, for the time of completion of the railway. Section 9 relates to the rights vested in the boards of water and sewerage commissioners. Section 10 is as follows: "The rights and privileges granted to the said company by this ordinance, or intended so to be, shall continue and be in force for the benefit of said company for the full term of twenty-five years from the passage of this ordinance, and no longer." Section 11 provides for a bond to be entered into by the North Chicago City Railway Company with the city of Chicago in the penal sum of $25,000, etc.

On February 21, 1861, the legislature

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passed an act entitled "An Act to Authorize the Extension of Horse Railways in the City of Chicago," which is as follows:

"Sec. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That Edward P. Ward, William K. McAllister, Samuel B. Walker, James L. Wilson, Charles B. Brown, Nathaniel P. Wilder, and their successors, be and they are hereby, created and constituted a body corporate and politic, by the name of 'The Chicago West Division Railway Company,' for the term of twenty-five years, with all the powers and authority pertaining to corporations for like purposes.

"Sec. 2. The said corporation shall possess all the powers conferred by, and be subject to all the provisions contained in, the 2d, 3d, 5th, and 6th sections of an act entitled 'An Act to Promote the Construction of Horse Railways in the City of Chicago,' approved February 14, 1859: Provided, that nothing herein contained shall be so construed as to in any manner invalidate or injuriously affect any of the rights of either of the corporations created by said act, or to authorize the corporation hereby created to construct or use any railway track in the North division of Chicago, except by the written consent of the North Chicago City Railway Company: And further provided, the consent of the owners of two thirds of the property, by lineal measure, fronting upon the streets through which said railway shall pass, shall be obtained.

"Sec. 3. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint. The first board of directors shall consist of said Charles B. Brown, James L. Wilson, William K. McAllister, Samuel B. Walker, and Nathaniel P. Wilder, and, thereafter, of not less than three nor more than seven stockholders, who shall be chosen each and every year by the stockholders, at such time and in such manner as the said corporation shall, by its laws, prescribe. The said directors shall hold their offices until their successors are elected and qualified, and may fill any vacancies which may happen in the board of directors, by death, resignation, or otherwise. They may also adopt such by-laws, rules, and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this state.

"Sec. 4. The corporation hereby created is authorized to purchase, hold, and convey real or personal estate; to mortgage or lease its franchises and property; to acquire, unite, and exercise any of the powers, franchises, privileges, or immunities conferred upon the Chicago City Railway Company by the act aforesaid, or any ordinance of the common council of said city, upon such terms and conditions as may, by contract between the said railway corporations, be prescribed; and the consent of the board of directors of the said Chicago City Railway Company, manifested in writing, shall be a condition precedent to the corporation hereby created, exercising the powers, or any of them, conferred upon it by the 2d section of the act aforesaid, as to any street of said South and West divisions of Chicago, in which the said Chicago City Railway Company has acquired the right of laying down its track: Provided, that upon obtaining such contract or consent, as aforesaid, this corporation shall thereupon and thereby become entitled, as to the streets last above mentioned, and no others, to use the same according to the provisions of said contract and the ordinances aforesaid, anything herein contained to the contrary notwithstanding.

"Sec. 5. If any person shall wilfully and maliciously obstruct either of the corporations aforesaid, or that hereby created, in the use of any of their railway tracks or the passing of the cars of either of said corporations thereon, such person, and all who shall be aiding or abetting, shall be punished by a fine not exceeding $500.00, or may be imprisoned in a common jail for a period not exceeding three months.

"Sec. 6. This act shall be deemed a public act, and noticed by all courts as such, without pleading, and shall take effect from its passage." Ill. Private Laws 1861, pp. 340–342.

An agreement, dated July 29, 1863, was entered into between the Chicago City Railway Company and the Chicago West Division Railway Company, whereby the City Railway Company agreed to sell, convey, and assure by good and sufficient deed or deeds to the West Division Railway Company all the property, rights, and privileges of the City Railway Company, the several railway tracks, turn-outs, and switches of the City Railway Company lying and being upon Randolph street, Madison street, Park street, Southwestern avenue, and Lake street, in Chicago, together with the franchises, rights, privileges, and immunities of the City Railway Company in, to, and upon either and all of said streets, and the bridges at Madison and Randolph streets across the South Branch of the Chicago river, conferred, given, or granted to the City Railway Company under any and all acts of the general assembly of the state of Illinois, and any and all ordinances of the city of Chicago, or contracts with the common council of said city; also all the rolling stock; also the right, privilege, and franchise of laying down, constructing, maintaining, and operating railway tracks in, upon, and along certain streets named in the West division of the city; and also the right of using, free of charge, the railway track of the city railway on State street from the intersection of the Madison street railway therewith northerly to Lake street. A deed, dated July 30, 1863, was executed by the Chicago City Railway Company to the Chicago West Division Railway Company, conveying to the latter the property, privileges, and franchises set forth and described in the contract last referred to.

On February 6, 1865, the legislature of

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Illinois passed an act entitled "An Act Concerning Horse Railways in the City of Chicago," which said act was passed over veto. This act of 1865 purported to amend the first sections of the acts of 1859 and 1861, hereinbefore set out, by changing the term of twenty-five years therein to ninety-nine years. It also purported to amend § 2 of the act of 1859, as expressed in that act, and as included in the act of 1861. It also confirmed an ordinance of the common council of Chicago passed on August 17, 1864, entitled "An Ordinance Concerning the Maintenance and Operation of the Chicago and Evanston Railroad in the Limits of the City of Chicago." The 5th section of the act provided that it should be deemed a public act, etc. 1 Ill. Private Laws 1865, p. 597.

On November 16, 1863, the common council passed an ordinance entitled "An Ordinance for the Preservation of Certain Streets of Chicago from Railway Uses," which said ordinance provides and declares that no railway track shall be constructed for the period of twenty years along Michigan and Wabash avenues, and other streets, which said ordinance contains the following recital, to wit: "Whereas also the Chicago West Division Railway Company . . . has acquired by contract with the Chicago City Railway Company all such right to use said streets as was and hereby is granted to said last-named company, as aforesaid, as to all the streets in said West division and certain of the streets in the South division of Chicago in said ordinances mentioned."

The lines of the North Chicago City Railway Company were operated as horse railways by that company from 1859 up to about the year 1886, at which time the North Chicago Street Railroad Company was organized, and, as is claimed by appellant, became the lessee of all of said North side lines under a lease alleged to have been executed to it by the North Chicago City Railway Company. But no such lease was introduced in evidence or appears in the record. Since 1886 the North Chicago Street Railroad Company has extended said lines and built others.

The Chicago West Division Railway Company, from July, 1863, until about 1889, continued to operate as street railways all of the West side lines. In 1889 the West Chicago Street Railroad Company was organized, and is claimed by appellant to have become the lessee of all of said West side lines under a lease alleged to have been executed to it by the Chicago West Division Railway Company; but no such lease was introduced in evidence, and none appears in the record. Thereafter the West Chicago Street Railroad Company built other lines in the West and South divisions of the city.

On May 24, 1899, the appellant, the Chicago Union Traction Company, was organized under the general incorporation law of this state. The statement filed by it in the office of the secretary of state in accordance with § 2 of the general incorporation act (1 Starr & C. Anno. Stat. 2d ed. p. 989) recites that "the object for which it is formed is to construct, own, purchase, acquire, and lease street railroads in the city of Chicago, and in the counties of Cook, Lake, McHenry, Du Page, and Will in the state of Illinois, and to operate the said railroads owned and leased by it with animal, cable, electric, or other power, except steam locomotive; and own and enjoy all real and personal property necessary or proper for the prosecution of the business aforesaid." The statement also states that the capital stock shall be $32,000,000, that the amount of each share is $100, that the number of shares are 320,000, that the location of the principal office is in Chicago, and that the duration of the corporation shall be ninety-nine years. The final certificate of appellant's organization, together with the report of the commissioners, etc., was filed in the recorder's office of Cook county on May 25, 1899.

The North Chicago Street Railroad Company continued to operate the North side lines from 1886 until about June 1 or July 1, 1899. It is claimed by appellant that at the latter date said North side lines were leased by the North Chicago Street Railroad Company to the Chicago Union Traction Company, but no such lease was introduced in evidence, nor is any such lease set out in the record.

On June 1, 1899, the West Chicago Street Railroad Company, as party of the first part, thereinafter called the "railroad company," executed a lease to the appellant, the Chicago Union Traction Company, as party of the second part, thereinafter called the "traction company." This lease recites that the railroad company was organized under the laws of Illinois, and has full corporate capacity to lease railroads in Chicago. It also recites that the traction company is a corporation organized under the laws of Illinois, and has full corporate capacity to acquire, by lease or otherwise, and thereafter maintain and operate, railroads in Chicago, etc. By the terms of this lease, the said railroad company sells, assigns, transfers, and sets over unto the traction company three certain agreements between the Chicago West Division Railway Company and the West Chicago Street Railroad Company, and between the latter and the Chicago Passenger Railway Company, dated respectively October 20, 1887, November 16, 1888, and March 15, 1889; but these agreements were not introduced in evidence, and do not appear in the record. Said lease, however, of June 1, 1899, recites that the Chicago West Division Railway Company and the said Chicago Passenger Railway Company, respectively, "demise and lease to the said railroad company, all and singular, their respective railways, owned and operated by the said railway companies, respectively, together with all their respective real, personal, and mixed property, and their rights and privileges connected with or related to the said demised railways, or any part thereof." The following recital is also made in said lease of June 1, 1899, executed by the West Chicago Street Railroad Company to the Chicago Union Traction Company, to wit:

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"Meaning and intending hereby to vest in said traction company, all and singular, the property rights, privileges, and everything of value, as they are now vested in and held by the said railroad company under the said leases, respectively, and correspondingly to obligate the said traction company to assume, carry out, and perform every condition, obligation, and covenant assumed and agreed to be performed and observed by the said railroad company," etc. By the terms of said lease of June 1, 1899, the West Chicago Street Railroad Company "does hereby grant, demise, and lease unto the said traction company, its successors and assigns, all and singular, the railways now owned and operated by the said railroad company in the city of Chicago and in Cook county, Illinois, and as the same may at any time hereafter be located or constructed, . . . together with all appurtenances and property, real, personal, moneys, securities, and choses in action, belonging to the party of the first part, and all contract and ordinance rights and privileges connected with or relating to the construction, maintenance, and operation of the said demised railways, or any part thereof," etc. It is also recited in said lease of June 1, 1899, that "the said traction company shall have the right and power to . . . do all other things that an absolute owner can do except to sell and assign" the stock, etc. In said lease of June 1, 1899, is the following recital: "The said traction company to hold the said properties as fully and entirely as the same now are, or may hereafter be vested in the said railroad company, its successors or assigns, saving and reserving, however, the franchise of being a corporation and every other right or privilege which is or may be necessary to preserve the corporate existence of the said party of the first part." It is also said in said lease of June 1, 1899, that "the traction company . . . shall maintain and effectually operate said railways to the extent that it shall have the lawful right so to do." Since June or July, 1899, appellant has continued to operate all of the West and North side lines.

Upon the trial in the criminal court of Cook county, at the close of the evidence, appellant moved the court that judgment be entered in its favor, upon the alleged ground that §§ 1723 and 1725 of the Revised Code of Chicago impaired the obligation of the contract between the city and the appellant, and upon the ground that said sections deprived the defendant of its property without due process of law, and denied to it the equal protection of the laws; the latter ground, however, having more particular reference to the eight actions not here under consideration, but taken as a separate case. The court overruled the motion, and the defendant then and there took exception. Appellee, the plaintiff below, by its counsel, submitted to the court, and the court held, certain written propositions of law, to the effect that appellant was guilty of a violation of said § 1723; that the city of Chicago was authorized to pass ordinances regulating street-railway fares and transfers; that § 1723 was a valid and lawful exercise of the city's powers to regulate street-railway fares and transfers, and did not violate any provision of the Constitution of the state of Illinois; that said § 1723 applies to cases where a person, firm, or corporation has subsequently become, and still is, the owner or lessee of, or has subsequently assumed the operation of, and is actually engaged in the operation of, two lines of street railway, each within the city of Chicago, which join, connect, cross, intersect, or come within 200 feet of each other. To the holding of these propositions the defendant excepted. The defendant, by its counsel, submitted to the court, and the court refused, certain written propositions of law, to the effect that said §§ 1723 and 1725 were in contravention of the Constitution of the United States, in that they deprived defendant of its property without due process of law, and denied to it the equal protection of the laws; that said sections were in contravention of the Constitution of the United States, upon the alleged ground that they impaired the contract between plaintiff and defendant, which contract is alleged to have been in force when said sections were passed, and ever since that time; that, as matter of law, under the law and the evidence, the judgment should be for the defendant; that an act of the legislature approved June 9, 1897, entitled "An Act to Amend the Title, and Sections 1 and 3, of an Act Entitled 'An Act in Regard to Horse and Dummy Railroads,'" approved March 19, 1874 (Laws 1897, p. 282), repealed so much of § 1723 as relates to transfers; that the common council of the city of Chicago had no power on April 8 or 9, 1897, to pass so much of § 1723 as relates to transfers, or to require any street railway company then or thereafter owning, leasing, or operating a street railway in said city to furnish any passenger who had paid his fare for riding on any car of such street railway a transfer ticket entitling such passenger, without further charge, to be carried on any other line owned, leased, or operated by such railway company, adjoining, connecting, crossing, or intersecting the line upon which such passenger first took passage, for a continuous trip for any distance within the limts of said city; that so much of § 1723 as relates to transfers does not apply to two different systems of street-railroad lines which crossed or connected with each other, and were built and in operation before and at the time of the passage of said ordinance, but which said systems at the time of the passage of said ordinance, and previous thereto, were severally in the possession of and operated by distinct and independent corporations. To the refusal of these propositions, appellant, by its counsel, excepted.

Mr. **W. W. Gurley,** with *Mr.* **Gwynn Garnett,** for appellant:

The charters of appellant's constituent companies constitute contracts as to rates of fare. The Municipal Code impairs these contracts, and therefore is in violation of

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the guaranties of the Constitution of the United States and of the state of Illinois.

Chicago v. *Sheldon*, 9 Wall. 53, 19 L. ed. 596; *Sloan* v. *Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397; *Philadelphia, W. & B. R. Co.* v. *Bowers*, 4 Houst. (Del.) 506; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Cleveland City R. Co.* v. *Cleveland*, 94 Fed. 385; *Detroit* v. *Detroit City R. Co.* 60 Fed. 161.

The requirement that appellant furnish transfers is in impairment of its rights.

Sloan v. *Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397; *Philadelphia, W. & B. R. Co.* v. *Bowers*, 4 Houst. (Del.) 506; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 15, 43 L. ed. 347, 19 Sup. Ct. Rep. 77; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

The charters of the Chicago West Division Railway Company and the Chicago North Division Railway Company, which provided that the rate of fare should not exceed 5 cents, constituted contracts between the city of Chicago and the railway companies that the latter should be entitled to charge 5 cents.

Chicago v. *Sheldon*, 9 Wall. 50, 19 L. ed. 596; *Cleveland City R. Co.* v. *Cleveland*, 94 Fed. 401; *Detroit* v. *Detroit City R. Co.* 60 Fed. 161; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

The legislature of the state of Illinois had the power, in 1865, to make irrevocable contracts as to rates of fare for the period of ninety-nine years.

Cooley, Const. Lim. 6th ed. 334; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Pingree* v. *Michigan C. R. Co.* 118 Mich. 332, 53 L. R. A. 274, 76 N. W. 635; *Sloan* v. *Pacific R. Co.* 61 Mo. 30, 21 Am. Rep. 397; *Philadelphia, W. & B. R. Co.* v. *Bowers*, 4 Houst. (Del.) 506; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 15, 43 L. ed. 347, 19 Sup. Ct. Rep. 77; *Freeport Water Co.* v. *Freeport*, 180 U. S. 593, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 672, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Detroit* v. *Detroit City R. Co.* 56 Fed. 867.

Clause 42, § 1, ¶ 63, art. 5, of the general incorporation act of 1872 does not grant to cities any power whatsoever over street railroad companies.

Monongahela Bridge Co. v. *Pittsburgh & B. R. Co.* 114 Pa. 484, 8 Atl. 223; *Farwell* v. *Chicago*, 71 Ill. 272; *Old Colony Trust Co.* v. *Atlanta*, 83 Fed. 39, 32 C. C. A. 132, 59 U. S. App. 230, 88 Fed. 859; *Philadelphia, W. & B. R. Co.* v. *Bowers*, 4 Houst. (Del.) 506; *Lynchburg* v. *Norfolk & W. R. Co.* 80 Va. 237, 56 Am. Rep. 592.

The powers of municipal corporations are strictly construed.

Mather v. *Ottawa*, 114 Ill. 664, 3 N. E. 216; *Huesing* v. *Rock Island*, 128 Ill. 471, 59 L. R. A. 21 N. E. 558; *Los Angeles City Water Co.* v. *Los Angeles*, 88 Fed. 729; 1 Dill. Mun. Corp. p. 115; *Treadway* v. *Schnauber*, 1 Dak. 238, 46 N. W. 464; *Minturn* v. *Larue*, 23 How. 436, 16 L. ed. 575; *Yonkers* v. *Yonkers R. Co.* 51 App. Div. 271, 64 N. Y. Supp. 955; *Re Lee Tong*, 9 Sawy. 333, 18 Fed. 253; *Mt. Pleasant* v. *Breeze*, 11 Iowa, 399; *Rochester* v. *Collins*, 12 Barb. 559.

Doubts as to the existence of a power are resolved against the municipality.

Emmons v. *Lewistown*, 132 Ill. 380, 8 L. R. A. 328, 24 N. E. 58; *Cairo* v. *Coleman*, 53 Ill. App. 687; 1 Dill. Mun. Corp. p. 115; *Los Angeles City Water Co.* v. *Los Angeles*, 88 Fed. 729; *Treadway* v. *Schnauber*, 1 Dak. 238, 46 N. W. 464; *Minturn* v. *Larue*, 23 How. 436, 16 L. ed. 575; *Richmond* v. *Richmond & D. R. Co.* 21 Gratt. 614; *Port Huron* v. *McCall*, 46 Mich. 565, 10 N. W. 23; *Yonkers* v. *Yonkers R. Co.* 51 App. Div. 271, 64 N. Y. Supp. 955; 15 Am. & Eng. Enc. Law, p. 1039; *Cairo* v. *Bross*, 101 Ill. 478; *Danville* v. *Danville Water Co.* 178 Ill. 311, 53 N. E. 118.

General words are not extended to things superior in rank to those specifically mentioned.

Sandiman v. *Breach*, 7 Barn. & C. 99; Dwarris, Stat. 656; 2 Inst. chap. 47, p. 478; *Casher* v. *Holmes*, 2 Barn. & Ad. 592; *Canterbury's Case*, 2 Cope, 46a; *Amber* v. *Whipple*, 139 Ill. 317, 28 N. E. 841.

A legislature is presumed to know prior legislation, and to have intended to change the meaning of a statute when it has amended its text.

Rich v. *Keyser*, 54 Pa. 89; *Cairo* v. *Bross*, 101 Ill. 475; *Henry* v. *Tilson*, 17 Vt. 485.

The general power to "regulate" does not include, as an incident, the right to fix rates of fare.

Detroit v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 494, 42 L. ed. 251, 17 Sup. Ct. Rep. 896.

A general power to regulate fares does not include, as an incident, a power to require transfer slips.

Old Colony Trust Co. v. *Atlanta*, 83 Fed. 39, 32 C. C. A. 132, 59 U. S. App. 230, 88 Fed. 859; *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 690, 43 L. ed. 861, 19 Sup. Ct. Rep. 565.

If clause 42 of the cities and village act authorized the city to regulate fares of street railroads, and required the giving of transfer slips, such power did not extend to street railroads in existence under special charters when clause 42 was enacted.

Ottawa v. *La Salle County*, 12 Ill. 340; *Braceville* v. *Doherty*, 30 Ill. App. 651; *People ex rel. Hinch* v. *Harrison*, 185 Ill. 313, 56 N. E. 1120; *Ridgway* v. *Gallatin County*, 181 Ill. 521, 55 N. E. 146; *People ex rel. Conlon* v. *Mount*, 87 Ill. App. 203; *Gunnarsshon* v. *Sterling*, 92 Ill. 573; *Swigart* v. *People*, 50 Ill. App. 188; *Butz* v. *Kerr*, 123 Ill. 659, 14 N. E. 671; 5 Thomp. Corp. § 5679; *Brown* v. *Philadelphia County*, 21 Pa. 43; *McKenna* v. *Edmundstone*, 91 N. Y. 233;

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Deters v. *Renick*, 37 Mo. 598; *Horton* v. *Mobile School Comrs.* 43 Ala. 598; *State, North Hudson County R. Co., Prosecutors*, v. *Hoboken*, 41 N. J. L. 71; *Rushville* v. *Rushville*, 32 Ill. App. 323; *East St. Louis* v. *Maxwell*, 99 Ill. 444; *Rankin* v. *Cowden*, 66 Ill. App. 139; *Lewis* v. *Cook County*, 72 Ill. App. 155; *Hyde Park* v. *Oakwoods Cemetery Asso.* 119 Ill. 141, 7 N. E. 627; *Trausch* v. *Cook County*, 147 Ill. 537, 35 N. E. 477; *Cantrell* v. *Seaverns*, 168 Ill. 171, 48 N. E. 186.

Section 1723 of the Municipal Code of Chicago has no application to the north and west side systems of appellant.

Ellis v. *Milwaukee City R. Co.* 67 Wis. 135, 58 Am. Rep. 858, 30 N. W. 218; *Hyde Park* v. *Oakwoods Cemetery Asso.* 119 Ill. 141, 7 N. E. 627; *Chicago, St. P. & K. C. R. Co.* v. *Kansas City, St. J. & C. B. R. Co.* 38 Fed. 58.

The power of assignment was granted to the predecessors of appellant by their charters.

Chicago v. *Evans*, 24 Ill. 52; *Liebermann* v. *Chicago & S. S. Rapid Transit R. Co.* 141 Ill. 148, 30 N. E. 544; *People ex rel. Cantrell* v. *St. Louis, A. & T. H. R. Co.* 176 Ill. 520, 35 L. R. A. 656, 45 N. E. 824, 52 N. E. 292.

The right granted by the legislature to take a certain toll is a franchise and property, and not a mere immunity or exemption.

Picard v. *East Tennessee, V. & G. R. Co.* 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; *Morgan* v. *Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Beekman* v. *Saratoga & S. R. Co.* 3 Paige, 74, 22 Am. Dec. 679; *Davis* v. *New York*, 14 N. Y. 523, 67 Am. Dec. 186; *Truckee & T. Turnp. Road Co.* v. *Campbell*, 44 Cal. 90; *Sellers* v. *Union Lumbering Co.* 39 Wis. 525.

A lease of railroad property, made under statutory authority, carries all franchises of the lessor, including whatever right it has to take tolls.

Jacksonville, L. & St. L. R. Co. v. *Louisville & N. R. Co.* 150 Ill. 484, 37 N. E. 924; *Chicago* v. *Evans*, 24 Ill. 54; *People ex rel. Cantrell* v. *St. Louis, A. & T. H. R. Co.* 176 Ill. 520, 35 L. R. A. 656, 45 N. E. 824, 52 N. E. 292; *Chicago West Div. R. Co.* v. *Metropolitan West Side Elev. R. Co.* 152 Ill. 519, 38 N. E. 736; *Campbell* v. *Marietta & C. R. Co.* 23 Ohio St. 168; *Barnett* v. *Brooklyn Heights R. Co.* 53 App. Div. 432, 65 N. Y. Supp. 1072; *Fisher* v. *New York C. & H. R. Co.* 46 N. Y. 644; *Santa Ana Water Co.* v. *San Buenaventura*, 56 Fed. 339.

Even where street railroad corporations lose their identity by consolidation, the rights of both as to rates of fare pass to the new corporation.

Citizens' Street R. Co. v. *Memphis*, 53 Fed. 715; *Africa* v. *Knoxville*, 70 Fed. 738; *State ex rel. Wilbur* v. *Trenton Pass. R. Co.* 57 N. J. L. 212, 31 Atl. 238; *Tennessee* v. *Whitworth*, 117 U. S. 145, 29 L. ed. 835, 6 Sup. Ct. Rep. 649.

There was no limitation in the Constitution of 1818, or that of 1848, upon the power of the legislature to bargain away its right to regulate tolls to be charged on street railroads.

State Bank v. *People*, 5 Ill. 304; *Neustadt* v. *Illinois C. R. Co.* 31 Ill. 484; *Illinois C. R. Co.* v. *Irvin*, 72 Ill. 454; *Illinois C. R. Co.* v. *Goodwin*, 94 Ill. 262; *People ex rel. Peabody* v. *Chicago Gas Trust Co.* 130 Ill. 296, 8 L. R. A. 497, 22 N. E. 798.

In the absence of definite constitutional restrictions, the power of the legislature to bargain away the right to regulate rates is unquestioned.

Walla Walla v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Los Angeles* v. *Los Angeles Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

It was the established policy of the state, prior to 1870, throughout all branches of the government, to favor grants of exclusive, irrevocable privileges.

People ex rel. Peabody v. *Chicago Gas Trust Co.* 130 Ill. 296, 8 L. R. A. 497, 22 N. E. 798; *State Bank* v. *People*, 5 Ill. 303.

Where the charter of a city gives it power to amend and repeal ordinances, such power does not authorize it to amend or repeal charters in the nature of contracts granted under legislative authority.

People v. *O'Brien*, 111 N. Y. 45, 2 L. R. A. 255, 18 N. E. 692; *New Jersey* v. *Yard*, 95 U. S. 110, 24 L. ed. 352.

On petition for rehearing.

Mr. William J. Calhoun, also for appellant:

Where a legislature has given a subject special consideration,—that is, has legislated concerning it by special act,—a subsequent general law will not be held to affect the matter which has been the subject of special legislative provision.

Lewis v. *Cook County*, 72 Ill. App. 155; *Rushville* v. *Rushville*, 32 Ill. App. 323; *Ottawa* v. *La Salle County*, 12 Ill. 339; *Hyde Park* v. *Oakwoods Cemetery Asso.* 119 Ill. 141, 7 N. E. 627; *State, North Hudson County R. Co., Prosecutors*, v. *Hoboken*, 41 N. J. L. 71.

The legislature declared by special acts that a 5-cent fare might be charged on the lines of the North Chicago City Railway Company, and, likewise, that a 5-cent fare might be charged on the lines of the Chicago West Division Railway Company.

Cleveland City R. Co. v. *Cleveland*, 94 Fed. 401; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 389, 46 L. ed. 608, 22 Sup. Ct. Rep. 410; *Detroit* v. *Detroit City R. Co.* 60 Fed. 161.

The right to fix the charges of hackmen and draymen is a very different matter from the power to determine the compensation of a street railway company or other incorporated carrier.

Old Colony Trust Co. v. *Atlanta*, 83 Fed. 39; *Philadelphia, W. & B. R. Co.* v. *Bowers*, 4 Houst. (Del.) 506.

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Where a street railroad is leased, the lessee operates the road demised, not under its own franchises, but under those of the lessor.

Chicago v. *Evans*, 24 Ill. 53; *Jacksonville, L. & St. L. R. Co.* v. *Louisville & N. R. Co.* 150 Ill. 484, 37 N. E. 924; *People ex rel. Cantrell* v. *St. Louis, A. & T. H. R. Co.* 176 Ill. 520, 35 L. R. A. 656, 45 N. E. 824, 52 N. E. 292; *Campbell* v. *Marietta & C. R. Co.* 23 Ohio St. 168; *Barnett* v. *Brooklyn Heights R. Co.* 53 App. Div. 432, 65 N. Y. Supp. 1072; *Fisher* v. *New York C. & H. R. R. Co.* 46 N. Y. 644.

Messrs. **Charles M. Walker, Henry Schofield,** and **Clarence N. Goodwin,** for appellee:

The common council of the city of Chicago had the power to prescribe a reasonable maximum rate of fare to be charged by a person, firm, or corporation, engaged in the business of carrying passengers for hire, for carrying a person from one point to another point within the limits of the city of Chicago.

Frankford & P. Pass. R. Co. v. *Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242; *Allerton* v. *Chicago*, 9 Biss. 552, 6 Fed. 555; *Dean* v. *Chicago General R. Co.* 64 Ill. App. 165.

The power delegated to the council of the city of Chicago was a power to legislate, to fix reasonable maximum rates by law, a governmental power, and not to make a contract with any person, firm, or corporation engaged in the business of carrying passengers for hire obligating itself (the council) never to change the rates once fixed.

Munn v. *Illinois*, 94 U. S. 116, 24 L. ed. 77; *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co.* v. *Cutts*, 24 L. ed. 94; *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 325, 29 L. ed. 642, 6 Sup. Ct. Rep. 334, 388, 1191; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Atlantic & P. R. Co.* v. *United States*, 76 Fed. 186.

If the words used leave room for doubt, that is fatal to a claim of grant.

Covington & L. Turnp. Road Co. v. *Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625.

The grant is personal to the grantee, unless apt words are used showing that the grant is transferable by the grantee.

St. Louis & S. F. R. Co. v. *Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Morgan* v. *Louisiana*, 93 U. S. 217, 224, 23 L. ed. 860; *Yazoo & M. Valley R. Co.* v. *Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot* v. *Philadelphia, W. & B. R. Co.* 21 L. ed. 888.

A transfer of "property," or of "rights and privileges," or of "franchises," will not carry an immunity from taxation, or from legislative control over rates, or an immunity from the exercise of any other governmental power, which the Supreme Court of the United States has held, wisely or unwisely, to be alienable.

Picard v. *East Tennessee, V. & G. R. Co.* 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The ordinances of 1858 and 1859 do not grant, either to the Chicago West Division Railway Company, or to the North Chicago City Railway Company, immunity from future exercise by the council of its power to prescribe the rates to be charged by said corporations.

Covington & L. Turnp. Road Co. v. *Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Danville* v. *Danville Water Co.* 178 Ill. 312, 53 N. E. 118; *Rogers Park Water Co.* v. *Fergus*, 178 Ill. 579, 53 N. E. 363; *Buffalo East Side R. Co.* v. *Buffalo Street R. Co.* 111 N. Y. 132, 2 L. R. A. 384, 19 N. E. 63.

Under the Constitution of 1870, the general assembly is powerless to alienate its governmental control over rates.

Piqua Branch of State Bank v. *Knoop*, 16 How. 369, 14 L. ed. 977; *Laurel Fork & S. H. R. Co* v. *West Virginia Transp. Co.* 25 W. Va. 384.

The ordinance on which the action is based is consistent with the alleged contracts, and does not impair their obligation, because it does not change the rate of fare fixed in the alleged contracts.

People ex rel. Jackson v. *Suburban R. Co.* 178 Ill. 594, 49 L. R. A. 650, 53 N. E. 349.

The words "the rate of fare shall not exceed 5 cents" only limit the power of the grantee, in the absence of legislation, to fix its rates. They do not limit the power of the city.

Atlantic & P. R. Co. v. *United States*, 76 Fed. 186.

It is not shown that the effect of the ordinance, if enforced over both the "union lines" and "consolidated lines" as one system of railway, will so cut into the earnings of appellant as to constitute a taking of its property.

San Diego Land & Town Co. v. *National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cotting* v. *Godard*, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 399, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

Even if the ordinance were not expressly prospective, it would be so construed, and would apply to persons and corporations and territory subsequently coming under its terms.

Illinois C. R. Co. v. *Chicago*, 173 Ill. 471, 53 L. R. A. 408, 55 N. E. 1104, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509;

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De Lima v. *Bidwell*, 182 U. S. 192, 45 L. ed. 1054, 21 Sup. Ct. Rep. 743.

A charter expressly made subject to future general legislation of the state upon the subject of rates of fare is no grant of immunity from legislative control.

Tomlinson v. *Jessup*, 15 Wall. 454, 21 L. ed. 204; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 270, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90; *New York ex rel. Schurz* v. *Cook*, 148 U. S. 397, 412, 37 L. ed. 498, 13 Sup. Ct. Rep. 645; *New Jersey* v. *Yard*, 95 U. S. 104, 111, 24 L. ed. 352; *People* v. *O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692; *Ruggles* v. *Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; *Minneapolis & St. L. R. Co.* v. *Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 566, 567, 35 L. ed. 269, 272, 14 Sup. Ct. Rep. 437.

The city council, in giving its consent to the use of a street by a railroad company, may impose such terms and conditions as are beneficial to the public. Such a provision is not a contract within the meaning of the contract clause of the Federal Constitution, and such a condition does not preclude the council from subsequently altering that rate of fare.

People ex rel. Jackson v. *Suburban R. Co.* 178 Ill. 594, 49 L. R. A. 650, 53 N. E. 349; *State ex rel. Rose* v. *Milwaukee County Super. Ct.* 105 Wis. 651, 81 N. W. 1046; *Des Moines Gas Co.* v. *Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *Kittinger* v. *Buffalo Traction Co.* 160 N. Y. 377, 54 N. E. 1081; *New Jersey* v. *Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

The placing of a present limitation on the rates to be charged by a water company does not imply intention on the part of the legislative body to barter away its governmental right to make such further regulations as thereafter may become necessary.

Rogers Park Water Co. v. *Fergus*, 178 Ill. 571, 53 N. E. 363; *Atlantic & P. R. Co.* v. *United States*, 76 Fed. 186.

Where an exemption from governmental control is sought, doubt as to the meaning is fatal to the grant claimed.

Stone v. *Farmers' Loan & T. Co.* 116 U. S. 325, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Atlantic & P. R. Co.* v. *United States*, 76 Fed. 186; *Ruggles* v. *Illinois*, 108 U. S. 531, 27 L. ed. 815, 2 Sup. Ct. Rep. 832; *Danville* v. *Danville Water Co.* 178 Ill. 299, 53 N. E. 118, 180 Ill. 235, 54 N. E. 224, 186 Ill. 326, 57 N. E. 1129, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; *Rogers Park Water Co.* v. *Fergus*, 178 Ill. 571, 53 N. E. 363, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; *Freeport Water Co.* v. *Freeport*, 186 Ill. 179, 57 N. E. 862, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

Magruder, Ch. J., delivered the opinion of the court:

There is no conflict between the parties as to the facts in the three cases here under consideration. The proof shows that appellant refused to give a passenger on its North Clark street-car line a transfer ticket entitling such passenger to a ride, without additional fare, upon its Madison street line. The proof also shows that the appellant refused to give to a passenger on its Madison street-car line a transfer ticket entitling such passenger to a ride, without additional fare, upon its North Clark street-car line. The proof also shows that the appellant refused to give to a passenger on its Van Buren street-car line a transfer ticket entitling such passenger to a ride without additional fare, upon its Halsted street-car line. Under the facts, therefore, appellant was guilty of a violation of § 1723 of the Revised Code of Chicago, as the same is set forth in the statement preceding this opinion. The only questions which arise upon the record, and which are presented for our consideration, are questions of law, growing out of the giving and refusal of the propositions of law submitted by the parties, and set forth in the statement preceding this opinion. Counsel for appellant make three points in their brief in support of their contention that the judgments entered by the criminal court of Cook county in these three cases are erroneous. These three points are as follows: First, that the charters of appellant's constituent companies constitute contracts as to rates of fare, and that § 1723 of the Municipal Code of Chicago impairs these contracts, and is, therefore, in violation of the guaranties of the Constitutions of the United States and of the state of Illinois; second, that the city of Chicago has no power under the statutes of Illinois, and has not been authorized by the legislature of Illinois, to regulate fares charged by street railroad companies, or to require such companies to furnish transfer tickets; and, third, that said § 1723, passed in 1890, and re-enacted in 1897, and applicable to conditions then existing, has no application to transfers between the North and West side systems of appellant.

1. The second point thus made by appellant will be considered first. Has the common council of the city of Chicago the power to prescribe a reasonable maximum rate of fare to be charged for carrying a person from one point to another within the limits of the city of Chicago by a person, firm, or corporation engaged in the business of carrying passengers for hire on street railways?

The ordinance of June 26, 1890, re-enacted on April 8, 1897, of which §§ 1723 and 1725 are parts, is an ordinance which prescribes

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the maximum rate of fare to be charged. It provides that the rate of fare to be charged by any person, firm, company, or corporation owning, leasing, running, or operating street cars or other vehicles for the conveyance of passengers on any street railroad within the limits of the city of Chicago for any distance within the city limits shall not exceed 5 cents for each passenger over twelve years of age, and half fare for each passenger over seven and under twelve years of age for one continuous trip, except when such street cars or other vehicles shall be chartered for a specific purpose. Council Proceedings of 1890, 1891, p. 434. In order to determine whether or not the city of Chicago has the nower to prescribe the reasonable maximum rate of fare to be charged by street railway companies, it will be necessary to examine the provisions of the present and former charters of the city. Appellant's contention, that no power whatsoever over street railway companies has ever been granted by the legislature to the city of Chicago, will be found to be incorrect upon an examination of the city charters of 1851, 1863, and 1872.

On February 14, 1851, the legislature passed an act entitled "An Act to Reduce the Law Incorporating the City of Chicago and the Several Acts Amendatory Thereof, into One Act, and to Amend the Same." Section 4 of chapter 4 of this act of 1851 provides as follows: "Sec. 4. The common council . . . shall likewise have power within the jurisdiction of the city by ordinance: . . . Ninth. To license, regulate, and suppress hackmen, draymen, carters, porters, omnibus drivers, cabmen, packers, carmen, and all others who may pursue like occupations with or without vehicles, under other cognomens, and prescribe their compensation. . . . Sixty-Second. The common council shall have power to make, publish, ordain, amend, and repeal all such ordinances or by-laws and police regulations, not contrary to the Constitution of the state, for the good government and order of the city and the trade and commerce thereof, as may be necessary or expedient to carry into effect the powers vested in the common council, or any officer of said city, by this act; and enforce observance of all rules, ordinances, by-laws, and police and other regulations made in pursuance of this act by penalties not exceeding $100.00 for any offense against the same." Ill. Private Laws 1851, pp. 142, 143, 148. On February 13, 1863, the legislature passed an act entitled "An Act to Reduce the Charter of the City of Chicago, and the Several Acts Amendatory Thereof, into One Act, and to Revise the Same." Section 8 of chapter 4 of this act of 1863 provides as follows: "Sec. 8. The common council . . . shall likewise have power within the jurisdiction of the city by ordinance: . . . Ninth. To license, regulate, and suppress hackmen, draymen, carters, porters, omnibus drivers, cabmen, carmen, and all others, whether in the permanent employment of any individual, firm, or corporation, or otherwise, who may pursue like occupations, with or without vehicles, and prescribe their compensation. . . . Forty-Ninth. . . . Also to regulate the running of horse-railway cars, the laying down of tracks for the same, the transportation of passengers thereon, and the kind of rail to be used. . . . Sixty-Fourth" (which gives general power to amend and repeal ordinances and make such ordinances as may be necessary, the clause being almost identical with the corresponding clause in the act of 1851 as above set forth). Ill. Private Laws 1863, pp. 40, 56, 57, 60, 62. On April 10, 1872, the legislature passed an act entitled "An Act to Provide for the Incorporation of Cities and Villages." Section 1 of article 5 of this act of 1872 provides as follows: "Section 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers: . . . Forty-Second. To license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation. . . . Ninetieth. The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam or horse-railroad company, except upon the petition of the owners of the land representing more than one half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes. . . . Ninety-Sixth. To pass all ordinances, rules, and make all regulations, proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: Provided, no fine or penalty shall exceed $200.00, and no imprisonment shall exceed six months, for one offense." 1 Starr & C. Anno. Stat. 2d ed. pp. 689–715. Said clause 90 was amended in 1887 so as to include dummy, electric, cable, or other railroad companies, whether incorporated by this state under general or special law. Ill. Sess. Laws 1887, p. 108.

The city of Chicago has adopted as its charter the city and village act of 1872, above referred to. It will be noticed that the 42d clause of § 1 of article 5 of the act of 1872 is substantially the same as the 9th clause of § 4 of chapter 4 of the act of 1851, and the 9th clause of § 8 of chapter 4 of the act of 1863, so far as is material to the questions here involved. Under the act of 1872 the common council of the city of Chicago has power to regulate hackmen, omnibus drivers, cabmen, "and all others pursuing like occupations, and to prescribe their compensation." Street railway companies come within the purview and meaning of the words "all others pursuing like occupations," as used in connection with hackmen, omnibus drivers, and cabmen. The occupation of hackmen, omnibus drivers, and cabmen is the carrying of passengers for hire. All of the last-named vehicles are drawn by horses. The acts of 1859 and 1861, under which appellant claims its rights herein,

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were acts to promote the construction of horse railways, and to authorize the extension of horse railways in the city of Chicago. The ordinances of 1858 and of 1859, under which, also, the appellant claims its rights, are ordinances authorizing the construction, extension, and operation of horse railways in the streets of Chicago. The railways referred to in these acts and ordinances were nothing more than carriages drawn by horses with the exception that such carriages moved upon fixed iron rails, in a regular track, with wheels, while the other vehicles mentioned go with wheels upon the ordinary street way. The occupation of the appellant is the carrying of passengers for hire, and therefore its occupation is like the occupation of hackmen, omnibus drivers, and cabmen. By the application of the maxim, *Ejusdem generis*, which is only an illustration or specific application of the broader maxim *Noscitur a sociis*, the rule is deduced that "'when general words follow an enumeration of particular cases, such words apply only to cases of the same kind as those expressly mentioned,' or, stated in different language, the word 'other,' following an enumeration of particulars, embraces enumerated particulars of like nature only, unless a broader sense is obviously intended." *Union County* v. *Ussery*, 147 Ill. 204, 35 N. E. 618; *Misch* v. *Russell*, 136 Ill. 22, 12 L. R. A. 125, 26 N. E. 528; *First Nat. Bank* v. *Adam*, 138 Ill. 483, 28 N. E. 955; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454. Here the general words, to wit, "all others pursuing like occupations," follow an enumeration of particular cases, to wit, hackmen, omnibus drivers, and cabmen, and consequently such general words apply to cases of the same kind as those expressly mentioned.

That this is the correct view of the meaning of the 42d clause of the present charter and the clauses of a like nature in the charters of 1851 and 1863 is shown by the purport of decisions upon the subject. In *Frankford & P. Pass. R. Co.* v. *Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242, an act of the Pennsylvania legislature provided "that the select and common councils of the city of Philadelphia shall have authority (by ordinance or ordinances) to provide for the proper regulation of omnibuses, or vehicles in the nature thereof; and, to this end, it shall be lawful for the said councils, etc., to provide for the issuing of licenses to such, and so many persons, as may apply to keep and use omnibuses or vehicles in the nature thereof; and to charge a reasonable annual or other sum therefor." Section 12, act April 15, 1850 (P. L. 469). In construing this act, the lower court in Pennsylvania, speaking through Mr. Justice Sharswood, said: "Now, surely, no one can doubt that a passenger railway car is a vehicle in the nature of an omnibus, if it is not itself an omnibus running on a railroad." When the case was taken by appeal to the supreme court of Pennsylvania, the judgment of the lower court was affirmed, and the opinion affirming it was delivered by Mr. Justice Strong, afterwards a member of the Supreme Court of the United States, in which he says, in reference to this act: "It plainly authorizes regulation by the issue of licenses. And we are of opinion that it applies to passenger railway cars. They are omnibuses, or, if not, they are vehicles in the nature of omnibuses. They are open to all, intended for all. The change of form from that of anything known when the act of assembly was passed is not a change of the nature of the vehicle. In one city, at least, of Europe, large vehicles, intended for indiscriminate public use, run sometimes upon a railway track, and at other times upon a common pavement. Nobody can doubt they are omnibuses. The form of the wheels, or the character of the roadway over which a vehicle runs, does not determine its nature so much as do the uses to which it is put, and for which it was designed."

In *Allerton* v. *Chicago*, 9 Biss. 552, 6 Fed. 555, this very clause 42 of § 1 of article 5 of the act of 1872 was given the same construction which is here put upon it. In the latter case it was held, in an opinion by the late Judge Drummond, that the general law of Illinois for the incorporation of cities and villages in the state, which provided that the city council in cities should have authority to license hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing like occupations, and to prescribe their compensation, included street railways within its meaning. The case of *Frankford & P. Pass. R. Co.* v. *Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242, was there referred to as an authority upon this subject, and it was there said by Drummond, Ch. J.: "But it is claimed it does not include the street railway, because it is not pursuing an occupation like any of those named. Omnibuses may be licensed. They may pass over even the same streets as those occupied by the horse railways, and they may carry passengers in the same manner. The only distinction which can be called substantial between the two classes of occupation is that one carriage goes upon iron rails, in a regular track, with wheels, and the other carriage goes with wheels upon the ordinary street way. The supreme court of Pennsylvania has held that these street railway carriages are of a like nature as omnibuses, and there can be no doubt, I think, of the right of the city to demand a license from all omnibus drivers, and to include every omnibus which may belong to a particular company or corporation, and to require the payment of a license for such omnibus that may be so owned and used."

In *Farwell* v. *Chicago*, 71 Ill. 269, speaking of an ordinance adopted under and in pursuance of said clause 42 of the act of 1872, this court said: "The spirit of the ordinance is to bring the class of carriers therein named under the police regulations of the city. It is designed to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition, and wrong to strangers and others com-

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pelled to employ them, in having their property or persons carried from one part of the city to another. This is a rightful exercise of the police power." It has often been held that a street railway company is a common carrier of passengers for hire. *North Chicago Street R. Co.* v. *Williams*, 140 Ill. 275, 29 N. E. 672; *North Chicago Street R. Co.* v. *Wrixon*, 51 Ill. App. 307; *North Chicago Street R. Co.* v. *Cook*, 145 Ill. 551, 33 N. E. 958. In *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008, it was held that the construction of a street railroad is merely a mode of facilitating existing travel, and of modifying or changing the existing public use; that there is thereby added an additional mode of conveyance to those already in use upon the street; that the street car carries along the street such passengers as would otherwise be obliged to pass over it on foot or in other vehicles; and that thereby the ordinary street railway merely furthers the original uses of the street, by relieving the pressure of local travel. It necessarily follows that those whose business it is to propel street-railway cars along the iron tracks laid in the public streets of a city are engaged in the business of carrying passengers for hire, and that their occupation is of a like nature with the occupation of hackmen, omnibus drivers, and cabmen, whose business, also, is the carriage of passengers for hire. The general doctrine is that the legislature has power to regulate the charges of common carriers. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co.* v. *Cutts*, 24 L. ed. 94; *Ruggles* v. *People*, 91 Ill. 256, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832. The legislature, having such power, can confer it upon the common council of the city. In other words, the municipality may exercise the power by delegation from the state. *Rogers Park Water Co.* v. *Fergus*, 178 Ill. 571, 53 N. E. 363; *Danville* v. *Danville Water Co.* 180 Ill. 235, 54 N. E. 224; *Dean* v. *Chicago General R. Co.* 64 Ill. App. 165; *Chicago Packing & Provision Co.* v. *Chicago*, 88 Ill. 225, 30 Am. Rep. 545.

Therefore, when the legislature gave to the city of Chicago, under its charters above referred to, the power to regulate, and prescribe the compensation of, street railway companies as carriers of passengers, it gave the city power to pass §§ 1723 and 1725, set forth in the statement preceding this opinion. The grant of the power to regulate the occupation, and prescribe the compensation of those pursuing it, is accompanied by a grant of power to pass all such ordinances, rules, and regulations as may be proper or necessary to carry into effect the power so granted.

The appellant introduced in evidence, and relies upon, the ordinance of August 16, 1858, set forth in the statement preceding this opinion. Section 6 of that ordinance provides that "the rate of fare for any distance shall not exceed 5 cents, except when cars or carriages shall be chartered for a specific purpose." That ordinance was passed before the legislature passed the act of February 14, 1859. At the time of the passage of the ordinance of August 16, 1858, there was no law or statute in Illinois conferring upon the common council of any city the power to make a contract with any person, firm, or corporation engaged in the business of carrying passengers for hire, obligating the city never to change the rates once fixed, or to make a contract with any such person, firm, or corporation in relation to a maximum rate of fare to be charged. Hence, the common council could not have passed § 6 of the ordinance of 1858 in pursuance of any act of the legislature granting the power to make such contract. The only act of the legislature then existing which conferred upon the common council the power to pass § 6 of the ordinance of 1858 was the act of February 14, 1851. If the common council of the city had no power, under clause 9 of § 4 of chapter 4 of said act of 1851, to pass said § 6, then it was without any such power at all, as there was no other source from which the same could be derived, except the act of 1851.

The act of February 14, 1859, by the 2d section thereof, granted to the Chicago City Railway Company the power to construct, maintain, and operate a single or double track railway within the then present or future limits of the South or West divisions of the city of Chicago, as the common council of said city had authorized the corporators therein named, or any of them, or should authorize said corporation so to do, "in such manner and upon such terms and conditions, and with such rights and privileges as the said common council has, or may, by contract with said parties, or any or either of them, prescribe." The last clause is elliptical, and the word, "prescribed," to which the word "has" applies, was accidentally omitted. If the word thus omitted be supplied, the clause should read as follows: "with such rights and privileges as the said common council has prescribed, or may, by contract with said parties, or any or either of them, prescribe." The words "by contract with said parties, or any or either of them," qualify the words "may prescribe." That is to say, the right to contract was a right to be exercised in the future. The words "with such rights and privileges as the said common council has prescribed" refer to the past. There was no other action of the common council, taken before the passage of the act of February 14, 1859, except the ordinance of August 16, 1858. By the use of the words "with such rights and privileges as the said common council has prescribed," the legislature could not have referred to any other action of the common council than the passage of the ordinance of August 16, 1858. It thereby recognized the power of the common council to pass that ordinance, and the appellant here introduces it and relies upon it. The legislature, by thereby affirming and recognizing the passage of the ordinance of August 16, 1858, also recognized the power of the common

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council to pass that ordinance under clause 9 of § 4 of chapter 4 of the charter of 1851.

Again, in the ordinance of May 23, 1859, the language shows that the common council which passed that ordinance relied upon its power to do so under said clause 9 of the charter of 1851. Section 1 of the ordinance of May 23, 1859, recites that under and by virtue of the act of the legislature approved February 14, 1859, "and by virtue of the powers and authority in the said common council otherwise by law vested," the council thereby granted permission to the Chicago City Railway to lay a single or double track for a railway, etc. In other words, the ordinance of May 23, 1859, was not only passed in pursuance of the act of February 14, 1859, but also by virtue of the power and authority vested by law in the common council otherwise than by the act of February 14, 1859. Necessarily, the power referred to in § 1 of the ordinance as otherwise by law vested in the council was the power so vested by virtue of clause 9 of § 4 of chapter 4 of the charter of 1851. Section 7 of the ordinance of May 23, 1859, provided that "the rate of fare for any distance shall not exceed 5 cents, except when cars or carriages shall be chartered for specific purposes." Also the ordinance passed on May 23, 1859, authorizing the construction and operation of horse railways in the North division of the city of Chicago, provides, in § 6 thereof, that "the rates of fare for any distance within the city limits shall not exceed 5 cents for each passenger, except when cars or carriages shall be chartered for a specific purpose." The fixing of a maximum rate of 5 cents for each fare for any distance can as well be attributed to an exercise of the power to prescribe compensation under the charter of 1851, as to any power to make a contract upon the subject embodied in the act of February 14, 1859. If the common council had the power to fix the maximum rate of fare for any distance at 5 cents, as was done by said § 1723, it also had the power to provide for transfer tickets in the manner and at the places and within the time named in said § 1723. The requirement as to transfer tickets, transferring the passengers from one line to another of the same company, is a mere incident to the power to fix the maximum rate of fare. The charter of the city gave its common council power to prescribe the compensation of persons pursuing the occupation of operating street railways. The compensation referred to can be none other than the fare to be charged for carrying passengers. The power to fix the rate of fare must necessarily include the power to fix the rate for carrying a passenger over two lines operated by one company, as well as the power to fix the rate for carrying a passenger over one line operated by such company; the question being, not as to the reasonableness of the charge, but as to the power to regulate or fix the charge.

Our conclusion upon this branch of the case, therefore, is that, as a question of power, simply, the common council of the city of Chicago was authorized to pass the ordinance of June 26, 1890, subsequently re-enacted on April 8, 1897, and designated herein as §§ 1723 and 1725.

2. It is furthermore insisted by the appellant that § 1723 of the Municipal Code of Chicago, if enforced against appellant, will impair its alleged contract rights, and that therefore the section is in violation of the guaranties of the Constitutions of the United States and of the state of Illinois. The party insisting that its contract rights are violated by these §§ 1723 and 1725 is the appellant, the Chicago Union Traction Company, organized in May, 1899. It is not claimed, nor could it be, that there was or is any contract made directly between the state, or the city council of Chicago as the subordinate agency of the state, and the Chicago Union Traction Company, appellant herein. The contention of the appellant is that contracts were made in 1859 and 1861 with the North Chicago City Railway Company and the Chicago West Division Railway Company, and that those contracts have passed by assignment to the appellant, the Chicago Union Traction Company. It is claimed by the appellant that in 1886, or thereabouts, the North Chicago City Railway Company executed a lease of all its property and privileges to a new corporation then organized, called the "North Chicago Street Railroad Company," and that the Chicago West Division Railway Company in 1889, or thereabouts, executed a lease of its property, privileges, and franchises to a new corporation then organized, called the "West Chicago Street Railroad Company." No such leases as these have been introduced in evidence, or are in this record. What their terms are, it is impossible for us to know, so far as the present record shows. The charters or certificates of organization of the North Chicago Street Railroad Company and the West Chicago Street Railroad Company are not in the record, and were not introduced upon the hearing below. As, however, those corporations were organized in 1886 and 1889, they must have been organized under the general incorporation act of this state passed in 1872. Since the adoption of the Constitution of 1870, no corporation could be formed in this state under a special charter. Section 1 of article 11 of the Constitution of 1870 provides that "no corporation shall be created by special laws, or its character extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state; but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created." Counsel for appellant seek to avoid the difficulty arising from the absence of these leases from the record by saying that their existence is admitted by counsel for appellee. There seems to be an admission on the part of the appellee that the Chicago West Division Railway Company and the North Chicago City Railway Company leased their railway properties, respectively, to the West Chicago Street Rail-

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road Company and the North Chicago Street Railroad Company; but there is no admission, so far as we are able to discover, that there was any transfer or assignment of the contracts claimed to exist in favor of the present appellant. What are those contracts? The ordinances of 1858 and 1859 in relation both to the West Division Railway Company and the North Chicago City Railway Company provided that the rate of fare for any distance, or any distance within the city limits, should not exceed 5 cents, or 5 cents for each passenger. It is claimed on the part of appellant that these ordinances, taken in connection with the acts of the legislature of 1859 and 1861, referred to in the statement preceding this opinion, constituted contracts between the city and said railway companies to the effect that the companies had a right to charge as much as 5 cents for one fare, and that the city had no right thereafter to reduce the fare to any figure below 5 cents. In other words, the contention of appellant is that the words "the rate of fare shall not exceed 5 cents" constitute a contract binding the municipality not to reduce fares below that rate. Section 1723 does not, in terms, fix a rate of fare less than 5 cents. On the contrary, it provides, just as the earlier ordinances, upon which appellant relies as constituting its contract, provided, that the rate of fare to be charged shall not exceed 5 cents for each passenger, etc. But the contention is that the requirement of a transfer ticket from one line to another line operated by the same company necessarily reduces the fare below 5 cents; appellant claiming the right to charge 5 cents over one of its lines, and an additional 5 cents over another of its lines.

We pause not at this point to determine the correctness of this statement of the contracts; the only object at this stage of the discussion being to state what such contracts are claimed to be, with a view of determining whether they have been transferred or assigned to the present appellant. In order to show that such contracts, if they existed, are the property of the present appellant, it is not sufficient merely to show assignments or leases from the Chicago West Division Railway Company to the West Chicago Street Railroad Company, and from the North Chicago City Railway Company to the North Chicago Street Railroad Company. The West Chicago Street Railroad Company and the North Chicago Street Railroad Company are not here insisting upon any contracts, or complaining of the violation of any contracts. It devolves upon appellant to show that there were assignments, or leases amounting to assignments, from the West Chicago Street Railroad Company and the North Chicago Street Railroad Company to the present appellant, the Chicago Union Traction Company. There is in the record no lease from the North Chicago Street Railroad Company to the present appellant, but there has been introduced in evidence, and appears in the record, a lease purporting to have been made on June 1, 1899, from the West Chicago Street Railroad Company to the present appellant. In one aspect of these cases, the failure of the testimony in the respect thus indicated would necessarily lead to an affirmance of the judgment entered by the court below. But if it be conceded, as is contended for by the appellant, that the leases were made by the original companies to the companies organized in 1886 and 1889, and by both of these latter companies to the appellant in 1899, did the contracts, if there were contracts in relation to the maximum rate of fare, pass, or have they passed to the present appellant, so as to become the property of the latter?

It is a matter of serious doubt whether the Chicago West Division Railway Company became vested with the right to charge a full fare of 5 cents for a ride upon any one of its cars in the West division of the city alone. If it did not have such right, then it could not have transferred it, by lease or any other sort of assignment, to the West Chicago Street Railroad Company; nor, by consequence, could the latter have transferred it to the appellant. The ordinance of August 16, 1858, granted to the parties therein named the right to operate railway cars in the South and West divisions of the city, and upon streets lying in both of those divisions. When, therefore, § 6 provided that the rate of fare for any distance shall not exceed 5 cents, the meaning was that it should not exceed 5 cents for a ride upon streets in the South and West divisions of the city, and from one division to the other. Section 2 of the act of February 14, 1859, authorized the construction and operation of railway cars over such streets within the present or future limits of the South or West divisions of the city, as the common council had authorized or should thereafter authorize, in such manner and upon such terms and conditions, with such rights and privileges, as the common council had theretofore prescribed, or might by contract with said parties, or any or either of them, prescrib. By the terms of said § 2 the railway was to be constructed and operated within the present or future limits of the South and West divisions, and not of one of these divisions only; and the terms theretofore prescribed by ordinance were that the rate of fare should not exceed 5 cents for any distance within the South or West divisions of the city. Section 10 of the act of 1859 refers to the grants therein conferred, and the duties therein required, as being for the South and West divisions of the city of Chicago. So, also, the ordinance of May 23, 1859, granted authority to lay tracks in and along the course of the streets and bridges of the South and West divisions of the city; and hence, of course, § 7 of that act, providing that the rate of fare for any distance shall not exceed 5 cents, referred to any distance within the South and West divisions of the city. Section 2 of the act of 1861 conferred upon the Chicago West Division Railway Company the powers theretofore granted to the Chicago City Railway Company, and subjected the Chicago West Division Railway Company to all the provisions

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contained in the 2d, 3d, 5th, and 6th sections of the act of 1859. If thereby the Chicago West Division Railway Company acquired the right to charge a maximum rate of 5 cents for any distance, it acquired the right to make the charge in the same way in which the Chicago City Railway Company was possessed of that right; that is to say, the right to charge a fare of 5 cents for a ride in the West and South divisions of the city, or from one point in one of said divisions to a point in the other of said divisions. It is true that an agreement was made in 1863 between the Chicago City Railway Company and the Chicago West Division Railway Company whereby the former company agreed to sell and convey to the latter all of its property rights and privileges, and that by deed executed on the next day it did sell and convey to the Chicago West Division Railway Company all its property, rights, and privileges. But the Chicago City Railway Company did not have at that time the right or privilege to charge a fare of 5 cents for a ride on the West side, and another fare of 5 cents for a ride on the South side, but it had only a right to charge 5 cents for a ride in both the West and South divisions of the city. There is nothing in the agreement or the deed executed between the Chicago City Railway Company and the Chicago West Division Railway Company which provides that the one should charge a full fare of 5 cents for a ride on the South side, and the other should charge a full fare of 5 cents for a ride on the West side. Nothing in the agreement or the deed specified what proportion of 5 cents for a full ride from one division to the other should be charged by each company after the separation between the two. Originally the Chicago City Railway Company had a right to lay its tracks and operate its cars in the West division as well as in the South division, and to charge a fare of 5 cents for a ride anywhere in the two divisions. It is left uncertain by the acts of the legislature and by the agreements between the parties as to how each company, after its separation from the other, should charge for the conveyance of passengers, and at what rate such charge should be made.

But, conceding that the effect of the acts of the legislature and of the ordinances and of the agreements between the two corporations was that each should charge 5 cents for a ride in the division in which it operated its cars, the question still remains whether the contract to make such charge passed by assignment or lease. Counsel for appellant contend that by § 4 of the act of 1861 the Chicago West Division Railway Company had the power to lease its franchises and property, and this contention is correct. But was the right conferred upon the original companies by the provision that the rate of fare for any distance shall not exceed 5 cents, such a franchise or such property as could be transferred by lease? From some of the authorities it would seem to be true that the right conferred by this provision, or these provisions, in regard to the rate of fare, was not a franchise, but a mere exemption.

If the provision that the rate of fare for any distance should not exceed 5 cents conferred upon each of the original railway companies a mere exemption, it could not be transferred to another company by lease or assignment, or otherwise. In *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 652, 39 L. ed. 568, 15 Sup. Ct. Rep. 484, it appeared that by an act of April 4, 1887, the legislature of Arkansas prescribed a maximum rate of 3 cents per mile for each passenger carried by the railroads of that state; that the St. Louis, Arkansas, & Texas Railway Company, organized under the laws of Arkansas, had the right under the laws of the latter state, in force in April, 1880, when it was organized, to charge passenger rates not in excess of 5 cents per mile, so long as its profits did not exceed 15 per cent per annum on the capital actually paid in, and that it subsequently leased its railroad to the St. Louis & San Francisco Railway Company; and the question was whether the St. Louis & San Francisco Railway Company, as assignee of the St. Louis, Arkansas, & Texas Railway Company, and owner of its road, franchises, and privileges, had succeeded to the right to charge passenger rates not in excess of 5 cents per mile; and, in deciding the case, the court, speaking by Mr. Justice Shiras, said: "It has been frequently decided by this court that a special statutory exemption or privilege, such as immunity from taxation, or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute. *Morgan* v. *Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Wilson* v. *Gaines*, 103 U. S. 417, 26 L. ed. 401; *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813. We find here no such express statutory direction, nor is there any equivalent implication by necessary construction." See also *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Picard* v. *East Tennessee, V. & G. R. Co.* 130 U. S. 639, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640. In the *Sandford Case*, 164 U. S. 586, 41 L. ed. 563, 17 Sup. Ct. Rep. 201, the court, speaking by Mr. Justice Harlan, said: "When a corporation succeeds to the rights, powers, and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government that immunity or exemption from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public." In the *Picard Case*, 130 U. S. 639, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640, it was held that legislative immunity from taxation is a personal privilege, not transferable, and not to be extended beyond the immediate grantee,

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unless otherwise so declared in express terms. In the *Gill Case*, 156 U. S. 652, 39 L. ed. 568, 15 Sup. Ct. Rep. 484, the right to fix and determine rates of fare was placed in the same category of exemptions or privileges as immunity from taxation. In *Morgan* v. *Louisiana*, 93 U. S. 223, 23 L. ed. 861, it was held that immunity from taxation granted to a railroad company is not one of its franchises.

In the case at bar there was no statutory direction authorizing the transfer of the privilege here under consideration to a purchaser or lessee. The authority given to the Chicago West Division Railway Company to lease its franchises and property did not confer the authority to lease or transfer the exemption or privilege here under consideration. If the right conferred by § 4 of the act of 1861 to acquire, unite, and exercise the powers, franchises, privileges, or immunities conferred upon the Chicago City Railway Company authorized the Chicago West Division Railway Company to acquire and become the owner of the privilege or exemption in question, it does not necessarily follow that it was thereby authorized to transfer or assign the same to the West Chicago Street Railroad Company, or any other person or corporation. So far as the North Chicago City Railway Company is concerned, there is nothing to show that the latter company ever attempted to transfer such privilege or exemption, granted to it by the act of 1859 and by the ordinance of May 23, 1859, to the North Chicago Street Railroad Company, or to the appellant, or to any other corporation. The grant is personal to the grantee, unless apt words are used showing that the grant is transferable by the grantee, and any doubt as to transferability must be solved against the same. *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 652, 39 L. ed. 568, 15 Sup. Ct. Rep. 484; *Morgan* v. *Louisiana*, 93 U. S. 223, 23 L. ed. 861; *Yazoo & M. Valley R. Co.* v. *Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *Wilmington & M. R. Co.* v. *Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot* v. *Philadelphia, W. & B. R. Co.* 21 L. ed. 888.

In *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 372, 46 L. ed. 598, 22 Sup. Ct. Rep. 412, the question as to the transferability of such an exemption or privilege as is here under consideration did not arise. In that case it is said in the statement of the case that "the defendant by its answer makes no issue as to the validity of such assignments, or the ownership by complainant of all the interests of the former companies in the contracts and ordinances set forth in the bill." In the *Detroit Case*, also, the city council of the city of Detroit was clothed by the legislature of Michigan with the power to contract with the street railroad company in regard to rates. Section 20 of the street railroad act (2 Mich. Comp. Laws 1897, § 6453) referred to in that case provided that the rates of toll or fare which any street railway company may charge for the transportation of passengers or persons over their road shall be established by agreement between said company and the corporate authorities of the city or village where the road is located, etc.

In the case at bar it is true that the act of 1859 confers the right to construct and operate a railway in such manner and upon such terms and conditions, with such rights and privileges, as the said common council "may by contract with said parties, or any or either of them, prescribe." This language, standing by itself, would seem, under the doctrine of the *Detroit Case*, to confer the power upon the common council to contract with a street railway company in regard to rates. But § 2 of the act of 1859 also grants the right to construct and operate railways "in such manner and upon such terms and conditions, with such rights and privileges, as the said common council has prescribed." By this reference to the ordinance of August 16, 1858, passed under the charter power of the city, conferred by the act of 1851, as already stated, the legislature evidently regarded the fixing of the rate of fare over these street railways as an exercise of a governmental function of a legislative character by the city authorities, under a delegated power from the legislature, as well as a subject for agreement between the parties. The ordinances passed by the common council, and insisted upon as embodying contracts, may have been passed, not in pursuance of the authority to contract in regard to rates, but in pursuance of the exercise of the legislative power delegated to the city authorities by the legislature.

Let it be admitted, however, that we are wrong in the views heretofore expressed, and that in view of the language contained in the acts of 1859 and 1861, and in the ordinances of 1858 and 1859, contracts were executed between the city and the Chicago West Division Railway and the North Chicago City Railway, as is claimed by the appellant. It will not be contended that the railway companies which were parties to the contracts originally, or their assignees, if they were properly assigned, could not waive any provision of the contract, or consent to its change or modification. In the *Detroit Case*, 184 U. S. 389, 46 L. ed. 608, 22 Sup. Ct. Rep. 418, the Supreme Court of the United States said in reference to the contract there under consideration: "It is a contract which gives the company the right to charge a rate of fare up to the sum of 5 cents for a single passenger, and leaves no power with the city to reduce it without the consent of the company." It could be reduced, therefore, with the consent of the company. The question, then, is whether there has been any consent on the part of the alleged assignees of the contracts in question to changes or modifications thereof. If the West Division Railway Company leased its property and privileges, in such a way as to include the right to charge a rate of fare up to the sum of 5 cents for a single passenger, to the West Chicago Street Railroad Company, it made such lease to a cor-

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poration organized under the general incorporation act of this state; and if the North Chicago City Railway Company leased its property, privileges, and franchises in such a way as to include the right to charge a rate of fare up to the sum of 5 cents for a single passenger, to the North Chicago Street Railroad Company, such lease was made to a corporation organized under the general incorporation act of this state. If the North Chicago Street Railroad Company executed a lease of its property and privileges, so as to include the contract in question, to the appellant, it leased it to a corporation organized under the general incorporation act of this state. The lease of the West Chicago Street Railroad Company to the appellant is in the record in this case. By making such leases to the Chicago Union Traction Company, did the West Chicago Street Railroad Company and the North Chicago Street Railroad Company consent to a modification and change of the contracts which gave them the right to charge a rate of fare up to the sum of 5 cents for a single passenger?

As has already been stated, the object for which the appellant was formed was "to construct, own, purchase, acquire, and lease street railroads in the city of Chicago," etc., ". . . and to operate the said railroads owned and leased by it, with animal, cable, electric, or other power, except steam locomotive." One of the purposes announced in its statement, for which the appellant was organized, was to lease street railroads. The business, then, which it was to pursue, was not only the business of constructing, owning, purchasing, and acquiring street railroads, but was the business of leasing street railroads. Inasmuch as appellant was organized under the general incorporation act of this state, it was obliged to conduct its business in accordance with the provisions of that act. Section 1 of the general incorporation act of this state provides "that corporations may be formed in the manner provided by this act for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money: Provided, that horse and dummy railroads, and organizations for the purchase and sale of real estate for burial purposes only, may be organized and conducted under the provisions of this act." 1 Starr & C. Anno. Stat. 2d ed. p. 988. That is to say, horse railroads "may be organized and conducted under the provisions of this act." As appellant was organized under said act, its railroad must be conducted under the provisions of the act. It is the fundamental requirement of its charter, by which the state gave to it its existence, that its railroads should be conducted under the provisions of the general incorporation act. Before the adoption of the Constitution of 1870, great evils grew up in this state by reason of the granting of private charters to corporations. When the Constitution was adopted, the people of the state determined to adopt a different policy, and to compel corporations created by the state to remain and be subject to the control of the people, speaking through their law-making power. Accordingly, in § 9 of the general incorporation act it was provided as follows: "The general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: And, provided, further, that this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation." 1 Starr & C. Anno. Stat. 2d ed., p. 1006. When, therefore, appellant was organized, and consented that its railroads should be conducted under the provisions of the incorporation act, it accepted its organization subject to the provision embodied in § 9. In the matter of operating roads leased by it, it was obliged to operate them under such regulations and provisions as the general assembly might deem advisable. Such regulations and provisions were binding upon it, and it could not conduct its business except in subjection to such regulations and provisions. One of these regulations and provisions was that the common council of the city of Chicago had a right, under its charter, as above referred to, to regulate the rates of fare to be charged by it, and to prescribe the compensation to which it was entitled for the carriage of passengers. Unquestionably, if the appellant, after its organization, had constructed its road, it would be obliged to operate that road subject to the requirements of § 9, above quoted; that is to say, subject to the power of the common council to regulate the rates of fare to be charged by it. When, in the statement of the purposes of its organization, it recites that it is formed for the purpose of leasing street railroads and operating leased railroads, it is just as much subject to regulation by the common council as though it was operating a road constructed by itself.

In *Danville* v. *Danville Water Co.* 178 Ill. 299, 53 N. E. 118, this court said (p. 306, 178 Ill., and p. 121, 53 N. E.): "The charter of a corporation formed under the general incorporation act does not consist of its articles of association alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of the charter. *People ex rel. Peabody* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798. Therefore, the provisions of the general incorporation act must be regarded as entering into and forming a part of the charter of the defendant in error." Then, after quoting § 9 of the general incorporation act, as above set forth, the court proceeds as follows: "By organizing under the general incorporation act, the defendant in error agreed to submit itself to and to be bound by such regulations and provisions as the legislature should deem it advisable to make. The object of its creation was to furnish water to the city of Danville and the inhabitants thereof. The right

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of the legislature to regulate and provide for the rates at which such water should be supplied was a right reserved by § 9. The language of § 9 is different from, and broader in its scope than, the language contained in many charters which reserve to the state the power to repeal, alter, amend, or modify the charter itself. We apprehend, therefore, that the decisions restricting the power of the state as to charters which are given subject to the right of the state to repeal, alter, amend, or modify them do not apply to such broad language as is used in § 9. By the terms of § 9, it is something more than the mere right to change the charter of the corporation, which is reserved to the legislature. The authority is thereby reserved to provide the regulations and provisions, under which the corporation may proceed in the transaction of its business." These views were indorsed by the Supreme Court of the United States in the case of *Freeport Water Co.* v. *Freeport*, 180 U. S. 596, 45 L. ed. 687, 21 Sup. Ct. Rep. 497, as we understand that decision. In the latter case the Supreme Court of the United States said in reference to this § 9: "The statute reserves to the general assembly the power to prescribe in the government of corporations 'such regulations and provisions as it may deem advisable.' The language is very comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it. The supreme court of the state has construed it to be of greater import than the usual reservation of the power to alter and amend the charters of corporations. The plaintiff, however, contends that it was not intended, by the terms 'regulations and provisions,' 'to interfere with the internal business management of the corporation itself,' but to regulate 'those classes of acts which control the relation existing between stockholders as individuals and the corporation as an entirety, and the relations between corporations and third persons; that is, the manner of carrying on their business or exercising the powers of a corporation.' We think the construction is too narrow. The statute made no distinction between the internal and the external business of corporations,— between their relations to stockholders and their relations to third persons. Such are but special exertions of the power which the legislature possesses."

When the West Chicago Street Railroad Company made the lease to the appellant, was appellant to operate the railroad so leased to it in accordance with the provisions of its own charter, or in accordance with the provisions of the contract as to the rate of fare said to have been made by the lessor companies with the city of Chicago? If the appellant was obliged to operate the leased railways in accordance with the provisions of its own charter, then § 1723 was a valid ordinance, and appellant was bound to obey its requirements, as it was passed under a power delegated to the city by the legislature, as heretofore stated. Even if such contracts as are here insisted upon were held and owned by the lessor companies, appellant could not operate the leased roads in accordance with the provisions of those contracts, because it was expressly forbidden to do so by its charter and by the very terms of its original organization. In *Hays* v. *Ottawa, O. & F. River Valley R. Co.* 61 Ill. 422, we said that persons contracting with a corporation "must be presumed to act with full knowledge of its powers, and cannot complain when its acts are in accordance with the law of its creation." The West Chicago Street Railroad Company and the North Chicago Street Railroad Company, when they made these leases — if any was made by the latter company — to the appellant, were obliged to take notice of the provisions and requirements of the appellant's charter. They themselves were organized under the general incorporation act, and certainly were informed of the provisions of the act under which they themselves had their own existence. In addition to this, the lease of the West Chicago Street Railroad Company to the appellant, which is in the record, shows that the appellant had full knowledge of the provisions of the appellant's charter. Let it be granted that these lessor companies had contracts which gave them the right to charge a rate of fare up to the sum of 5 cents for a single passenger, so that the city had no power to reduce the rate without their consent; it is at the same time true that the appellant was obliged, under its charter, to charge such rate of fare in the operation of the roads leased by it as the common council, under its power granted by the legislature, should by ordinance prescribe. The lessor companies, by making the leases in question, abandoned their duty to the public. They gave up the operation of their roads, and intrusted this function to the appellant. The lease of the West Chicago Street Railroad Company to the appellant, as set forth in the statement preceding this opinion, provides that the appellant is to become the absolute owner of the lessor company's railroad property and privileges, so as to leave nothing in such lessor company except the mere right to exist as a corporation. The general rule is that a railroad company is a quasi public corporation, and under peculiar obligations to the public, and that consequently it cannot make any contract, which will disable it from performing its public functions. 19 Am. & Eng. Enc. Law, pp. 895, 896, and cases in notes. The lessor companies, by thus submitting their roads to the operation of the appellant, impliedly agreed that the appellant should operate them under its own charter, and in accordance with the provisions of its own charter.

It is true, as a general rule, that, where one railroad company leases its property to another, the lessee must conform to the requirements of the charter of the lessor, and be governed by such charter, in operating the road. But this can only be true where the lessee company, in operating the road in accordance with the charter of the lessor,

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is not violating its own charter. The cases announcing this rule are cases where the lessee road had full power under its charter to operate the road of the lessor in accordance with the terms of the latter's charter, and without conflict with the lessee's charter. In *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953, it was held that the statute of Illinois of February 12, 1855, empowering all railroad corporations incorporated under the laws of the state to make contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, authorizes a railroad corporation of Illinois to make a lease of its road to a railroad corporation of another state, but confers no power upon a railroad corporation of another state to take such lease, if not authorized to do so by the laws of its own state; and it was there said by Mr. Justice Gray, delivering the opinion of the court: "This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the state which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other." The same principle announced in that case is applicable here. The act of February 12, 1855, conferred no power on appellant to take a lease and operate a leased railroad under the terms of the lessor's charter, if it was not authorized to do so by its own charter. The act of 1855 has reference to the making of contracts and arrangements between railroad companies already existing and in operation, for the leasing or running of their roads. For instance, one railroad company, whose construction has been completed and whose road is in operation, may make a contract or arrangement with another road for leasing or running that other road. There are some cases which hold that a railroad already constructed, and required by law to charge a certain rate of fare, may lease and operate another road, and charge the rate of fare prescribed by the charter of the lessor company, rather than that prescribed by its own charter. But these cases proceed upon the theory that the lessee road obeys its own charter in operating the part of the road constructed by itself, and operates the road leased by it in connection with its own road in accordance with the charter of the lessor road. In the case at bar, however, the appellant, so far as this record shows, never constructed or owned any railroad. The president of appellant testifies that appellant was organized for the express purpose of buying out the North and West side railroads. It does not operate a road, constructed by itself in part, in connection with another road leased by it for the purpose of aiding and helping the operation of its own road. Appellant is a corporation whose business is the leasing of railroads, and not the operation of a road leased in connection with another road constructed by it. The record shows that it operates no other roads except those leased by it. In its business of leasing and operating leased railroads, it must comply with its own charter; that is to say, it must submit to reasonable regulations by the common council as to its rate of fare.

Section 9 of the incorporation act, as above quoted, contains a proviso that the act shall not be held to extend any private charter. If appellant, organized under that act for the purpose of operating leased roads, can operate them in accordance with the charter of the lessor roads, it is extending the private charter of the lessor roads, because these lessor roads claim that their contracts were transferred and assigned to them by original roads which were organized under special charters. It is contrary to the provisions of our incorporation act that private charters should thus be extended through the machinery of that act. Indeed, it is questionable whether appellant was properly organized for the purpose of leasing other railroads and terminating the performance of their duties to the public. Corporations organized under the general incorporation act may be formed in the manner provided by that act for lawful purposes only. If, however, the leasing of other roads exclusively was a lawful purpose of appellant's organization, it certainly was obliged to operate such roads in accordance with the provisions of its own charter, and not in violation thereof.

By the terms of the lease of June 1, 1899, executed by the West Chicago Street Railroad Company to the Chicago Union Traction Company, it is provided that the traction company "shall maintain and effectually operate said railways to the extent that it shall have the lawful right so to do." Thus, by the very terms of the lease in question, the lessor only requires appellant, as lessee, to operate the leased railways to the extent that appellant shall have the lawful right so to do. Appellant would not have the lawful right to operate these roads in accordance with the contract claimed, rather than in accordance with the provisions of its own charter. When the West Chicago Street Railroad Company authorized the appellant to operate the roads to the extent that it should have the lawful right so to do it waived its right to insist upon the terms of the contract in question, and submitted itself to such terms as were proper under the charter of the appellant, to whom the lease was made.

For the reasons hereinbefore stated, we are of the opinion that, if there were any such contracts as are claimed by appellant, through assignment to it from the companies already mentioned, the enforcement of § 1723 is not a violation of those contracts. The lessor companies must be held to have waived the terms of the contracts when they executed the leases in question to appellant; and appellant is estopped from insisting

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upon the operation of the roads in strict accordance with the terms of such contracts, because it would thereby be violating the express requirements of its own charter.

Something has been said by counsel for appellant in the argument in regard to the constitutionality of the act of 1865, referred to in the statement preceding this opinion; but, as the validity of that act is not necessarily involved in the decision of this case, we decline to pass upon it.

3. If we understand the third point made by the appellant, it is that the ordinance of 1890, re-enacted in 1897, and known as §§ 1723 and 1725, applied only to railroads existing at the time of its passage, and therefore could have no application to the appellant, having come into existence afterwards, in 1899. We think that § 1723 is clearly prospective in its character. It refers to the "rate of fare to be charged." The words "to be charged" refer to the future,— to what is to be charged hereafter. The subsequent part of § 1723, which relates to transfer tickets, refers specially to any line of street railway which "does now or shall hereafter, within the limits of the city of Chicago, join, connect with, cross, intersect, or come within a distance of 200 feet of any other line," etc. These words are certainly prospective in their meaning. The terms of the sections clearly apply to persons or corporations subsequently coming into existence. In *Illinois C. R. Co.* v. *Chicago*, 176 U. S. 653, 44 L. ed. 625, 20 Sup. Ct. Rep. 509, it was held, in an opinion delivered by Mr. Justice Brown, that, under a section of a city charter providing that a railroad corporation should not locate its track within any city without the consent of the common council, such restriction was not limited to the city as bounded at the date of the charter, but applied also to the territory subsequently included within the city limits. In *De Lima* v. *Bidwell*, 182 U. S. 197, 45 L. ed. 1056, 21 Sup. Ct. Rep. 743, it was held by the same learned justice that a statute prohibiting the sale of liquors to minors applies, not only to minors alive on the day the statute was passed, but to afterborn minors.

4. There is no evidence in the record tending to show that § 1723 is an unreasonable ordinance. What the earnings of the Union Traction Company are, or have been since its organization, or what the earnings of the West Chicago Street Railroad Company and of the North Chicago Street Railroad Company are, or have been, the testimony in the case does not show. If there was a reduction in the rate of fare which appellant was entitled to charge, by the requirement as to the giving of transfers, as set out in § 1723, it was incumbent upon the appellant to prove that such reduction has so diminished its profits as to make the requirement unreasonable. It is possible that a reduction of rates might increase the amount of business and earnings of the appellant, instead of decreasing the same. The charge of a lower rate will often increase the number of passengers traveling upon the railroad to such an extent as to make the profits equal, if not superior, to those earned when a higher rate of fare is charged. *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 343, 36 L. ed. 179, 12 Sup. Ct. Rep. 402. In the latter case the Supreme Court of the United States, speaking through Mr. Justice Brewer, said: "The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." It is only where rates are made so unreasonable as to make the enforcement of the law establishing them equivalent to taking property for public use without just compensation that the Federal courts hold that the corporation has been deprived of its property without due process of law, and has been denied the equal protection of the laws. There being an entire absence of testimony as to the earnings or profits of the appellant, there is nothing in the three cases here under consideration to justify us in holding that there has been any infringement of this provision of the Constitution.

The judgments of the Criminal Court of Cook County in the three cases here considered are *affirmed*.

Petition for rehearing denied December 16, 1902.

Augusta MIDDEKE, Admrx., etc., of Agnes Marty, Deceased, *Appt.*,
v.
Rose BALDER *et al.*

(198 Ill. 590.)

Representatives of the beneficiary must show her survivorship, or the fund will go to the heirs in case of the death, in the same disaster, of a member of a mutual benefit society and the beneficiary of his certificate, which provides that, in the event of the death of the beneficiary before the decease of the member, the benefit shall be paid to his heirs.

(October 25, 1902.)

APPEAL by defendant Middeke from a judgment of the Appellate Court First District, affirming a judgment of the Circuit Court for Cook County awarding the funds arising from a benefit certificate of F. H. Marty, deceased, to his sisters, against the claim of the administratrix of his wife, in an interpleader proceeding by the society to determine the ownership of the funds. *Affirmed.*

Statement by **Carter**, J.:

This was a bill of interpleader by the National Union, a fraternal beneficiary association, bringing into court the parties to this appeal for the purpose of having their conflicting claims to the benefit which became

NOTE.—As to presumption of survivorship among those who perish in common disaster, see also, in this series, *Re* Willbor (R. I.) 51 L. R. A. 803, and *note*, and United States Casualty Co. v. Kacer (Mo.) 58 L. R. A. 436.

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payable on the death of F. H. Marty settled. Marty held a benefit certificate, in which the association promised to pay to his wife, Agnes Marty, $2,000 upon the death of the member in good standing. Marty, his wife, and infant child were burned to death in the same fire which consumed their home in Chicago February 14, 1899. The laws of the association provided that, "in the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made, the benefit shall be paid to the heirs of the deceased member." Marty left, him surviving, his sisters, Rose Balder and Bertha Marty, appellees, who claimed the fund. The wife, Agnes Marty, left, her surviving, her father and mother and four brothers and two sisters. Augusta Middeke was appointed administratrix of her estate by the probate court, and is the appellant here (together with the other surviving members of the family), and also claims the fund. It was admitted on the hearing that there was no proof whatever as to which one of the three, husband, wife, or child, survived the others. The court decreed the fund to appellant, the administratrix of the wife, which decree was, on appeal to the appellate court, reversed, and the cause remanded. The circuit court then redocketed the case, and entered a decree in favor of appellees, the two sisters of the member, from which decree appellant appealed to the appellate court, where the decree was affirmed, and appellant then took this, her further appeal to this court.

Mr. **Samuel J. Howe,** with *Mr.* **George F. Ort,** for appellant:

It was incumbent on appellees to aver and prove that Agnes Marty died before F. H. Marty.

Cowman v. *Rogers,* 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64; *Paden* v. *Briscoe,* 81 Tex. 563, 17 S. W. 42; *Fuller* v. *Linzee,* 135 Mass. 468; Niblack, Ben. Soc. § 205; Toller, Exrs. & Admrs. 133; Comyns' Digest, *Administration,* B, 10, 11; Co. Litt. 289; *Makepeace* v. *Moore,* 10 Ill. 476.

The rights of Agnes Marty to the fund could, under no circumstances, be said to be as heir of F. H. Marty. Her rights were by virtue of a direct contract with the National Union, evidenced by the certificate in which she was named as beneficiary.

Maryland Mut. Benev. Soc. I. O. of R. M. v. *Clendinen,* 44 Md. 434; *Rogers* v. *Humphrey,* 4 Ad. & El. 299; 2 Washb. Real Prop. 320; 1 Chance, Powers, 1; 1 Sugden, Powers, ed. 1856, 242; 2 Sugden, Powers, 22; *Bradish* v. *Gibbs,* 3 Johns. Ch. 523; *Doolittle* v. *Lewis,* 7 Johns. Ch. 45, 11 Am. Dec. 389; *Burleigh* v. *Clough,* 52 N. H. 267, 13 Am. Rep. 23; *Cowman* v. *Rogers,* 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64.

Messrs. **Thomas H. Joyce, Dent & Whitman,** and **W. O. Lindley,** for appellees:

Under the laws of the National Union itself, the beneficiary, in order to take, must be in existence and capable of taking at the death of the insured. This requirement formed a part of the contract between the insured and the National Union.

Paden v. *Briscoe,* 81 Tex. 563, 17 S. W. 42; *Fuller* v. *Linzee,* 135 Mass. 468; *Expressmen's Aid Soc.* v. *Lewis,* 9 Mo. App. 412; Niblack, Ben. Soc. §§ 202-207; 2 Bacon, Ben. Soc. §§ 243a, 396a; *Supreme Council, A. L. of H.* v. *Adams,* 68 N. H. 236, 44 Atl. 380; *Masonic Mut. Relief Asso.* v. *McAuley,* 2 Mackey, 70.

Agnes Marty never had any vested right in this benefit fund; so that, whoever might be ultimately entitled thereto, nothing ever descended to her representatives, for the reason that she never enjoyed more than a mere expectancy as to such benefit fund. A mere expectancy cannot descend.

Johnson v. *Merithew,* 80 Me. 111, 13 Atl. 132; *Ehle's Will,* 73 Wis. 445, 41 N. W. 627; *Newell* v. *Nichols,* 75 N. Y. 78, 31 Am. Rep. 424; *Benton* v. *Brotherhood of Railroad Brakemen,* 146 Ill. 570, 34 N. E. 939; *Fisher* v. *Donovan,* 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 778; *Voigt* v. *Kersten,* 164 Ill. 314, 45 N. E. 543; *Delaney* v. *Delaney,* 70 Ill. App. 130; *Fischer* v. *American L. of H.* 168 Pa. 279, 31 Atl. 1089; *Michigan Mut. Ben. Asso.* v. *Rolfe,* 76 Mich. 146, 42 N. W. 1094.

Carter, J., delivered the opinion of the court:

When two or more persons lose their lives in a common disaster, by the civil law a number of presumptions of survivorship arise, based on age, sex, and condition of health; but there is no presumption that they all died simultaneously. At common law there is no presumption of survivorship, and, if survivorship is claimed, it must be proved, and the one having the burden of proof of such survivorship must fail if he cannot prove it. While there is no such presumption, the practical result of this rule is that the parties are treated as having all died at the same instant of time, and that no one of those thus dying synchronously takes from any of the others dying in the common disaster by reason of the other's death. This rule was practically settled in England in 1855 in the leading case of *Underwood* v. *Wing,* 4 De G. M. & G. 633, heard on appeal from the master of the rolls. *Underwood* v. *Wing,* 19 Beav. 459. All the previous cases and authorities were cited, and the subject was thoroughly discussed. Underwood, his wife, and three children all perished at sea on the voyage from London to Australia. The lord chancellor said: "The question in the present case is whether, the plaintiff [one Underwood] being the next of kin or representing the next of kin, Mr. Wing shows a title depriving her of that to which, in the absence of a valid will, she is entitled. That depends, first of all, on the terms of the will; and the will gives the property to Mr. Wing 'in case my wife shall die in my lifetime.' Then comes the question, On whom does the burden of proof rest to show whether the wife did or did not die in the testator's lifetime? I think, the principle once being admitted that the prima facie title is in the

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next of kin, that it must rest on the person who claims the property under a bequest giving it to him in that particular event. It is not for the next of kin to show that the wife did not die in her husband's lifetime, but the person who claims under the disposition must show, not that probably it might be one way or the other, but that that state of circumstances did in fact occur which entitles him, according to the language of the will, to say that the wife did die in her husband's lifetime. . . . The result, therefore, is that, there being a will giving away the property in one state of circumstances,—namely, that the wife died in the husband's lifetime,—and it not being proved that that state of circumstances existed, the property is not given away at all, and must be distributed among the next of kin as upon an intestacy." And it was also said that, there being no proof as to which one, husband or wife, survived the other, "the property must be distributed just as it would have been if they had both died at the same moment." The case went to the House of Lords as *Wing* v. *Angrave*, 8 H. L. Cas. 183, and the same rules as to survivorship and burden of proof were there announced.

This subject has been considered by a number of our American courts, and all are agreed that there is no presumption of survivorship, and that survivorship must be proved. In considering the question upon which the decision of the case at bar must turn, a review of the principal cases may not be unprofitable. In *Coye* v. *Leach*, 8 Met. 371, 41 Am. Dec. 518, the father, his only daughter, her husband, and their only child perished at sea on a voyage from Charleston to Baltimore. The contest was between the heirs of the daughter and the heirs of the father. Speaking of the question of survivorship as between the father and the daughter, the court said: "For aught that appears in the present aspect of the case, they may both have perished together. This being so, and no arbitrary presumption being authorized by law in such cases, arising from age or sex, the consequence is that those who seek to enforce their rights as heirs at law of Caroline E. Coye [the daughter] must fail in establishing their right to a distributive share in the estate of Sylvanus Keith," the father. In the case of *Newell* v. *Nichols*, 75 N. Y. 78, 31 Am. Rep. 424, there was a will devising property to trustees on certain trusts for the benefit of the husband and two children of testatrix for life, and, in the event of their death without further disposition of the property, to certain named relatives of the wife. The husband of the testatrix, her mother, and her two children, were all lost on a voyage from New York to Europe in 1875. The contention was between the heirs of the children and the relatives of the testatrix named in the will. The doctrine of the English court in the *Underwood Case* was approved, and it was held that the persons who claim through a survivorship must prove the same. After quoting some expressions in the older English cases, the court said: "These expressions only mean that, as the fact [of survivorship] is incapable of proof, the one upon whom the *onus* lies fails, and persons thus perishing must be deemed to have died at the same time, for the purpose of disposing of their property." In *Johnson* v. *Merithew*, 80 Me. 111, 13 Atl. 132, A. W. Nickerson, his wife, and his three children, sailed from Scotland for Havana, and were never heard from again. His mother had died some years before, leaving him and his two sisters as her only heirs at law. The contest was between the grantee of the father and the two sisters. The court said: "In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because that fact is presumed, but because, from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory. . . . The children are not proved to have survived their father, and therefore he died without issue, and his . . . [share] descended to his father,"—citing the three cases quoted above. In *Russell* v. *Hallett*, 23 Kan. 276, the court said, citing with approval *Coye* v. *Leach*, 8 Met. 371, 41 Am. Dec. 518, and *Newell* v. *Nichols*, 75 N. Y. 78, 31 Am. Rep. 424: "In the absence of other evidence, the fact as to who was the survivor where several persons perish in the same catastrophe is assumed to be unascertainable, and property rights are disposed of as if death occurred to all at the same time. While, therefore, it is correct to say the law makes no presumption on the subject, the practical consequence is nearly the same as if the law presumed all to have perished at the same moment." *Ehle's Will*, 73 Wis. 445, 41 N. W. 627, Abram Ehle, his son James, the son's wife, and their three children, all perished in the same fire. The court found from the evidence that Abram died first, then his son James, and, lastly, the wife and children. In speaking of the question of survivorship, the court said: "In the absence of any such evidence, the question of such survivorship must necessarily be regarded as unascertainable, and, hence, in such case the rights of property must be determined as if death occurred to all at the same moment of time." In the case of *Re Willbor*, 20 R. I. 126, 51 L. R. A. 863, 37 Atl. 634, the three Willbor sisters were burned to death at the same time in their house at Newport. Each one left a will leaving her property to the others. The court said: "As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence, the rights of succession to their estates are to be determined as if death occurred to all at the same moment." 51 L. R. A. 863, *note*.

There are also several cases involving the right to the proceeds of a policy of insurance upon the life of the husband for the benefit of the wife where both perished in the same disaster, and the contest was between the administrator of the wife's estate

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and those claiming through the husband, or as substituted beneficiaries. The same rules have been adhered to as in the foregoing cases, and the question as to what party has the burden of proof has been determined by the doctrine of each particular court, whether the beneficiary took a vested or a contingent interest in the fund. In *Fuller* v. *Linzee*, 135 Mass. 468, the contest was between the next of kin of Mrs. Fuller and the administrator of her husband, who also represented his next of kin. N. G. Fuller, his wife, and their five children sailed from Calcutta for New York, and all perished together at sea. Fuller's life was insured, the insurance payable to his wife, and, if she predeceased him, then it was payable to their children. The court construed the insurance contract as giving to the wife an interest contingent upon her surviving her husband, and said: "This is a proceeding to establish a right in the wife which would devolve upon her next of kin, and the burden of proof is upon the party who undertakes to establish it. We think, upon the view of the contract already taken, that the wife had no interest transmissible to the next of kin unless she survived her husband, and that they cannot maintain their claim without proof that she survived him." A different view has been taken where it is held that the beneficiary in the policy has a vested interest in it. The case of *Paden* v. *Briscoe*, 81 Tex. 563, 17 S. W. 42, was a suit upon a benefit certificate issued by the Supreme Lodge Knights and Ladies of Honor to John F. Briscoe, payable to his wife on his death. The by-laws provided that, if the beneficiary should die before the member, the proceeds of the certificate should be paid to the dependent heirs of the deceased. Both husband and wife perished in a fire which consumed the hotel in which they were stopping. The trial court found that both died at the same instant of time, and gave judgment for the mother and sister of the deceased, dependents upon him for support, and against the administrator of the estate of the wife. On a review of the case the supreme court said: "The court below finds that the wife, the beneficiary named by the husband, did not die before her husband, but died at the same instant. The result of this finding is that the beneficiary named, at the time the policy was earned by the death of the husband, did not survive him, and was incapable of taking the proceeds of the policies. . . . The instantaneous death of both the husband and wife as successfully accomplished the inability of the wife to take as if she had died before." In *Hildebrandt* v. *Amos* (Tex. Civ. App.) 66 S. W. 128, which was a suit on an insurance policy, both husband and wife being drowned in the Galveston disaster, the court of civil appeals of Texas said: "There being no presumption either of survivorship or of simultaneous death, and no evidence in the case to sustain a finding of either of these facts, it is manifest that the party upon whom lay the burden to establish such survivorship or simultaneous death has failed to make out his case, and the only question for us to determine is upon which of the parties to this suit such burden was imposed. The determination of this question is not affected by the position of the parties as plaintiff or defendant in the court below." After an extended discussion, the court found that the beneficiary had no vested interest in the policy, and held "that it devolved upon her [the beneficiary's] representatives to show that the contingency had happened which would entitle her to receive the proceeds of the policy." In the recent case of *United States Casualty Co.* v. *Kacer*, 169 Mo. 301, 58 L. R. A. 436, 69 S. W. 370, Yocum and his daughter perished by the destruction of their yacht on a trip in the Gulf of Mexico. Yocum carried two accident insurance policies, payable to his daughter, if surviving; if not, to his legal representatives. In discussing the case the court fully approved of the rules regarding survivorship and burden of proof as stated in the cases, and said: "The rule is that he who claims a right by virtue of survivorship must prove the fact of the survival of him through whom he claims, and that, failing in this, the property or fund remains vested as it was before the calamity. . . . But this does not settle the case, because the representatives of the father and daughter each claim that the rights of the other depend upon their showing which of the two survived the other, and hence each claims the burden of proof is upon the other. The representative of the father further claims that, if neither can prove what the fact in this regard was, then the doctrine of 'distribution' applies, and the fund must go where it would have gone if there had been no appointed beneficiary in the policy, to wit, to the representative of the assured." The court held that an insurance policy of the kind sued on conferred a vested interest in the beneficiary, and hence gave judgment for the administrator of the daughter's estate.

A different view of the question was taken in *Cowman* v. *Rogers*, 73 Md. 406, 10 L. R. A. 550, 21 Atl. 64. In that case Walter E. Hoopes, his wife, and two children were all drowned in the Johnstown disaster, in Pennsylvania, in 1889. He was insured in the Order of the Golden Chain, and the certificate was payable upon his death to his wife. A sister of the deceased and the administrator of the wife both claimed the fund. The court said: "Mrs. Hoopes was the beneficiary named in the certificate. Her representative has a prima facie title to the fund. That title can only be devested by evidence showing that she died before her husband. They are both dead, and both died in the same disaster. There is no proof and there is no legal presumption as to which one died first, or as to their having died simultaneously. Until it is shown that she died before her husband, the fund is payable to no one else other than her representative, because it is only in the event of the death of

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the nominated beneficiary in the lifetime of the assured that others can possibly take. Until proof of her having so died is first furnished, her prima facie title cannot be displaced." Just what the court meant by the expression "prima facie title" is not clear. If the court meant to say that the beneficiary of a certificate in these fraternal beneficiary associations has a vested interest, such is not the commonly accepted view, and is not the law of this state. *Martin* v. *Stubbings*, 126 Ill. 387, 18 N. E. 657; *Benton* v. *Brotherhood of Railroad Brakemen*, 146 Ill. 570, 34 N. E. 939; *Voigt* v. *Kersten*, 164 Ill. 314, 45 N. E. 543. In cases of ordinary property no one has a vested interest in it during the lifetime of the absolute owner, but has only an expectancy, dependent upon the death of the owner during the life of the expectant, and upon the further contingency that the owner does not dispose of the property by deed, gift, or will made before his death. The case of a beneficiary in a certificate of a fraternal beneficiary association is analogous. The member of the beneficiary association procuring the beneficiary certificate is the moving party through whose action the beneficial scheme of the association is put in operation for the benefit of the nominated beneficiary; and it is under the control of the member, at least to such an extent that he can defeat the expectancy of the beneficiary, and secure the benefit of the scheme to some other eligible beneficiary. The object of the insured is to provide for the support of those dependent on or related to him, usually by the ties of consanguinity. Such dependents and relations are the ones entitled to the benefit of the insurance, and the burden of proof rests upon the heirs of the beneficiary—upon those claiming the benefits of the joint action of the insured and the beneficiary association through the nominative beneficiary—that such beneficiary actually became entitled to such benefit by surviving the insured; and, if they cannot do this the benefits will accrue to the succeeding surviving beneficiaries, as may be provided in the scheme of the association, or to the next of kin of the deceased member. In the case at bar the laws of the association provided that the benefit should, in case of the death of the beneficiary before the insured, be paid to the heirs of such insured member. These are the appellees, Rose Balder and Bertha Marty. Treating the case as if the member and the beneficiary died at the same time, the result is the same as if the beneficiary died first.

It is contended by appellants that there is no proof appellees are the only heirs of F. H. Marty. Such heirship was alleged in the bill of interpleader and claimed in the answer of appellees, but was denied in the answer of appellants. The circuit court, in the decree, found that appellees were the only heirs at law of the deceased member, and we are of the opinion that this finding is supported by the certificate of evidence.

The judgment of the Appellate Court must be affirmed.

59 L. R. A.

JACKSON PAPER MANUFACTURING COMPANY of Jackson, Michigan, *Appt.*, *v.* COMMERCIAL NATIONAL BANK.

(199 Ill. 151.)

1. **A superintendent of a mill, with authority to manage the running of it, has no implied authority** to indorse commercial paper given in payment of mill accounts, where such power is not necessary to the performance of the duties imposed on him, and he is not accustomed to perform acts of a similar nature.
2. **One purchasing from an agent, upon his indorsement, commercial paper payable to the order of his principal,** cannot imply authority to make the indorsement from the facts that he has been the agent in charge of the principal's mill, engaged in the management of his business, opening mail, giving orders to employees, and countersigning checks drawn by the principal for supplies.
3. **The drawee of a check, having notice of the agency of the indorser** by the form of his signature, is bound to take notice of the limitations upon his authority.
4. **By the certification of a check, the drawee undertakes absolutely to pay it** when presented at any time within that fixed by the statute of limitations, and is estopped to deny the possession of funds.
5. **Rightful possession by an agent of a check** payable to his principal gives no authority to indorse and transfer title to it.
6. **One taking commercial paper upon the indorsement of the payee's agent** has the burden of proving the authority to make the indorsement.

(October 25, 1902.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of defendant in an action brought to recover the amount alleged to be due on a check. *Reversed.*

Statement by **Magruder**, Ch. J.:

This is an action in assumpsit, brought on April 18, 1898, in the superior court of Cook county, by the appellant, the Jackson Paper Manufacturing Company, of Jackson, Michigan, against appellee, the Commercial National Bank of Chicago. The declaration contained two special counts and the common counts. The special counts are based on a check bearing date December 18, 1896, payable to the order of the Jackson Paper Manufacturing Company, drawn on the Commercial National Bank, for the sum of $325.65, by J. Herz & Son. The defendant below (appellee here) filed a plea of general issue, and the trial below resulted in verdict and judgment in favor of appellee. An appeal was taken to the appellate court, where the judgment has been affirmed, and

NOTE.—As to authority of agent to indorse negotiable paper, see also Gate City Bldg. & L. Asso. v. National Bank of Commerce (Mo.) 27 L. R. A. 401, and *note*.

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the appellate court has granted a certificate of importance. The present appeal is prosecuted from the judgment of affirmance so entered by the appellate court.

Mr. **W. H. Wilkins,** with *Mr.* **Bowen W. Schumacher,** for appellant:

If the power to indorse commercial paper could be implied, such implication would still be subject to the general rule that the extent of the authority of an agent, implied from his acts, is limited to acts of a kind like those from which it is implied.

Mechem, Agency, §§ 389, 398; *Gregory* v. *Loose,* 19 Wash. 599, 54 Pac. 33; *Boord* v. *Strauss,* 39 Fla. 381, 22 So. 713; 1 Parsons, Contr. 6th ed. p. 62; Dan. Neg. Inst. §§ 292. 293.

A party maintaining that an ostensible authority existed must prove that he knew of the facts giving color of authority to the supposed agent at the time of the transaction.

Cash v. *Taylor,* 8 L. J. K. B. 262; *St. John* v. *Redmond,* 9 Port. (Ala.) 428; Chitty, Bills & Notes, 13th Am. ed. p. 41. *32; 1 Dan. Neg. Inst. 4th ed. § 297; *Rawson* v. *Curtiss,* 19 Ill. 456; *Maxey* v. *Heckethorn,* 44 Ill. 437; *Blass* v. *Terry,* 156 N. Y. 122, 50 N. E. 953.

The burden of proving the authority of Jackson to indorse the name of the plaintiff upon the check was upon the defendant.

Hardesty v. *Newby,* 28 Mo. 567, 75 Am. Dec. 137; *Hays* v. *Lynn,* 7 Watts, 524; *Morgan* v. *Bank of State,* 1 Duer, 434; *Bank of the University* v. *Tuck,* 101 Ga. 104, 28 S. E. 168; *Jackson* v. *National Bank,* 92 Tenn. 154, 18 L. R. A. 663, 20 S. W. 802; *Chicago Electric Light Renting Co.* v. *Hutchinson,* 25 Ill. App. 476; *Commercial Nat. Bank* v. *Lincoln Fuel Co.* 67 Ill. App. 166; *Beattie* v. *National Bank,* 174 Ill. 571, 43 L. R. A. 654, 51 N. E. 602.

A person dealing with an agent takes the risk as to the extent of his authority, and is bound to inquire into it.

Chicago Electric Light Renting Co. v. *Hutchinson,* 25 Ill. App. 476; *Schilling* v. *Rosenheim,* 30 Ill. App. 81; *Theile* v. *Chicago Brick Co.* 60 Ill. App. 560; *Schneider* v. *Lebanon Dairy & Creamery Co.* 73 Ill. App. 612; *Wise* v. *American Trust & Sav. Bank,* 75 Ill. App. 96.

Authority to indorse commercial paper cannot be inferred from the fact that the agent is a traveling salesman, collector, or is even treasurer, president, general manager, or general agent of his principal. A general agent must have special authority to accept or indorse commercial paper.

Mechem, Agency, § 398; *Dodge* v. *National Exch. Bank,* 30 Ohio St. 1; *Doubleday* v. *Kress,* 50 N. Y. 410, 10 Am. Rep. 502; *Smith* v. *Co-Operative Dress Asso.* 12 Daly, 304; *Atkinson* v. *St. Croix Mfg. Co.* 24 Me. 176; *Middlesex County Bank* v. *Hirsch Bros. Veneer Mfg. Co.* 24 N. Y. S. R. 297, 4 N. Y. Supp. 385; *Graham* v. *United States Sav. Inst.* 46 Mo. 186; *Robinson* v. *Chemical Nat. Bank,* 86 N. Y. 407; *Vanbibber* v. *Bank of Louisiana,* 14 La. Ann. 486, 74 Am. Dec. 442; *Jacoby* v. *Payson,* 85 Hun, 367, 32 N. Y. Supp. 1032; *Railway Equipment & Pub. Co.* v. *Lincoln Nat. Bank,* 82 Hun, 8, 31 N. Y. Supp. 44; *Smith* v. *Gibson,* 6 Blackf. 369; *Hines* v. *Butler,* 38 N. C. (3 Ired. Eq.) 307; *New York Iron Mine* v. *First Nat. Bank,* 39 Mich. 644; *Culver* v. *Leovy,* 19 La. Ann. 202; *Sewanee Min. Co.* v. *McCall,* 3 Head, 619; *Chicago Electric Light Renting Co.* v. *Hutchinson,* 25 Ill. App. 476; *Commercial Nat. Bank* v. *Lincoln Fuel Co.* 67 Ill. App. 166.

By the act of certification, the bank assumed a duty directly to the plaintiff.

Metropolitan Nat. Bank v. *Jones,* 137 Ill. 634, 12 L. R. A. 492, 27 N. E. 533; *Middlesex County Bank* v. *Hirsch Bros. Veneer Mfg. Co.* 24 N. Y. S. R. 297, 4 N. Y. Supp. 385; *Smith* v. *Co-Operative Dress Asso.* 12 Daly, 304; *Dowden* v. *Cryder,* 55 N. J. L. 329, 26 Atl. 941.

Messrs. **Tenney, McConnell, Coffeen, & Harding,** for appellee:

Presentation for payment, and proof of money on deposit at the time of presentation, sufficient to pay the check, are essential in a suit against the bank by the holder of a check.

Lane v. *Adams,* 19 Ill. 167; *Neagle* v. *Herbert,* 73 Ill. App. 18; *Gate Hotel Co.* v. *Union Nat. Bank,* 171 Ill. 531, 39 L. R. A. 479, 49 N. E. 420; *Wyman* v. *Ft. Dearborn Nat. Bank,* 181 Ill. 279, 48 L. R. A. 565, 54 N. E. 946; *Shaffner* v. *Edgerton,* 13 Ill. App. 132; 1 Dan. Neg. Inst. § 654; *Metropolitan Nat. Bank* v. *Jones,* 137 Ill. 634, 12 L. R. A. 492, 27 N. E. 533; *First Nat. Bank* v. *Whitman,* 94 U. S. 343, 24 L. ed. 229.

On the question of Jackson's want of authority, the burden was upon the plaintiff.

Heinemann v. *Heard,* 62 N. Y. 448; *Farmers, Loan & T. Co.* v. *Siefke,* 144 N. Y. 354, 39 N. E. 358; *Smith* v. *Grant,* 30 Ill. App. 150; 5 Am. & Eng. Enc. Law, pp. 23, 29–31; 1 Taylor. Ev. 9th ed. 276; *Simpson* v. *Davis,* 119 Mass. 269, 20 Am. Rep. 324; *Fidelity & Casualty Co.* v. *Weise,* 182 Ill. 496, 55 N. E. 540.

Authority may be implied from the course of business and employment, and from repeated recognitions by the principal of the agent's authority.

1 Dan. Neg. Inst. § 289.

The powers of the superintendent or general manager of the corporation depend upon the facts of each particular case, special attention being directed to the degree of control exercised by this officer, and the character and magnitude of the interests put in his charge.

4 Thomp. Corp. §§ 4850, 4853.

There was evidence showing that this superintendent was one of such extended powers, that he was practically in absolute control of the company's business.

Shaffner v. *Edgerton,* 13 Ill. App. 132; *Commercial Nat. Bank* v. *Lincoln Fuel Co.* 67 Ill. App. 166; *Atkinson* v. *St. Croix Mfg. Co.* 24 Me. 171; *Bates* v. *Keith Iron Co.* 7 Met. 224.

The question was, whether or not the in-

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dorsement by Jackson was sufficient to transfer title to the check to Copelin & Co.

As soon as the paper comes into the hands of a holder unaffected by any defect, its character as a negotiable security is established, and the power of transferring it to others with the same immunity which attaches in his hands is incident to his legal right, and necessary to sustain the character and value of the instrument as property, and to protect the bona fide holder in its enjoyment.

1 Dan. Neg. Inst. § 803; *Woodworth* v. *Huntoon*, 40 Ill. 131, 89 Am. Dec. 340; *Rice* v. *Van Ackere*, 22 Ill. App. 588; *Central School Supply House* v. *Donovan*, 70 Ill. App. 208.

If, as between Copelin & Co. and the Jackson Paper Manufacturing Company, the latter, because of prior transactions in which Jackson's authority had been recognized, would not be permitted to deny his authority to indorse the check, Copelin & Co., having acquired valid title to it, could transfer that title to one who might have had express knowledge that Jackson had no actual authority to make the indorsement.

Magruder, Ch. J., delivered the opinion of the court:

The errors assigned by the appellant and relied on for a reversal of the judgment are the refusal to admit testimony offered in behalf of the plaintiff, the admission of testimony in behalf of the defendant over the objection of the plaintiff, the refusal to give instructions offered by the plaintiff, the giving of instructions in behalf of the defendant, and the overruling of the motion for a new trial.

1. The main question, arising out of the action of the trial court in the admission and refusal of testimony and in the giving and refusal of instructions, relates to the authority of the superintendent of a manufacturing corporation to indorse a check made payable to the order of that corporation, and given in payment of a debt, created by the purchase of goods from the corporation by the drawer of the check. The appellant was engaged in the manufacture and sale of paper at Jackson, Michigan. In January, 1895, it employed one Charles A. Jackson to act as superintendent of its mill at Jackson, Michigan, and he continued to act as such superintendent from January, 1895, to the latter part of December, 1896, or the 1st of January, 1897. In December, 1896, Jackson went to Chicago to solicit orders for the company, and to make sales of paper for it. J. Herz & Son and E. W. Copelin & Co., paper dealers of Chicago, were customers of the appellant. J. Herz & Son were indebted to the appellant at that time in the sum of between $300 and $400. Jackson went to see J. Herz & Son at their store in Chicago, and settled with them their account with appellant. J. Herz & Son, on December 18, 1896, gave to Jackson their check of that date for $325.65, payable to the order of the Jackson Paper Manufacturing Company, and drawn upon the Commercial National Bank of Chicago. Jackson took this check to E. W. Copelin & Co., of Chicago, and asked E. W. Copelin to cash it for him. Copelin had done business with the appellant, and had visited the mill of appellant at Jackson, Michigan, and had seen C. A. Jackson there acting as superintendent and manager of the mill. Jackson indorsed the check as follows: "Jackson Paper Mfg. Co., C. A. Jackson, Supt.," and turned it over to Copelin. Copelin procured the check to be certified by the Commercial National Bank, upon which it was drawn, and gave Jackson the currency for it. Copelin then indorsed the check over to the American Exchange National Bank, with which he did business, and deposited it to his credit in the American Exchange National Bank. The check went through the Chicago clearing house on December 19, 1896, and was paid by the Commercial National Bank on December 21, 1896. The amount thereof was charged to the account of J. Herz & Son, the drawers of the check. When Jackson thus obtained the money upon the check from Copelin, he did not remit the money to the Jackson Paper Manufacturing Company in Michigan, and the amount thereof was never received by the appellant. The appellant learned nothing of the whereabouts of Jackson until January, 1897, when it then learned of his death by suicide in New Orleans. About the same time it learned of his collection of this money from J. Herz & Son through letters received from the latter.

If C. A. Jackson had authority to indorse the name of appellant to the check, so as to transfer good title thereto to E. W. Copelin & Co., then the judgments of the lower courts are correct; but, if he had no authority to indorse the check for the appellant, then such judgments are wrong, and the rulings of the court below in the admission and exclusion of evidence and in the giving and refusal of instructions were erroneous. The evidence is clear and uncontradicted that Jackson had no express authority from the appellant to indorse checks in its name. Indeed, it is not contended by the appellee that Jackson had any express authority to make any such indorsements, but it is claimed that he had implied authority so to do. The appellee contends that his authority to make the indorsement is to be implied from the nature of his duties as appellant's superintendent and manager, and from his conduct in connection with the business of appellant. As superintendent of the mill, Jackson was under the direction of Nathan S. Potter, who was the treasurer and managing director of the corporation. Jackson had charge of the buying of the material and of the hiring of the men, and looked after the manufacture and sale of paper. He was paid a certain annual salary, and was entitled to a percentage of the net profits of the business in excess of a certain amount. His brother, Gale Jackson, was the bookkeeper of the corporation. Appellant had a president, a treasurer, and a secretary, though the president and secretary ap-

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peared to take but little active management of the company's business. Sometimes, when Jackson was traveling, he collected money from customers of the appellant, which was charged by his brother, the bookkeeper, to his account; but, the testimony tends to show that appellant had no knowledge of these charges until after the death of Jackson. Sometimes, when Jackson was on a trip for the company for the purpose of selling goods or making collections, he would adjust accounts due to the company. It was not shown that any collections made by him had ever been paid by check payable to the order of the appellant, except the check here in controversy. It was shown that the letter head of the Jackson Paper Manufacturing Company had printed at the top of it, not only the names of the president of the company and the treasurer of the company, but also the name of "C. A. Jackson, Supt." The only person who had express authority to sign notes for the company, and draw checks for the company, and indorse its paper and checks, was Nathan S. Potter, the treasurer, who, as managing director, had also the general supervision and management of the business. Sometimes one P. B. Loomis, Jr., the secretary of the company, indorsed Potter's name when he was absent. It appears, also, that Potter sometimes authorized Gale Jackson, the bookkeeper, to indorse checks and drafts in Potter's name for deposit in the People's National Bank of Jackson, Michigan, where appellant kept its account. It is also shown that Jackson sometimes countersigned checks drawn by appellant upon its own bank; that is to say, he wrote his name across the end of the check over the word "countersign," though this was not done in the case of all checks drawn by appellant upon its bank. The checks so countersigned by him were drawn by appellant to pay for purchases which Jackson would make for the use of the mill, and the object of such countersigning was to show that the amount of the purchase was correct; Jackson having charge of the purchase of material to be used in the manufacture of paper by the appellant. The checks, however, given by the appellant, were all drawn by Potter, the treasurer.

The weight of authority seems to be in favor of the contention of appellant that authority to indorse commercial paper can only be implied where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his plincipal must be a necessary implication from an express authority conferred upon such agent. Wherever such power is implied from the acts of the agent, the acts, subject to such implication, must be acts of a kind like those from which the implication is drawn. Parsons, in his work on Contracts (vol. 1, 6th ed. p. 62), says: "An agent's acts in making or transferring negotiable paper (especially if by indorsement) are much restrained. It seems that they can be authorized only by express and direct authority, or by some express power which necessarily implies these acts, because the power cannot be executed without them." The power of an agent to bind the principal by the making or indorsing of negotiable paper can only be charged against the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such a power, or where the power is a manifestly necessary and customary incident of the character bestowed upon the agent, and where the power is practically indispensable to accomplish the object in view. An agent cannot bind his principal by making or indorsing notes for his own benefit or the benefit of third persons. Mechem, Agency, §§ 389–392. It is true that Jackson was the superintendent of appellant's mill, and managed the business of running the mill; but "an agent having general authority to manage his principal's business has, by virtue of his employment, no implied authority to bind his principal by making, accepting, or indorsing negotiable paper. Such an authority must be expressly conferred, or be necessarily implied from the peculiar circumstances of each particular case. It may undoubtedly be conferred, and by implication, but it will not be presumed from the mere appointment as general agent." Id. § 398. Daniel, in his work on Negotiable Instruments (vol. 1, 4th ed. § 292), says: "When the authority to execute or indorse a negotiable instrument is sought to be deduced from an agency to do certain other acts, it must be made to appear affirmatively that the signing or indorsement of such an instrument was within the general objects and purposes of the authority which was actually conferred; and, in interpreting the authority of the agent, it is to be strictly construed." We fail to discover anything in the record in the present case to show that the power to indorse the check here in controversy was within the general objects and purposes of the authority conferred upon Jackson. Instead of transmitting the check to the appellant, he assumed to sign appellant's name upon the back of the check, and to obtain the cash for it. The indorsement was evidently made for his own benefit. There is, of course, some evidence tending to show that the trip made by him to Chicago was a trip taken in the interest of the business of the appellant, but his accounts show that there was paid to him during the time of his trip sufficient money for his expenses. Copelin & Co., who cashed the check upon his indorsement, had no business, on the 18th day of December, 1896, when the check was cashed, with the appellant, or with Jackson, as the agent of appellant. There is nothing to show that Copelin & Co. at that time owed the appellant anything, or purchased any goods from the appellant at that time through Jackson, as appellant's agent. It may be that Jackson had authority at that time to collect debts that may have been due to the appellant as his employer, but "authority to collect debts and give discharges carries no implication of authority to indorse a negotiable note." 1

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Dan. Neg. Inst. 4th ed. § 293. "The nature and extent of an implied authority are deemed to be limited to acts of a like nature with those from which it is implied." 1 Am. & Eng. Enc. Law, 2d ed. p. 1002. It is not shown by any evidence whatever in the record that Jackson ever indorsed a check for the appellant, except the check here in controversy. It is not proved that he ever did any such act as the indorsement of a check or note, which was approved and ratified by the appellant after it was done. The statements made by the text writers above referred to appear to be sustained by the decided cases. *Boord* v. *Strauss*, 39 Fla. 381, 22 So. 713; *Gregory* v. *Loose*, 19 Wash. 599, 54 Pac. 33; *Dodge* v. *National Exch. Bank*, 30 Ohio St. 1; *Doubleday* v. *Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Smith* v. *Co-Operative Dress Asso.* 12 Daly, 304; *Atkinson* v. *St. Croix Mfg. Co.* 24 Me. 176; *Middlesex County Bank* v. *Hirsch Bros. Veneer Mfg. Co.* 24 N. Y. S. R. 297, 4 N. Y. Supp. 385; *Graham* v. *United States Sav. Inst.* 46 Mo. 186; *Smith* v. *Gibson*, 6 Blackf. 370; *Railway Equipment & Pub. Co.* v. *Lincoln Nat. Bank*, 82 Hun, 9, 31 N. Y. Supp. 44; *New York Iron Mine* v. *First Nat. Bank*, 39 Mich. 644; *Vanbibber* v. *Bank of Louisiana*, 14 La. Ann. 486, 74 Am. Dec. 442; *Jackson* v. *National Bank*, 92 Tenn. 154, 18 L. R. A. 663, 20 S. W. 820.

While it is well settled that an authority to draw, accept, or indorse bills may be presumed from acts of recognition in former instances, yet those acts must be known to the party setting them up. *Rawson* v. *Curtiss*, 19 Ill. 456; *Maxey* v. *Heckethorn*, 44 Ill. 437; *St. John* v. *Redmond*, 9 Port. (Ala.) 432; *Cash* v. *Taylor*, 8 L. J. K. B. 262; Chitty, Bills, 13th Am. ed. p. 41, *32. That is to say, where a party, accepting a check or note or bill indorsed by an agent, and shown upon its face to be indorsed by an agent, maintains that the agent had apparent authority to make such indorsement, he must prove that the facts giving color of authority to the agent were known to him. If such person has no knowledge of such facts, he does not act upon them, or part with anything on the faith of any apparent authority, and therefore is not in a position to claim anything from such apparent authority. 1 Dan. Neg. Inst. 4th ed. § 297, and other authorities last above referred to. Chitty on Bills (13th Am. ed. p. 41, *supra*) says: "But it must appear that the bill or note is taken upon the faith of prior similar transactions, and therefore the holder of a bill purporting to be, but not in fact, accepted by the person to whom it is addressed, cannot recover against the apparent acceptor by proving a fact, subsequently discovered, that on a former occasion the defendant had given a general authority to the person, who accepted in his name, to accept bills for him. To make such authority available, the holder must show, either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority."

It is insisted by the appellant, that the appellee bank did not show, and did not propose to show, that appellee had any knowledge of the acts relied upon as showing by implication the authority of Jackson to indorse the check. To this contention the appellee replies that it was not necessary for it to prove its knowledge of prior similar transactions, and that it accepted and paid the check on the faith of such transactions, but that it was sufficient if Copelin & Co., who purchased the check from Jackson had such knowledge. In other words, the question, as presented by the appellee, is whether Copelin & Co. obtained good title to the check through the indorsement of Jackson. Appellee claims that, if Copelin & Co. had good title to the check, that firm would transfer by its indorsement no worse title than it had. Without stopping to discuss this contention, or to pass any opinion upon it, it may be admitted, for the purposes of this case, to be correct, and yet the question remains, whether there were any acts or circumstances brought home to the knowledge of Copelin & Co. which would justify them in purchasing this check upon Jackson's indorsement without making inquiry as to his authority. It is true that Copelin had been to Jackson, Michigan, and had seen Jackson in charge of appellant's mill, and had seen him engaged in the management of appellant's business. There is also evidence to the effect that he saw Jackson opening mail, and giving orders to the men in the employ of the company, and countersigning some of the checks drawn by the company upon its bank to pay for material. But, under the authorities above referred to and quoted from, none of these acts were sufficient to justify Copelin & Co. in inferring that Jackson had authority to indorse the check.

The check was drawn by J. Herz & Son upon the appellee bank. In the present case it is not denied that Herz & Son had funds enough in the appellee bank to pay the check so drawn by them to the order of appellant. The doctrine of this court is that, "when the check of a depositor is presented to the banker, if the deposit is sufficient to pay the check, it is an absolute appropriation of the amount of the check to the holder; and that the contract implied by law between the banker and his depositor for the benefit of whoever may become the holder of the check is one upon which such holder can maintain an action." *Gage Hotel Co.* v. *Union Nat. Bank*, 171 Ill. 531, 39 L. R. A. 479, 49 N. E. 420. In the present case it appears that the check was certified by the appellee. By such act of certification appellee assumed the duty to pay the check only to the appellant, the payee therein, or upon appellant's genuine indorsement. Having direct notice of Jackson's agency by his signature upon the back of the check as superintendent, appellee was bound to take notice of the limitations upon his authority. When it certified the check, it entered into an absolute undertaking to pay it when presented at any time within the time fixed by the statute of limitations, and was, therefore, estopped to deny that it possessed sufficient

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funds of the drawer to pay the check. *Metropolitan Nat. Bank* v. *Jones*, 137 Ill. 634, 12 L. R. A. 492, 27 N. E. 533; *Middlesex County Bank* v. *Hirsch Bros. Veneer Mfg. Co.* 24 N. Y. S. R. 297, 4 N. Y. Supp. 385; *Smith* v. *Co-Operative Dress Asso.* 12 Daly, 304; *Dowden* v. *Cryder*, 55 N. J. L. 329, 26 Atl. 941. The mere fact that Jackson was in possession of the check which he thus obtained from J. Herz & Son did not authorize him to transfer it to Copelin & Co., or authorize Copelin & Co. to purchase it from him upon his indorsement of appellant's name thereon; nor was any authority thereby conferred upon the appellee bank to pay the same. In *Dodge* v. *National Exch. Bank*, 30 Ohio St. 1, it was held that "the rightful possession of a check made payable to the order of a particular person confers no authority on the drawee to pay the same to the person having such possession, without the genuine indorsement of the payee;" and that, if the drawee relies upon false representations as to identity, for which neither the drawer nor payee is responsible, he makes payment to a wrong person at his peril.

In *Doubleday* v. *Kress*, 50 N. Y. 410, 10 Am. Rep. 502, it was held that the possession by an assumed agent of a promissory note payable to the order of the payee, and not indorsed by him, is not alone sufficient evidence of his authority to authorize a payment thereof to him. In *Smith* v. *Co-Operative Dress Asso.* 12 Daly, 304, it was held that a party making a special contract with the general manager of a corporation knows that he is making it with a mere agent, and he is bound at his peril to ascertain the agent's real authority. In *Atkinson* v. *St. Croix Mfg. Co.* 24 Me. 176, it was held that proof that a person was an agent of an incorporated company, and had charge of the business of said company at a certain place, was not alone sufficient to show that such person was authorized to draw a note or bill in behalf of the company, and that the acceptance of a draft by the treasurer of an incorporated company, without evidence of any authority in him to perform such acts, did not thereby render the company liable thereon. In *Smith* v. *Gibson*, 6 Blackf. 370, it was held that the authority of an agent to buy and sell goods for his principal did not confer a power to bind him by drawing or indorsing bills and notes, and that no agency will be implied in such cases unless there is some evidence of recognition by the principal in the particular case or in similar cases. In *Railway Equipment & Pub. Co.* v. *Lincoln Nat. Bank*, 82 Hun, 9, 31 N. Y. Supp. 44, which was an action brought to recover for the conversion of certain checks belonging to the plaintiff, it was held that the fact that the agent there was held out as the manager of the business of the corporation in no way authorized the conclusion that he had the right to bind the corporation by his signature to commercial paper. In *New York Iron Mine* v. *First Nat. Bank*, 39 Mich. 644, it was held that a general agent, without being specially empowered so to do, had no authority to make promissory notes in the name of his principal, and that, where a general agent in Michigan was accustomed to indorse the company's paper for collection or discount, and to draw on the treasurer in New York for the current needs of his corporation, and his drafts were duly paid, this could not imply authority in the agent to make promissory notes in the name of the corporation. In *Vanbibber* v. *Bank of Louisiana*, 14 La. Ann. 486, 74 Am. Dec. 442, it appeared that the drawers of a check were accustomed to have deposits of funds at the bank, and to draw occasionally against the same; and it was there said: "The drawers of this check requested the bank to pay its amount to plaintiffs or order. The bank had no right to pay it to any other person. It has however, paid it upon a forged indorsement, and the amount of the check must be considered to be still in the bank, subject to the rights of plaintiffs. . . . If there was a negligence anywhere, it was upon the part of the bank. Their duty to their depositor required them to be satisfied that the indorsement of the check was that of the payees. . . . It is also established that the collector was never authorized by plaintiffs to indorse any check drawn to the order of the firm, or any check." In *Graham* v. *United States Sav. Inst.* 46 Mo. 186, which was a case similar in its facts to the case at bar, it was said by the court: "This suit is brought to recover the amount of two checks, which were drawn on the defendant by third parties in favor of the plaintiffs, and made payable to their order. The drawers delivered the checks to the plaintiffs' collecting agent, one Dixon, in settlement of certain bills which the latter had in charge for collection, being bills due from the drawer of the checks to the plaintiffs. Dixon indorsed the defendant's firm name upon the checks, and presented them at the bank, and drew the money upon them, which he seems to have appropriated to his own use, without rendering any account thereof to the plaintiffs. . . . The question presented is purely one of agency. Was Dixon the plaintiff's agent to indorse negotiable paper given in settlement of debts due to his employers? He was their agent to adjust such claims and receive the amounts due upon them, and to do those subordinate and incidental things usual and customary in the accomplishment of the main purpose had in view, to wit, the collection. That main purpose had been accomplished when he had received the checks payable to his principals. His duties as a collector ceased at that point. His next duty was to account with his employers for the proceeds of his collections, and turn over the checks to them, to be disposed of as they might judge proper. The indorsement of the checks was no necessary incident of the collection of the accounts." In *Jackson* v. *National Bank*, 92 Tenn. 154, 18 L. R. A. 663, 20 S. W. 820, which is also a case similar in its facts to the case at bar, the supreme court of Tennessee says: "No authority will be implied

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from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will be conceded to the agent by implication. In order, therefore, that the authority to make or draw, accept and indorse, commercial paper as the agent of another may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. The rule is strictly enforced that the authority to execute and indorse bills and notes as agent will not be implied from an express authority to transact some other business, unless it is absolutely necessary to the exercise of express authority. Tiedeman, Com. Paper, § 77. Possession of a check, payable to order, by one claiming to be agent of the payee, is not prima facie proof of authority to demand payment in the name of the true owner. Id. § 312. A bank is obliged by custom to honor checks payable to order, and pays them at its peril to any other than the person to whose order they are made payable. Id. § 431. It must see that the check is paid to the payee therein named upon his genuine indorsement, or it will remain responsible. *Pickle* v. *Muse*, 88 Tenn. 380, 7 L. R. A. 93, 12 S. W. 919. An authority to receive checks in lieu of cash in payment of bills placed in the hands of an agent for collection does not authorize the agent to indorse and collect the checks. *Graham* v. *United States Sav. Inst.* 46 Mo. 186; 1 Wait, Act. & Def. p. 284; 1 Dan. Neg. Inst. § 294. The indorsement of the check was not a necessary incident to the collection of accounts. *Graham* v. *United States Sav. Inst.* 46 Mo. 186. It follows that a drummer or commercial traveler, employed to sell and take orders for goods, to collect accounts, and receive money and checks payable to the order of his principal, is not, by implication, authorized to indorse such principal's name to such checks. No equitable considerations can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages, and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security." See also *Chicago Electric Light Renting Co.* v. *Hutchinson*, 25 Ill. App. 476; *Commercial Nat. Bank* v. *Lincoln Fuel Co.* 67 Ill. App. 166; *Beattie* v. *National Bank*, 174 Ill. 571, 43 L. R. A. 654, 51 N. E. 602. A person dealing with an agent takes the risk as to the extent of his authority, and is bound to inquire into his authority. *Reynolds* v. *Ferree*, 86 Ill. 570, and authorities last above referred to. The rulings of the court below upon the admission and exclusion of evidence, and its action in giving and refusing instructions, were in opposition to the views hereinbefore expressed. We are therefore of the opinion that the trial court erred in this respect.

2. It was held by the court below, in the instructions given by it to the jury, that the burden of proving the authority of Jackson to indorse the name of the appellant upon the check in question was upon the appellant. In our opinion, this holding was wrong. The appellant asked the court to instruct the jury that "the burden of showing the authority of a stranger to a check to indorse the same for the payee is upon the drawee, if he would escape liability to pay over again to the payee," and this instruction was refused by the court. It should have been given. Where one attempts to take advantage of the act of an agent, it is for him to show the authority of that agent. The appellee relied for its defense upon the proposition that C. A. Jackson had authority to indorse appellant's name upon the check, and therefore the burden was upon the appellee to prove such authority. In *Hardesty* v. *Newby*, 28 Mo. 567, 75 Am. Dec. 137, it was held that, where a matured negotiable promissory note is delivered by the payee, without indorsement, to an agent for collection, the possession of the note by the latter will not rise a presumption that he has authority to assign the same, and the burden of proving an assignment by authority of the payee rests upon the party claiming under such alleged assignment. In *Hays* v. *Lynn*, 7 Watts, 525, it was said by the court: "A party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. The burden of the proof lies on him to establish the agency and the extent of it." In *Morgan* v. *Bank of State*, 1 Duer, 438, it was said by the court: "When a bill or check is payable to order, to justify the application to its payment of the funds of the drawer it must be proved that the required order was in fact given,—in other words, it must be proved that the indorsement was genuine; and the burden of this proof rests upon the person or bank upon whom the bill or check is drawn." In *Bank of the University* v. *Tuck*, 101 Ga. 104, 28 S. E. 168, it was held that the maker of a negotiable promissory note pays the amount due thereon to any person other than the holder at his own risk; and a defense to an action on such note, setting up payment to one authorized by the holder to collect for him, casts upon the defendant the burden of showing, not only that he has paid the money, but that he has made payment to a person authorized by the holder to receive it, or else that it actually reached the holder's hands. In *Commercial Nat. Bank* v. *Lincoln Fuel Co.* 67 Ill. App. 166, it was said: "But the mere fact that Gordon & Co. had possession of the check affords no presumption of their authority to indorse it; nor would mere authority possessed by Gordon & Co. to accept checks from customers of appellee for coal sold give to them either express or implied authority to indorse such checks by the name of appellee. And if the drawee of such a check pays the same upon an indorsement that is not genuine, or is not authorized, it does so at its peril, and the burden of showing the authority of the stranger to the check to indorse the same

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for the payee would be upon the drawee, if it would escape liability to pay it over again to the payee. *Jackson* v. *National Bank*, 92 Tenn. 154, 18 L. R. A. 663, 20 S. W. 820."

The judgment of the Appellate Court and the judgment of the Superior Court of Cook County are reversed, and the cause is remanded to the Superior Court of Cook County for further proceedings in accordance with the views herein expressed.

Anna FLANNIGAN, *Plff. in Err.*,
v.
William HOWARD *et al.*

(200 Ill. 396.)

1. **Statement of the residence of the parents of a child** about to be adopted, in a written consent filed by them, is a sufficient compliance with a statute requiring the residence of the parents of the child to be stated among other things in a petition for adoption.
2. **The adoption of a child after the making of a will** brings it within the provisions of a statute providing that on the birth of a child after making of a will, unless an intention to disinherit it shall appear from the will, the devises and legacies shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of testator had he died intestate, where, by statute, an adopted child, for the purpose of inheritance, is declared to be in law the child of the parents the same as if he had been born to them in lawful wedlock.

(December 16, 1902.)

ERROR to the Circuit Court for La Salle County to review a judgment in favor of defendants in an action brought to establish plaintiff's rights as a child of Bridget Howard, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. **Butters & Carr** for plaintiff in error.

Messrs. **E. J. Kelly** and **D. B. Snow**, for defendants in error:

Neither the petition, nor the decree, states the residence of the parents of this child.

Watts v. *Dull*, 184 Ill. 86, 56 N. E. 303.

Under § 10, chap. 39, *Descent*, an adopted child cannot be regarded the same as "a child born to any testator," and so is not entitled to receive out of the estate of the testator the same property as if the testator had died intestate.

Ottawa v. *La Salle County*, 12 Ill. 340; *Wiagg* v. *Penn Twp.* 94 Ill. 11, 34 Am. Rep. 199; *People* v. *Barr*, 44 Ill. 198; 23 Am. & Eng. Enc. Law, pp. 491, 492; *Keegan* v. *Geraghty*, 101 Ill. 26; *Foley* v. *Foley*, 61 Ill. App. 577; *Pulaski County* v. *Stuart*, 28 Gratt. 870; *Davis* v. *Fogle*, 124 Ind. 41, 7 L. R. A. 485, 23 N. E. 860; *Bowdlear* v. *Bowdlear*, 112 Mass. 184; *Jenkins* v. *Jenkins*, 64 N. H. 407, 14 Atl. 557; *Sewall* v. *Roberts*, 115 Mass. 262.

On petition for rehearing.

Any act or acts of the legislature which in effect modifies or takes away the right of any person to dispose of all his property by will should receive, not only a careful consideration, but a strict, as distinguished from a liberal, construction.

Watts v. *Dull*, 184 Ill. 90, 56 N. E. 303.

A testator, disposing of his property at variance with the law of descent, in legal contemplation, creates an unnatural relation between himself and the objects of his bounty so far as property rights under the statute are concerned. In the matter of inheritance, this very adoption statute discriminates against the adopted child by providing that he may not inherit from the lineal or collateral kindred of the adoptive parents.

Keegan v. *Geraghty*, 101 Ill. 26; *Davis* v. *Fogle*, 124 Ind. 41, 7 L. R. A. 485, 23 N. E. 860; *Lewis* v. *Lynch*, 61 Ill. App. 476.

Cartwright, J., delivered the opinion of the court:

Bridget Howard, of La Salle County, made her last will and testament in October, 1894, by which she disposed of all her property. By the will certain specific bequests were made, and the residue was given to three children, Catherine, Peter, and William. No provision was made for any child that might be born afterward, and it did not appear by the will that it was her intention to disinherit such child if there should be one. On December 21, 1898, she filed in the county court of La Salle county her petition for the adoption of her grandchild, Anna Flannigan, plaintiff in error, then thirteen years old, and asked the court to make an order declaring said child to be her adopted child and capable of inheriting her estate. The petition was accompanied by the written consent of Thomas Flannigan and Mary A. Flannigan, parents of plaintiff in error, who thereby waived service of notice of the application for adoption. On the same day the cause was heard, and the court entered an order that plaintiff in error should be from thenceforth the adopted child of said Bridget Howard, and capable of inheriting her estate. Bridget Howard died February 18, 1899, leaving said last will and testament, which was admitted to probate in the probate court of La Salle county. Plaintiff in error filed her petition in said probate court, alleging said facts, and praying that the several devises and legacies granted and given by the will should be abated in equal proportions to raise a portion for her equal to that which she would have been entitled to receive out of the estate of testatrix if she had died intestate. Upon a hearing, the probate court dismissed the petition. An appeal was taken to the circuit court of La Salle county, where the cause was heard, and the petition was again

NOTE.—As to revocation of will by subsequent adoption of child, see also, in this series, Davis v. Fogle (Ind.) 7 L. R. A. 485; *Re* Comassi (Cal.) 28 L. R. A. 414; Hilpipre v. Claude (Iowa) 46 L. R. A. 171; and Glascott v. Bragg (Wis.) 56 L. R. A. 258.

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dismissed. The estate consisted, in part, of lands, and the writ of error in this case was sued out from this court to review the judgment of the circuit court.

It is contended by defendants in error that plaintiff in error was not legally adopted by Bridget Howard. In order to sustain that claim, it would be necessary to show that the county court of La Salle county never acquired jurisdiction to enter an order of adoption, and it is conceded that, if the county court had jurisdiction, the order cannot be collaterally attacked in this proceeding. The only objection going to the jurisdiction of that court is that the petition failed to state the place of residence of the parents of the plaintiff in error. The statute provides that the petition shall state the name, sex, and age of the child sought to be adopted, and, if it is desired to change the name, the new name, the name and residence of the parents of the child, if known to the petitioner, and of the guardian, if any, and whether the parents, or the survivor of them, or the guardian, if any, consents to such adoption. 1 Starr & C. Anno. Stat. 1896, p. 353. The petition gave the names of the parents of plaintiff in error, and alleged that they consented to her adoption by petitioner, as would appear from their written consent filed therewith. The written consent filed with the petition gave, as the residence of the parents, Lostant, in the county of La Salle, state of Illinois. There must be a substantial compliance with the provisions of the statute, but the construction of the statute should not be so narrow or technical as to invalidate proceedings where every material provision has been complied with. Every purpose of stating the place of residence of the parents was fully satisfied by the statement in the written consent, which was referred to in the petition, and filed with it as a part of the application. The statute was substantially complied with. The court had jurisdiction over the petitioner, the plaintiff in error, who resided with petitioner in La Salle county, and the natural parents. All the jurisdictional facts appeared from the record of the county court, and the order is not open to collateral attack in this proceeding.

The remaining question is whether plaintiff in error is within the terms of § 10 of chapter 39 of the statute in regard to the descent of property. 2 Starr & C. Anno. Stat. 1896, p. 1433. That act was in force July 1, 1872, and said section provides as follows: "If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but, unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate." The act of 1867, providing for the adoption of children, was then in force. 1 Gross's Stat. 1869, p. 319. That act provided that the relation between a person adopting a child and such child should be, as to their rights and liabilities, the same as if the relation of parent and child existed between them, except that the adopted father or mother should never inherit from the child. Afterward the law in relation to the adoption of children was revised by the act in force July 1, 1874, constituting chapter 4 of the Revised Statutes. 1 Starr & C. Anno. Stat. 1896, p. 354. Section 5 of that act is as follows: "A child so adopted shall be deemed, for the purpose of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." By this section, an adopted child, for the purpose of inheritance and other legal consequences and incidents of the natural relation of parents and children, is declared to be, in law, the child of the parents, the same as if he had been born to them in lawful wedlock, except as therein stated. By the plain and unambiguous language of the statute, the right of plaintiff in error to inherit from Bridget Howard is made identical with the right of a child born to her; and when plaintiff in error became her child by adoption, after the making of the will, the effect, in law, was precisely the same as the birth of a child to the testatrix. The argument against the rights of plaintiff in error is solely on the ground that she was not, as a matter of fact, born to the testatrix, and therefore not the sort of a child mentioned in the statute of descent. This argument would apply with equal force to other sections of the same act which provide for the descent of intestate property to children of the decedent, making no reference to children by adoption. By accepted definitions, a child is the immediate progeny of human parents, and in its natural meaning the word applies to offspring born to such parents. By the statute, however, the relation of parent and child is recognized and declared as legally existing between persons not so related by nature. The statute of descent does not in any case mention this legal relation of an adopted child and the adopting parent, but the right of the adopted child is fixed by the act providing for adoption, which creates, in law, the relation of parent and child. The purpose of § 10 of the act in regard to descent is to give to a child who shall come into existence after the making of a will, and who would inherit but for the will, the same rights it would have if the estate were intestate, where no provision is made in the will for such child, and no contrary intention is expressed in the will. The act says that, if a child shall be born to a testator after the making of a will, such child shall have the

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rights of inheritance therein specified, and the act providing for the adoption declares that the adopted child shall have the same rights as a child born to such testator. So far as inheritance is concerned, the adopted child is to be deemed the child of the testator, precisely the same as though born to the testator. This is the construction given to a statute in all material respects like our own by the supreme court of Iowa in *Hilpire* v. *Claude*, 109 Iowa, 159, 46 L. R. A. 171, 80 N. W. 332. The Iowa statute provides that "the subsequent birth of a legitimate child to the testator before his death will operate as a revocation." The statute providing for the adoption of children confers upon the adopted child "all the rights, privileges, and responsibilities which would pertain to the child if born to the person adopting, in lawful wedlock," and that "the rights, duties, and relations between parent and child by adoption shall thereafter in all respects, including the right of inheritance, be the same that exists by law between parent and child by lawful birth." In that case it was held that the adoption of a child subsequent to the making of a will by the adopting parent operated as a revocation of the will. Our statute is copied from the Massachusetts act, and under that act it was held that, so far as the right of inheritance is concerned, an adopted child must be regarded in the light of a child born to the adopting parent. *Sewall* v. *Roberts*, 115 Mass. 262. An adopted child becomes the lawful child of the adopting parent for all purposes of inheritance, and is in the eyes of the law as much the child of such parent as though it had been his own child. *Keegan* v. *Geraghty*, 101 Ill. 26; *Sayles* v. *Christie*, 187 Ill. 420, 58 N. E. 480. The authorities are generally to the effect that for all purposes of inheritance an adopted child is the lawful child of the adopting parent, except as otherwise provided by the statute. We are of the opinion that plaintiff in error is within the provisions of the statute, and entitled to its benefits.

The judgment of the Circuit Court of La Salle County is reversed, and the cause is remanded to that court, with directions to enter an order granting the prayer of the petition.

Rehearing denied.

City of CHICAGO, *Plff. in Err.*,
v.
CHICAGO UNION TRACTION COMPANY.

(199 Ill. 250.)

1. Requiring street car companies to keep the surface of the streets between their outer rails clean does not illegally discriminate against, or cast the public burden upon, them, where their tracks tend to accumulate dirt, and make the crown of the street flat, so as to render the cleaning of the street much more difficult than it otherwise would be.

2. A municipality cannot, in granting authority to a street car company to operate cars in its streets, deprive itself of the power to compel the company to clean the street between its outer rails, if the exercise of such power is necessary to the health and comfort of the people.

(October 25, 1902.)

ERROR to the Criminal Court for Cook County to review a judgment reversing a judgment of a justice of the peace in plaintiff's favor in a suit to recover penalties for violation of an ordinance relating to the cleaning of streets. *Reversed.*

The facts are stated in the opinion.

Messrs. **Charles M. Walker, Henry Schofield,** and **Clarence N. Goodwin,** for plaintiff in error:

All property is held subject to such burdens as may be imposed by the legislative authority for the promotion of the health, comfort, and convenience of the public and general welfare of the community. Such enactments violate no constitutional provision.

Barbier v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *Culver* v. *Streator*, 130 Ill. 238, 6 L. R. A. 270, 22 N. E. 810; *Concordia Cemetery Asso.* v. *Minnesota & N. W. R. Co.* 121 Ill. 212, 12 N. E. 536; *Illinois C. R. Co.* v. *People*, 143 Ill. 435, 19 L. R. A. 119, 33 N. E. 173; *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Ritchie* v. *People*, 155 Ill. 110, 29 L. R. A. 79, 40 N. E. 454; *Harmon* v. *Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *Chicago & N. W. R. Co.* v. *Chicago*, 140 Ill. 325, 29 N. E. 1109.

Railway companies have been compelled to construct and maintain cattle guards for the protection of sheep and cattle.

Thorpe v. *Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Ohio & M. R. Co.* v. *McClelland*, 25 Ill. 140.

Street railway companies have been compelled to light their tracks.

Cincinnati, H. & D. R. Co. v. *Sullivan*, 32 Ohio St. 152; *Cincinnati, H. & D. R. Co.* v. *Bowling Green*, 57 Ohio St. 336, 41 L. R. A. 422, 49 N. E. 121; *St. Marys* v. *Lake Erie & W. R. Co.* 60 Ohio St. 139, 53 N. E. 795.

And water their tracks.

City & Suburban R. Co. v. *Savannah*, 77 Ga. 731; *State* v. *Canal & C. R. Co.* 50 La. Ann. 1189, 56 L. R. A. 287, 24 So. 265; *Chester* v. *Chester Traction Co.* 5 Pa. Dist. R. 609.

NOTE.—As to right to require street railway company to pave between tracks, see, in this series, Fielders v. North Jersey Street R. Co. (N. J.) ante, p. 455, and cases in *footnote* thereto.

As to validity of ordinance requiring street railways to sprinkle streets, see State v. New Orleans City & Lake R. Co. (La.) 39 L. R. A. 618, and State v. Canal & C. R. Co. (La.) 56 L. R. A. 287.

As to municipal power to impose conditions generally when giving assent to railway in street, see Galveston & W. R. Co. v. Galveston (Tex.) 36 L. R. A. 33, and *note.*

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Railroads have been compelled to elevate their tracks.

New York & N. E. R. Co. v. *Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

Maintain viaducts at their own expense, although the city had contracted to bear a part of it.

Chicago, B. & Q. R. Co. v. *Nebraska, ex rel. Omaha*, 170 U. S. 74, 42 L. ed. 954, 18 Sup. Ct. Rep. 513.

A special tax may be levied on railroads, alone, for the purpose of maintaining a railroad commission for the benefit of the public.

Charlotte, C. & A. R. Co. v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255.

Street railways may be compelled to remove snow from their tracks.

McDonald v. *Toledo Consol. Street R. Co.* 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104; *Bowen* v. *Detroit City R. Co.* 54 Mich. 496, 52 Am. Rep. 822, 20 N. W. 559; *Dixon* v. *Brooklyn City & N. R. Co.* 100 N. Y. 170, 3 N. E. 65; *Broadway & S. Ave. R. Co.* v. *New York*, 49 Hun, 126, 1 N. Y. Supp. 646.

Numerous other police regulations similar in their nature to the ordinance at bar have been held valid.

State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. *Cape May*, 59 N. J. L. 396, 36 L. R. A. 653, 36 Atl. 696; *State, North Hudson County R. Co., Prosecutors*, v. *Hoboken*, 41 N. J. L. 71; *State, Trenton Horse R. Co., Prosecutor*, v. *Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; *Sternberg* v. *State*, 36 Neb. 308, 19 L. R. A. 570, 54 N. W. 553; *Detroit* v. *Ft. Wayne & E. R. Co.* 90 Mich. 646, 51 N. W. 688; *Baltimore* v. *Baltimore Trust & Guarantee Co.* 166 U. S. 681, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; *Worster* v. *Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 205; *Conroy* v. *Twenty-Third Street R. Co.* 52 How. Pr. 50; *Haines* v. *People*, 19 Ill. App. 354; *American Rapid Teleg. Co.* v. *Hess*, 125 N. Y. 641, 13 L. R. A. 454, 26 N. E. 919; *Union R. Co.* v. *Cambridge*, 11 Allen, 287; *McPherson* v. *Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454; *Memphis, P. P. & Belt R. Co.* v. *State*, 87 Tenn. 746, 11 S. W. 946; Elliott, Roads & Streets, 2d ed. § 772; *Toledo, P. & W. R. Co.* v. *Deacon*, 63 Ill. 91; *Galena & C. U. R. Co.* v. *Loomis*, 13 Ill. 548, 56 Am. Dec. 47; Booth, Street Railways, §§ 98, 230, 235, 239, 331; *Com.* v. *Cutter*, 156 Mass. 52, 29 N. E. 1146; *Chicago & N. W. R. Co.* v. *Chicago*, 140 Ill. 325, 29 N. E. 1109; *Wabash R. Co.* v. *Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748.

Owners of property abutting on a street have been compelled to clear the snow off the sidewalk where they had property rights and special privileges in the street other than and different from those of the general public.

Carthage v. *Frederick*, 122 N. Y. 277, 10 L. R. A. 178, 25 N. E. 480; *Goddard, Petitioner*, 16 Pick. 504, 28 Am. Dec. 259.

The presumption is in favor of the reasonableness of an ordinance.

Harmon v. *Chicago*, 140 Ill. 378, 29 N. E. 732, 110 Ill. 400, 51 Am. Rep. 698; *Cincinnati, H. & D. R. Co.* v. *Sullivan*, 32 Ohio St. 152; *Hawes* v. *Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373; *People ex rel. Morrison* v. *Cregier*, 138 Ill. 401, 28 N. E. 812; *New York* v. *Dry Dock, E. B. & B. R. Co.* 133 N. Y. 104, 30 N. E. 563; *Swift* v. *Klein*, 163 Ill. 269, 45 N. E. 219; *Walker* v. *Jameson*, 140 Ind. 597, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869; *City & Suburban R. Co.* v. *Savannah*, 77 Ga. 731; *West Philadelphia Pass. R. Co.* v. *Philadelphia*, 10 Phila. 70; *State, Trenton Horse R. Co., Prosecutor*, v. *Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; *State, Consolidated Traction Co., Prosecutor*, v. *Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146.

Messrs. **James W. Duncan, Ira C. Wood, Frank E. Harkness, W. W. Gurley,** and **John A. Rose** for defendant in error.

Boggs, J., delivered the opinion of the court:

The city of Chicago instituted an action before a justice of the peace against the defendant in error company to recover the fines provided by § 1717 of the Revised Code of Ordinances of said city for the alleged violation of the provisions of § 1716 of the Code. The traction company was adjudged guilty by the justice of the peace, and a fine of $100 was assessed against it. In the criminal court of Cook county, to which the traction company brought the cause by an appeal, judgment was entered finding the traction company not guilty. The city has sued out this writ of error to bring the record into this court for examination.

The ordinances upon which the prosecution is based are as follows:

"1716. The several street railway companies at any time operating railroad tracks on and along the surface of any of the streets, avenues, or alleys of the city of Chicago are hereby, respectively, required to remove all dirt, snow, and other accumulations from so much of the surface of each street, avenue, or alley now or hereafter containing any of their railway tracks, as lies between the two outermost rails of such tracks, and also from such additional surface, in width, as may be prescribed in any ordinance relating to or affecting any such street, avenue, or alley, and shall, respectively, clean such portions of said street, avenue, or alley, and remove entirely from and out of such street, avenue, or alley, all such dirt, snow, and accumulations at least once in each week, and as much oftener as the commissioner of public works shall, in writing, direct; such dirt, snow, and accumulations to be removed and disposed of in accordance with the ordinances of the city in relation to the removal of street cleanings, and subject to the rules and regulations of the department of public works in that behalf.

"1717. Any street railway company operating a street railway upon or along the surface of any street, avenue, or alley in the city of Chicago, which shall refuse or neg-

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lect to clean any part of a street, avenue, or alley, as required by the last preceding section hereof, shall, upon conviction thereof, be fined in a sum not less than $50 nor more than $200 for each and every case of such refusal or neglect."

The alleged violation of the ordinance consisted in the refusal of the traction company to remove the dirt and other accumulations lying on the surface of the street between the two outermost rails of the track of its railway in Kinzie street. That the defendant in error company so refused and failed to obey the ordinance was conceded.

The judgment of acquittal proceeded upon the view urged by the traction company that the ordinances were void. The defendant in error company is a corporation organized and existing under and by virtue of the laws of the state of Illinois, and is engaged in the occupation and business of carrying passengers for hire in street cars propelled by electricity and otherwise in the city of Chicago. Its tracks were laid in Kinzie street by virtue of an ordinance adopted by the city council of the city on the 14th day of March, 1887, authorizing the North Chicago Street Railway Company, its successors and assigns, to construct and maintain a double-track street railway in said Kinzie street, and operate the same by electricity conveyed by overhead wires. The defendant in error company is the successor of the said North Chicago Street Railway Company. It has constructed and maintains a double track railway on Kinzie street, in the city of Chicago, from Market to State street, and operates its street cars thereon by electric power. It was stipulated that ever since the 1st day of July, 1899, the said defendant, the Chicago Union Traction Company, has had possession and control of said street-car tracks on Kinzie street, and has run thereon street cars for the conveyance of passengers, operated by electric power only, by means of an overhead wire; and that during the week beginning Sunday, August 6, 1899, and ending Saturday, August 12, 1899, the said defendant did not remove, and refused, on demand, to remove, from the said street-car tracks on Kinzie street, the dirt and other accumulations lying on the surface of said street between the two outermost rails of said tracks, contrary to the form of said ordinance of April 8, 1897; that said Kinzie street is a public street in the city of Chicago, the fee title to the soil of which street is in the said city of Chicago for the use of the public as a street.

The sole question presented is whether the city possessed power to adopt and enforce the ordinance. The position of counsel for the defendant in error company is that the ordinance is void, and that contention met the view of the criminal court. There was testimony to the effect that the presence of the rails of a street railway track upon a street causes the dirt to accumulate in the portion of the street between the rails. The tendency is for dirt to gravitate towards the sides of the street where there are no rails to prevent it; that this tendency of dirt to gravitate toward the sides of the street is aided by the elements, and that little brooming is required to keep the center of streets clean if there are no rails upon them, but rails retain the dirt in the center of the street; that the presence of the tracks in Kinzie street added to the difficulty in cleaning the portion of the street outside the rails; that it took longer to clean an entire street with rails than it took to clean a street where there were none,—three times as long on the portion of Kinzie street in question; that Kinzie street was paved between the rails with granite, and outside with cedar blocks, and has a flat crown between the rails, and sloped from the outside rails to the gutter; that the dirt came from horse droppings, from excavation wagons, coal wagons, and ordinary wear and tear; that street accumulations have an effect upon the general health, through dust, in two ways,—one through the presence of irritating particles, which are injurious in this: as being irritants to the respiratory passages and the eyes; and also to the presence of pathogenic bacteria, which are in and upon the particles of dust which are in the street. As to these points there was no countervailing proof. It appeared from this testimony that the health and comfort of the people required that the dust and other accumulations should be removed from that portion of Kinzie street described in the ordinance. There is, it is conceded, a general police power possessed by the city, by which the traction company and all persons, natural or artificial, may be subjected to such reasonable restrictions and regulations as are found to be proper and requisite to secure the health, comfort, and convenience of the people. The ordinance, it is urged by counsel for the city, should be sustained as a legitimate exercise of the police power. It is insisted by the traction company that it is the duty of the city to keep the streets of the city clean and in good repair; that the city has power to raise funds for that purpose by general taxation; that the public interest is concerned in the matter of cleaning and repairing the streets, and that the execution of the power to raise the necessary funds to clean and repair the streets by general taxation is a duty devolving upon the city, and that it cannot lawfully lay the burden of the work of cleaning and repairing the portion of Kinzie street in question on the traction company, as is proposed to be done by this ordinance; that the ordinance is void, for the reason that it casts a public burden upon the traction company, and discriminates against the traction company, and is a perversion of the police power.

It is clear that the city could not, by virtue of the police power or otherwise, require the defendant in error company to clean and repair the street if the real purpose is merely to shift the public burden from itself to the company. In *Gridley* v. *Bloomington*, 88 Ill. 554, 30 Am. Rep. 566, we held invalid an ordinance which imposed a fine upon anyone who should permit snow to remain on

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the sidewalk abutting premises occupied or owned by him longer than a period of six hours after it ceased to fall, or, if the cessation is in the nighttime, then longer than six hours after sunrise on the next morning, for the reason, as there said: "The sidewalk, as was declared in the case cited, is as much a public highway, free to the use of all, as the street itself, and upon principle it follows the citizen cannot be laid under obligations, under our laws, to keep it free from obstructions in front of his property at his own expense, any more than the street itself, either by the exercise of the police power, or by fines and penalties imposed by ordinance, or by direct legislative action." In *Chicago* v. *O'Brien*, 111 Ill. 532, 53 Am. Rep. 640, we held the city had not the constitutional power to require the owner or occupant of premises to keep the sidewalk and gutters in front thereof free from snow and ice, or to sprinkle the same with ashes or sand, where the snow and ice cannot be removed without injury to the pavement, and inflict a fine on him for a neglect or failure to do so, and declared the principle that "a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation." The doctrine of these cases is unquestionably sound, but we do not assent to the view pressed upon us by counsel for the defendant in error company, that they are decisive of the validity of the ordinance here under consideration. The defendant in error company does not occupy the position of the owner of property abutting upon a street. The owner of property abutting on a street has no interest in the street of the city, as a street, other than that possessed by every other citizen. He may be required, by way of special assessments or special taxation laid in pursuance of law, to make special contributions to defray the cost of constructing a sidewalk or improving the street, but this is upon the theory that the value of his property is enhanced thereby. The burden, however, of keeping the sidewalk or street clear of snow, ice, and other accumulations, is a public burden, and no obligation is imposed upon the lot owner to perform that which it is the duty of the municipality, as the representative of the public, to perform. The lot owner has no special right, benefit, or interest in the street in front of his premises.

The defendant in error company has, however, been granted a special privilege to occupy the street with its rails, girders, poles or posts, and wires, etc., and to operate its cars along its tracks so laid in the street. Horsemen and drivers of vehicles must yield the right of passage to its cars along and upon its tracks in the streets, as we have explained in *North Chicago Electric R. Co.* v. *Peuser*, 190 Ill. 67, 60 N. E. 78. It has acquired privileges in the street which other persons, natural or artificial, do not possess. It actually occupies a portion of the street in a manner which would not be permitted without the aid of an ordinance. It has a qualified right of occupancy, and to that extent a property interest, in a portion of the street, and is authorized to transact its business for its own gain on the public street. It sustains a relation to the street and to the city entirely distinct from that of an abutting property owner, and it does not follow that the defendant in error company cannot be required to clean that portion of the street occupied by its tracks simply because an abutting property owner cannot be required to clean that portion of the sidewalk or street which is in front of his premises. The permission or license given the defendant in error company to use the street did not operate to deprive the city of the general power of control over the street delegated to the municipality by the general assembly of the state. The license and privilege enjoyed by the defendant in error company are in subordination to the general power so residing in the city. The traction company, in virtue of the special privileges granted, has a qualified right of occupancy of that portion of the street between the outermost rails of its two lines of track which are laid in the street. The evidence shows that portion of the pavement of the street, for the convenience of the company, has been constructed differently by the company from what it otherwise would have been laid; that on that portion of the street covered by the tracks of the street railway the pavement has been laid flat, thus giving the surface of the street a flat crown of the width of 16 feet, when, but for the tracks of the railroad, the pavement would have been laid with a slope from the center of the street to the gutter upon either side; and that the rails of the tracks prevent the filth of the street from reaching the gutters. It further appeared that the tracks of the railway interfere with the work of cleaning both that portion of the street within the tracks, and also that portion of the street between the outermost rails of the tracks and the gutters; that as much time was required to clean the portion of the street outside the tracks as would be required to clean the entire surface of the street if the railroad tracks were not there. All of these things must be considered in determining as to the reasonableness, necessity, and justice of the requirements of the ordinance. True, the dirt and accumulations to be removed (so far as the evidence bears upon that question) were not brought by the traction company on that portion of the street occupied by its tracks; but it does appear that its rails and roadbed, and the manner in which the crown of the street has been constructed for its convenience, tended to retain the dirt and filth there, and to render it more difficult and expensive to remove the same, and also to make it more expensive to clean the street outside the tracks. The public health and comfort required that the street should be cleansed of the dirt and filth which "accumulated" on the pavement between the tracks of the railway and about the rails of such tracks, and the exercise of the police power to that end devolved upon the city as a duty.

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It does not seem unreasonable that the city should require the traction company to clean and render healthy that portion of the street occupied by the tracks of the road, under the circumstances of the case. In order to secure the public health and comfort, the property of individuals and corporations may, alike, be subjected to reasonable restrictions and burdens. It does not appear unreasonable that the traction company, having, in the exercise of the special privilege enjoyed by it of using the street, contributed to the unsanitary condition which injuriously affects the public health and comfort, should be required to aid in removing such conditions. The privilege enjoyed by the defendant in error company to maintain its railway in the street and operate its cars thereon is to be exercised in the interest of the public. It was to serve the public that the privilege was granted to it. Its business and property are impressed or affected with a public use. It may, therefore, be subjected to municipal regulations of a greater scope, in the interest of the public at large, than that of a railroad company exercising its franchises on its own roadbed. *State, Cape May, D. B. & S. P. R. Co. Prosecutor*, v. *Cape May*, 59 N. J. L. 396, 36 L. R. A. 653, 36 Atl. 696; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. Ordinances have been upheld which required street railway companies to keep the street between the rails of their tracks in repair, and which regulated the common use of the streets for street railway and ordinary travel (*State, North Hudson County R. Co., Prosecutors*, v. *Hoboken*, 41 N. J. L. 71); to make the railroad tracks of street railway companies located in a street to conform to the requirements of the ordinance, so as to enable wagons, carriages, and other vehicles to pass over tracks without inconvenience or danger (*North Chicago City R. Co.* v. *Lake View*, 105 Ill. 183); to remove snow from the street (*Broadway & S. Ave. R. Co.* v. *New York*, 49 Hun, 129, 1 N. Y. Supp. 646); prohibiting the use of sand, saltpeter, or salt on the tracks of a street railway (*Dry Dock, E. B. & B. R. Co.* v. *New York*, 47 Hun, 221; *State, Consolidated Traction Co., Prosecutor*, v. *Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146). And ordinances to compel cleaning and sprinkling of the tracks of street railways have been not infrequently upheld as valid. Booth, Street Railways, § 230; 23 Am. & Eng. Enc. Law, p. 999; *City & Suburban R. Co.* v. *Savannah*, 77 Ga. 731. The ordinance here under consideration is general in its operation, affecting alike all corporations and individuals who are similarly situated and bear the same relation to the streets of the city. The rule of equality and uniformity is not invaded, nor does the ordinance unjustly discriminate against any individual or corporation.

It is urged the ordinance granting the license to lay the tracks and operate the street railway in Kinzie street constitutes a contract between the city and the traction company, the obligations whereof cannot be impaired by any ordinance subsequently enacted; and we are invited to consider whether the provisions of the ordinance so granting permission to occupy the street with the tracks of its railway, and operate its cars on such tracks, do not relieve the defendant in error company of the burden sought to be laid upon it by the ordinance here endeavored to be enforced. On the other hand, counsel for the city insist the latter ordinance requires the company to do no more than it is bound to do by a fair and reasonable construction of the terms and provisions of the former ordinance granting authority to the defendant in error company to occupy the street with its tracks. The city, as the representative of the state, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety, and comfort of the people. The exercise of this power affects the public, and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power, or relieve itself of this duty; nor could the defendant in error company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety, or comfort of the people. "No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation. It cannot be doubted that a company which secures a right to use the streets of a municipal corporation takes it subject to the police power resident in the state as an inalienable attribute of sovereignty." Elliott, Roads & Streets, p. 801. We are of the opinion the ordinance under consideration is a reasonable and valid exercise of the police power, and that it should be obeyed and enforced accordingly.

The judgment of the Criminal Court is therefore reversed, and the cause is remanded to that court for further proceedings in conformity to this opinion.

Petition for rehearing denied December 3, 1902.

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WASHINGTON SUPREME COURT.

RE Application of Takuji YAMASHITA for Admission to the Bar.

(.....Wash.....)

1. **A statute providing for the admission of attorneys** from other states without examination does not affect a provision of a prior statute that attorneys must be citizens of the United States.
2. **A judgment naturalizing a person** who is shown by the face of the proceeding not to be entitled to naturalization may be collaterally attacked.
3. **Members of the Japanese race** are not entitled to become citizens of the United States.

(October 22, 1902.)

APPLICATION for admission to the bar. *Denied.*

The facts are stated in the opinion.

Mr. **Takuji Yamashita** *in propria persona* in support of application.

Messrs. **W. B. Stratton,** Attorney General, **E. W. Ross,** and **C. C. Dalton,** *amici curiæ contra:*

The applicant cannot be admitted to practise law in this state unless he is a citizen of the United States.

Re Hong Yen Chang, 84 Cal. 163, 24 Pac. 156.

The validity of a certificate of naturalization may be questioned in this proceeding.

Savage v. *Sternberg,* 19 Wash. 679, 54 Pac. 611; *Re Gee Hop,* 71 Fed. 274; *Re Hong Yen Chang,* 84 Cal. 163, 24 Pac. 156; Freeman, Judgm. §§ 116, 120, pp. 176, 183.

A native of Japan is not a "white person," and therefore is not entitled to become a citizen of the United States.

Re Camille, 6 Sawy. 541, 6 Fed. 259; *Re San C. Po,* 7 Misc. 471, 28 N. Y. Supp. 383; *Re Ah Yup,* 5 Sawy. 155, Fed. Cas. No. 104; *Re Saito,* 62 Fed. 126; *Re Kanaka Nian,* 6 Utah, 259, 4 L. R. A. 726, 21 Pac. 993; Webster, Naturalization, pp. 13–15.

Reavis, Ch. J., delivered the opinion of the court:

Takuji Yamashita, a native of Japan, applies for admission as an attorney and counselor at law in the courts of this state. He shows that he is over twenty-one years of age, has been a resident of the state for more than one year, and that he has the requisite learning and ability qualifying him for admission. The law relating to the qualifications and admission of attorneys and counselors at law is found in the act of March 19, 1895 (Laws 1895, p. 178), together with the amendment in the act of February 16, 1897 (Laws 1897, p. 12). The law of 1895 made no provision for admission without an examination. Sections 2 and 3 of the act provided for holding regular examinations for admission, but § 6 of the act declared: "No person shall practise as an attorney and counselor at law in any court of this state who does not reside in this state, or who is not a citizen of the United States." In the act of 1897, § 4 of the former act is so amended in substance as to provide for the admission of attorneys from sister states, upon satisfactory evidence of qualifications, without examination. The amendatory act does not affect § 6 of the original act, which, it may be observed, has been the law since 1881. It is apparent, therefore, that, to entitle the applicant to admission, he must be a citizen of the United States. The qualifications required for admission to the bar are prescribed by law, and they are exclusively within the discretion and policy of the state. One of the conditions required for the applicant is that he must be a citizen of the United States. It is shown by exemplification of the record that an order was entered admitting applicant to citizenship in the superior court of Pierce county on the 14th of May, 1902. It is also urged that such superior court was one of competent jurisdiction, and therefore its judgment must be final, and cannot be questioned here. The record of naturalization shows that the applicant is a native of Japan, and that he renounces allegiance as a subject of the Mikado. The naturalization law requires the applicant to declare on oath that he absolutely and entirely renounces and abjures all allegiance and fidelity to every prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereign of which he was before a citizen or subject (U. S. Rev. Stat. § 2165, subd. 2, U. S. Comp. Stat. 1901, p. 1329), and the proceedings must be recorded by the clerk of the court. Thus, the transcript of the order admitting him to citizenship shows that he is of the Japanese race. The judgment of the superior court, if acting within its jurisdiction, is conclusive; but, if the judgment upon its face shows that the court was without authority to pronounce the judgment, the determination is void and must be disregarded. A judgment void upon its face may be attacked at any time and in any proceeding, and the same may be disregarded. *Savage* v. *Sternberg,* 19 Wash. 679, 54 Pac. 611. Also, as pertinent and relating to such proceedings in naturalization, see *Re Gee Hop,* 71 Fed. 274; *Re Hong Yen Chang,* 84 Cal. 163, 24 Pac. 156.

The question presented is whether one of the Japanese race is eligible, under the naturalization laws, for admission to citizenship. The Federal Constitution confers plenary power upon Congress to prescribe the qualifications and conditions for naturalization. All the acts of Congress relating to the naturalization of aliens, commencing with that of April 14, 1802, to the Revised Statutes, contain the provision that

NOTE.—As to right of inhabitant of Hawaiian Islands to naturalization, see, in this series, *Re* Kanaka Nian (Utah) 4 L. R. A. 726.

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"any alien being a free white person may be admitted to be a citizen," etc. After the adoption of the 13th and 14th Amendments to the Federal Constitution, and in the act of July 14, 1870, it was enacted by Congress "that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." 16 Stat. at L. 256, chap. 254, § 7. This was afterwards revised and placed in the Revised Statutes,—§ 2169 (U. S. Comp. Stat. 1901, p. 1333), (see 18 Stat. at L. 318, chap. 80),—so as to read: "The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent." And this is the existing law. It is plain that the two races mentioned are now eligible to citizenship under the general naturalization laws; that is, white persons and persons of African (negro) descent and nativity. It is clear that within the meaning of these words the applicant is ineligible. When the naturalization law was enacted the word "white," applied to race, commonly referred to the Caucasian race. This is well stated in the case of *Re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104: "Webster, in his Dictionary, says: 'The common classification is that of Blumenbach, who makes five: (1) The Caucasian or white race, to which belong the greater part of the European nations and those of western Asia: (2) the Mongolian or yellow race, occupying Tartary, China, Japan, etc.; (3) the Ethiopian or negro (black) race, occupying all Africa, except the north; (4) the American or red race, containing the Indians of North and South America; and (5) the Malay or brown race, occupying the islands of the Indian Archipelago,' etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair, and skull. Linnæus makes four divisions, founded on the color of the skin: '(1) European, whitish; (2) American, coppery; (3) Asiatic, tawny; and (4) African, black.' Cuvier makes three: Caucasian, Mongol, and Negro. Others make many more, but no one includes the white or Caucasian with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race. (See New American Cyclopedia, title *Ethnology*.)" The courts, Federal and state, have uniformly determined that Chinese are not eligible to naturalization, because not white persons. In 1880 it was determined that a native of British Columbia, half Indian and half white, could not be naturalized. *Re Camille*, 6 Sawy. 541, 6 Fed. 256. In *Re San C. Po*, 7 Misc. 471, 28 N. Y. Supp. 383, a native of British Burmah was denied admission. In *Re Kanaka Nian*, a Hawaiian was denied naturalization. 6 Utah, 259, 4 L. R. A. 726, 21 Pac. 993. In *Re Saito*, 62 Fed. 126, the Federal circuit court adjudged that a native of Japan was of the Mongolian race, and therefore not eligible to naturalization.

But the applicant earnestly urges that the act of Congress specially excluding the Chinese from naturalization implies, when considered with reference to our modern treaties with the Empire of Japan, that the Japanese were excepted from the general exclusion of the Mongolian race. He also commends the reasoning in the case of *Re Rodriguez*, 81 Fed. 337, as persuasive to a more liberal construction in favor of the Japanese. In that case a native of Mexico, of undefined blood and race, and whose ancestors had for centuries been habitants of Mexico, was naturalized. But such decision was largely controlled by the various treaties with Mexico, and the fact that thousands of Mexicans, without regard to race or color, had been collectively naturalized as citizens of the United States. It is true, the learned judge, in the course of his opinion, suggests other and different views of the meaning of the classification by color contained in the naturalization laws, from those taken by the other authorities heretofore mentioned; but he also seems to concede that the Mongolian race is clearly excluded. It is likewise true that Congress has several times collectively conferred citizenship upon bodies of people without reference to race, but the reasons therefor in each instance were plainly special, and such acts cannot be extended beyond the particular instances. The general law, with the single extension made to the African or negro race, has been confined to free white aliens. The law seems to base the classification upon ethnological and racial considerations, rather than in any national distinctions. Whether the classification according to color is technically scientific or natural is not a proper subject of inquiry here. From its existence coextensively with the formation of the American Republic, it must be taken to express a settled national will.

The applicant cannot be admitted, because he is not a citizen of the United States.

Dunbar, Fullerton, Anders, and Mount, JJ., concur.

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ILLINOIS SUPREME COURT.

LINK BELT MACHINERY COMPANY, *Appt.*,
v.
George R. H. HUGHES.

(195 Ill. 413.)

1. **A creditor of an embarrassed corporation, who, for the purpose of getting control of its plant** and shielding it from its creditors, collusively obtains the appointment of a receiver, and thereby prevents the owner of the premises on which the plant is located from enforcing his claims for rent, will render himself personally liable for the rent accruing during the receivership.

2. **A landlord of an embarrassed corporation,** who intervenes in receivership proceedings against it, asserting a prior lien for rent, and asking leave to distrain therefor, does not waive or forfeit his rights on the ground of having assented to the proceedings, where he has consistently insisted on the priority of his claim.

3. **The owner of property leased to an embarrassed corporation,** for which a receiver is collusively appointed at the instance of one of its creditors, does not, by accepting the proceeds in the receiver's hands as a payment on his claim for rent, exhaust his remedy so as to prevent the court from requiring the creditor to pay the deficiency.

(February 21, 1902.)

NOTE.—*Liability for rent of premises occupied by receiver or assignee for creditors.*

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I. *Scope.*

This note includes the question of liability of receivers or assignees for the benefit of creditors or in bankruptcy of the lessee, for rent of leased premises, while such premises are in the hands of such receivers or assignees as such, or while the insolvent estate of the lessee is in the course of settlement, and the liability of the lessee himself and of third persons for such rent only. The question as to the right to prove a claim for rent previously accruing against the estate of an insolvent or bankrupt lessee is not regarded as within the subject.

II. *Liability of receiver or assignee.*

a. *General rules as to receivers.*

The general rule is undisputed, that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes, of the debtor if, in his opinion, it would be undesirable or unprofitable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts. If he elects to adopt a lease, the receiver becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent. United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86; Fidelity Safe Deposit & T. Co. v. Armstrong, 35 Fed. 567; Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257; *Re* Chambers, 98 Fed. 865.

But the mere appointment of a receiver of an estate including a leasehold interest does not make the receiver liable for rent under the covenants of the lease. Carswell v. Farmers' Loan & T. Co. 20 C. C. A. 282, 43 U. S. App. 300, 74 Fed. 88; Fidelity Safe Deposit & T. Co. v. Armstrong, 35 Fed. 567; Empire Distilling Co. v. McNulta, 23 C. C. A. 415, 46 U. S. App. 578, 77 Fed. 700; Com. v. Franklin Ins. Co. 115 Mass. 278; Mercantile Trust Co. v. Farmers' Loan & T. Co. 26 C. C. A. 383, 49 U. S. App. 462, 81 Fed. 254.

A receiver does not become liable under a lease held by the insolvent debtor merely because he is receiver; he becomes liable only by virtue of election on his part to adopt the lease. Empire Distilling Co. v. McNulta, 23 C. C. A. 415, 46 U. S. App. 578, 77 Fed. 700; Sunflower Oil Co. v. Wilson, 142 U. S. 319, 35 L. ed. 1025, 12 Sup. Ct. Rep. 235; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787.

And a receiver who does no act indicating his acceptance of the lease of premises from which he takes the property of the bankrupt does not become liable as tenant under the lease. Martin v. Black, 9 Paige, 641, 38 Am. Dec. 574.

The position of a receiver is analogous to that of an executor; if he waives the terms he

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APPEAL by the petitioner for a receivership of the Standard Eggette Coal Company from a judgment of the Appellate Court, First District, reversing a decree of the Superior Court for Cook County, which dismissed an intervening petition by the owner of the premises occupied by the coal company, seeking to recover the rent due upon the premises. *Affirmed.*

Statement by **Carter, J.**:

This is an appeal from a judgment of the appellate court for the first district reversing a decree of the superior court of Cook county. The same parties were before this court in *Link Belt Machinery Co.* v. *Hughes*, 174 Ill. 155, 51 N. E. 179, where a full statement of the case is given up to the time of that appeal. It was there found that appellee was entitled to the sum of $3,774.38 for rent due under his lease to the Standard Eggette Coal Company, to be paid by the receiver of said company. The receiver had but $2,138 in his hands, which amount he paid the appellee, leaving a balance due of $1,636.38. On showing made to the superior court that he had disposed of all of the property of the Eggette company, and distributed the funds in his hands according to the order of the court, the receiver was discharged. Appellee then filed his petition in the same suit, charging appellant with having fraudulently and collusively procured the appointment of said receiver of the Eggette company for its own purposes and emolument, and to hinder and delay other creditors, and charging that the appellant's creditors' bill was not filed for the purpose of collecting its judgment, but because the appellant, being then the owner of some $6,-

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cannot be charged as assignee of the lease. People v. National Trust Co. 82 N. Y. 283; Martin v. Black, 9 Paige, 641, 38 Am. Dec. 574.

Although the estate of the testator may be liable for the rent in the due course of administration, if the landlord refuses to re-enter. Martin v. Black, 9 Paige, 641, 38 Am. Dec. 574.

And the question of liability of a chancery receiver of a lessee railroad corporation for rent becoming due during the receivership is unaffected by the fact that, some days after the receiver was appointed at the suit of the mortgagor, the lessor appeared and assented to the appointment. St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795.

Nor are receivers of a leased line of railroad any more bound by a lease to the insolvent, by which rental is determined by the amount of gross earnings of the road, where they have not adopted the lease, than they would be by any other provision thereof; and such rent is not thereby given priority. New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 269.

And the court is not bound to direct a receiver of a railroad to adopt a lease made to the insolvent company by another railroad, and pay the rent therefor, where the adoption of the lease and the operation of the leased road would be a burden on the property in the hands of the receiver, and it would inflict a loss upon the former road, out of the money or property of which alone the rent could be paid. St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795.

So, the facts that a receiver can only enter into a contract as receiver with the sanction of the court, and that all persons are chargeable with notice and deal with him at the risk of the court refusing its assent, do not affect the result of the acceptance by the receiver of a lease made to the insolvent debtor for whom he was appointed. De Wolf v. Royal Trust Co. 173 Ill. 435, 50 N. E. 1049.

But if a receiver elects to adopt a lease made to the one for whom he is receiver, he becomes vested with a right to the leasehold estate, and a privity of estate is thereby created between him and the lessor by which he becomes liable upon the covenant to pay the rent. *Ibid.*

And where the trustee and executor of an owner of a moiety of a plantation takes a lease of the other moiety from the owners thereof, and a receiver is subsequently appointed for the management of his estate, and enters into possession of the entire plantation, parties interested under the will of the decedent are bound by the occupation of the receiver, and the owner of the other moiety is entitled to an order for payment of the arrears of rent, though some of the parties interested under the will are under disability. Neate v. Pink, 3 Macn. & G. 476, 21 L. J. Ch. N. S. 574, 16 Jur. 69.

And a receiver cannot take, and the court cannot authorize him to take, the leasehold estate of the insolvent, for whom he is receiver, except as a whole, and upon the terms of the lease. De Wolf v. Royal Trust Co. 173 Ill. 435, 50 N. E. 1049.

b. *General rules as to assignees under general assignment.*

The same considerations of public policy which permit an assignee in bankruptcy, or a receiver or executor, to reject a term for the benefit of the estate which he is appointed to administer, which would be charged with rent or interest, would seem to favor its application to a voluntary assignee for the benefit of creditors. Lewis v. Burr, 8 Bosw. 140 (*dictum*).

An assignee for creditors, like a receiver, is entitled to elect to take or refuse to take a lease included in the assignment, according to his estimate of its value, without interfering with their rights to the other property included in the assignment. Pratt v. Levan, 1 Miles (Pa.) 358; Smith v. Goodman, 149 Ill. 75, 36 N. E. 621; Horwitz v. Davis, 16 Md. 313; Journeay v. Brackley, 1 Hilt. 447; Myers v. Hunt, 8 N. Y. S. R. 338; Smith v. Wagner, 9 Misc. 122, 29 N. Y. Supp. 284.

And he may accept the assignment, and enter upon the execution of the trust, without becoming the assignee of a lease held by the insolvent, unless he elects to do so. Smith v. Goodman, 149 Ill. 75, 36 N. E. 621; Smith v. Ingram, 90 Ala. 529, 8 So. 144; Hoyt v. Stoddard, 2 Allen, 442; Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 989; Journeay v. Brackley, 1 Hilt. 447.

And he is not liable where he neither enters upon and enjoys the leasehold, nor otherwise indicates an acceptance of the lease. Hoyt v. Stoddard, 2 Allen, 442; Journeay v. Brackley, 1 Hilt. 447; *Re* Snyder, 8 Phila. 302; Copeland v. Stephens, 1 Barn. & Ald. 594.

And an assignee for the benefit of creditors is not liable for the rent of premises leased to his assignor where the assignor paid the monthly rent up to the month of the assignment, and it does not appear that the assignee ever took possession under the assignment, or in any way intermeddled therewith. *Re* Link, 14 Daly, 148.

And an assigned estate in the hands of an assignee for the benefit of creditors is not liable for rent of premises leased to the assignor, which

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000 or $7,000 of the capital stock of the Eggette company, desired to experiment with a patented process of manufacturing artificial coal, believing "there were millions in it," and to that end invoked the aid of the superior court, with the hope of conducting the speculation on appellee's premises, and virtually at his expense, without risk to its own treasury. Other allegations of the petition are that there was no necessity for a receivership in order to collect appellant's judgment, as there was ample personal property of the Eggette company to satisfy appellant's execution; that appellant's treasurer was also treasurer of the Eggette company, and was fully acquainted with its assets; that the issuing of the execution on appellant's judgment against the Eggette company, return of same unsatisfied, filing of creditor's bill, and appointment of receiver were all done on the same day, and by attorneys having offices and rooms together, and all by the procurement of appellant, with the connivance and assent of the Eggette company; that the filing by appellant of its creditor's bill and the carrying on of the proceedings in court were a mere sham and pretense, a cover for a speculation by appellant, and an abuse of the process and machinery of a court of equity; that the receiver was appointed at the request of appellant, and upon the faith of averments in its bill which were untrue; that appellant, by reason of the premises, became liable to appellee for the rental of the property occupied by the Eggette company for the whole time the same was occupied by the receiver. Appellee asked for an order in the case directing appellant to pay him the balance due on his rent, with interest. Appellant,

had been occupied by him, but of which the assignee never took possession, where it accrued after the date of the assignment. *Re* Snyder, 8 Phila. 302.

The liability of assignees for the benefit of creditors on a lease of the assignor is to be determined by the rule applicable to executors under similar circumstances. Jermain v. Pattison, 46 Barb. 9.

And in order to show that they are liable for rental under a contract of hiring by their assignor, it is necessary to show that they have assumed the obligation, either by express agreement, or by unequivocal acts. Judd v. Bennett, 28 Misc. 558, 59 N. Y. Supp. 624; Pratt v. Levan, 1 Miles (Pa.) 338.

A lease is deemed property or not, in case of an assignment for the benefit of creditors by the lessee, at the election of the assignee, until he enters under it, or by some other act or omission to act determines his right to elect, since, instead of being property, it may be an encumbrance or a debt, and not a benefit. Carter v. Hammett, 12 Barb. 253.

But an assignee for the benefit of creditors of a lessee of premises, who elects to accept the interest of his assignor by entering into possession, or by doing any other act which is equivalent to signifying his acceptance of the term as assignee of the land, becomes the assignee of the premises, and renders himself liable for rent. Smith v. Wagner, 9 Misc. 122, 29 N. Y. Supp. 284.

When an assignee for creditors has accepted an assignment of the lease of a store, he is liable for rent through a privity of contract thus created between himself and the landlord. Grant v. Gill, 2 Whart. 42; Dorrance v. Jones, 27 Ala. 630; Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 689.

And it is immaterial whether or not he chooses to keep the assigned goods on the leasehold. Grant v. Gill, 2 Whart. 42.

And where a trustee for the benefit of creditors accepts a lease held by his assignor, the election binds him, and he cannot recede from it. Dorrance v. Jones, 27 Ala. 630; Myers v. Hunt, 8 N. Y. S. R. 338; Hanson v. Stevenson, 1 Barn. & Ald. 303.

And the acceptance by an assignee for the benefit of creditors of the assignment, transferring a lease of premises held by the assignor, without excepting the lease and with knowledge of its terms, and subsequently entering into possession of the leased store, are prima facie sufficient evidence of an election to accept the lease; but the presumption may be rebutted or disproved. Smith v. Ingram, 90 Ala. 529, 8 So. 144.

And where the landlord seeks to enforce a claim based on an alleged election by the assignee to hold the lease for the benefit and at the expense of the estate, it is incumbent on him to prove, by clear and satisfactory evidence, an express agreement by the assignee to so hold it, or conduct on the assignee's part from which there is a plain and necessary implication that he has elected to do so. Weinmann's Estate, 164 Pa. 405, 30 Atl. 389.

c. *General rules as to assignees in bankruptcy.*

An assignee in bankruptcy, unless restrained by the terms of a lease given to the bankrupt, like a receiver or an assignee under a general assignment, may adopt or reject a term as he finds most beneficial to the creditors, and may take a reasonable time to decide the question. *Ex parte* Faxon, 1 Low. Dec. 404, Fed. Cas. No. 4,704; *Re* Merrifield, 3 Nat. Bankr. Reg. 98, Fed. Cas. No. 9,465.

And he does not become liable for rent accruing after the adjudication, until he elects to accept the lease as assignee; and his occupation of the leased premises independently of the lease, and payment for such occupation, are not evidence of such an election. *Re* Ten Eyck, 7 Nat. Bankr. Reg. 26, Fed. Cas. No. 13,829.

A trustee in bankruptcy is not bound to take a lease held by the bankrupt and charge the estate with the payment of rent, but may elect not to take it when it would be a burden, and not a benefit, to the estate, even though the lease might have been levied on and sold under judicial process against the bankrupt previous to the adjudication and passing of the legal title to the trustee. Bray v. Cobb, 3 Am. Bankr. Rep. 788.

In the absence of any positive and unequivocal act of acceptance, on the part of an assignee of a bankrupt lessee, of the demised premises, the lessor can only look to the bankrupt for payment of his rent. *Re* Washburn, 11 Nat. Bankr. Reg. 66, Fed. Cas. No. 17,211.

And if a trustee in bankruptcy elects to reject a lease held by the bankrupt, and surrenders the premises, neither the trustee, nor the bankrupt's estate, is liable for rent accruing after such election, and after the property ceases to be used for the administration of the estate. Bray v. Cobb, 3 Am. Bankr. Rep. 788.

But an assignee in bankruptcy, who occupies premises leased to the bankrupt after the day of the adjudication, and whose occupancy is for the benefit of the estate, and is in fact beneficial

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in its answer, denied all charges of fraud and collusion, of speculation, and abuse of process, but admitted that its treasurer was also treasurer of the Eggette company, and knew of its assets. On a hearing, appellee's petition was dismissed for want of equity from which decree appellee appealed to the appellate court for the first district, which court, upon a rehearing, reversed the decree and remanded the cause, with directions to the trial court to enter a decree for appellee for $1,636.38, with interest. From this judgment of the appellate court appellant has appealed to this court. The evidence shows that before the bill of appellant was filed the sheriff made no attempt to levy on any property of the defendant in the execution, but only made demand on its treasurer, who said that he had no assets to which he could readily turn to satisfy the judgment, and that the sheriff then immediately made his return of *nulla bona;* that the bill was filed to head off attachment proceedings that were threatened by other creditors; that appellee, in December previous to the filing of the creditor's bill, had levied a distress warrant upon some of the machinery of the Eggette company for back rent, and that some time thereafter the creditors of the Eggette company made an arrangement by which they were paid the amount of their claims in stock of the company; that appellant had the largest claim, amounting to over $8,000, and that stock was issued to its treasurer, as trustee, for such claim; that, after the receiver was appointed, appellant loaned him $1,558.13 to carry on the business of the Eggette company as such receiver, which amount has not been repaid. In appellant's creditors' bill it was alleged

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to it, will be credited with the rent which he is obliged to pay therefor. *Re* Webb, 6 Nat. Bankr. Reg. 302, Fed. Cas. No. 17,315.

d. *What amounts to acceptance or adoption of lease.*

1. *Generally.*

The election of a receiver or assignee to occupy a leased estate may be signified, if within a reasonable time after he accepts his assignment, either by his express act, or by unequivocal acts inconsistent with the right of entry by the landlord, indicating an intention to appropriate the leasehold estate. Smith v. Goodman, 149 Ill. 75, 36 N. E. 621, Reversing 43 Ill. App. 530; Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250, Affirming 58 Ill. App. 637; Judd v. Bennett, 28 Misc. 558, 59 N. Y. Supp. 624; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025, 12 Sup. Ct. Rep. 235; *Re* Washburn, 11 Nat. Bankr. Reg. 66, Fed. Cas. No. 17, 211; Horwitz v. Davis, 16 Md. 313; Goodwin v. Noble, 8 El. & Bl. 587, 27 L. J. Q. B. N. S. 204, 4 Jur. N. S. 208; Lindsay v. Limbert, 12 Moore, P. C. C. 204, 2 Car. & P. 526.

The election of a receiver to abide by or carry out the terms of a lease held by the insolvent may be made by continuing in possession of the leased premises for a time, paying the rent provided for in the lease, and making no request to the court which appointed him to determine whether or not the rent should be continued, or by failure to make other and different arrangements with the landlord on the question of amount or terms of the lease. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179.

But the election of an assignee for the benefit of creditors must be signified by an unequivocal act. Either the lease must be specifically mentioned in the assignment, or the assignee, after accepting the trust, must have acted in such a way with respect to the leasehold premises as to show that he had elected to take his assignor's interest therein. Journeay v. Brackley, 1 Hilt. 447.

No express declaration by a receiver to the landlord, however, of his intention or election to abide by or carry out the terms of a lease to the insolvent lessee is necessary. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179.

And the election of a receiver to occupy the leasehold estate of the assignee may be effected without any act of the landlord putting the court or the receiver to an election. Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250, Affirming 58 Ill. App. 637.

And when a receiver has elected to take a demised lease of premises which he occupies, and has not notified the lessor of his recession from this position, no demand by the lessor of possession of the leasehold is essential to make the receiver liable for rent under the lease. Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 517.

But no general rule can be laid down as to the effect of an assignee of a bankrupt remaining in possession of demised premises or paying rent for them, or doing any other act consistent with the supposition that he has elected to take the lease as part of the property of the bankrupt for the benefit of creditors; each case must be determined by the peculiar circumstances belonging to it. Goodwin v. Noble, 8 El. & Bl. 587, 27 L. J. Q. B. N. S. 204, 4 Jur. N. S. 208.

The burden of proof rests with receivers of a railroad company, taking possession of a leased line, to establish the proposition that they do not assume the lessee's liability under the lease. Ames v. Union P. R. Co. 60 Fed. 967.

And where the question whether railroad leases should be renounced by a receiver or not has been carefully considered upon conflicting evidence, and a decision has been rendered by a master and the court below, the decision is presumptively right, and, unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, the order based upon such decision will not be disturbed on appeal. Mercantile Trust Co. v. Farmers' Loan & T. Co. 26 C. C. A. 383, 49 U. S. App. 462, 81 Fed. 254.

2. *Taking possession.*

(a) *Under general order.*

A chancery court does not bind itself, or its receivers, for rent *eo instanti* by the mere act of taking possession of a leasehold. Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795; United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86; Ames v. Union P. R. Co. 60 Fed. 674; Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Mariner v. Crocker, 18 Wis. 251; Carswell v.

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that the Eggette company had reached a point where it could successfully and profitably manufacture artificial coal; that, if its plant could be continued in operation, its assets would become of great value, and that they could only be preserved and made valuable by continuing the business by or under the order of court, through a receiver; that the best interests of appellant and the Eggette company and its creditors required that the business should be promptly reopened under the order of court, and its good will and business preserved; and that the plant and machinery should be turned over to a receiver, for use in further conducting said business. On this bill the receiver was appointed, and it was ordered that he continue the business of manufacturing artificial coal as then carried on by the defendant Eggette company; that he employ suitable persons to conduct such business; that he purchase necessary materials and supplies, and pay for them out of the funds coming into his hands; that he pay rent and other charges to conserve and preserve the property of the Eggette company pending further orders of the court.

Messrs. **Herrick, Allen, Boyesen, & Martin** for appellant.

Messrs. **H. S. Osborne, F. S. Osborne,** and **R. F. Pettibone,** for appellee:

Appellant's bill was not a mere creditor's bill, but a bill to run a business by a receiver. Irrespective of the question of fraud, appellant is liable for the receivership expenses, including the rent.

Knickerbocker v. *McKindley Coal & Min. Co.* 172 Ill. 535, 50 N. E. 330; *Link Belt*

Farmers' Loan & T. Co. 20 C. C. A. 282, 43 U. S. App. 300, 74 Fed. 88; Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257; Park v. New York, L. E. & W. R. Co. 57 Fed. 799; Dayton Hydraulic Co. v. Felsenthall, 116 Fed. 961.

If the order of the court under which a receiver acts embraces a leasehold estate held by the insolvent, it becomes the receiver's duty to take possession of it; but he does not, by taking such possession, become assignee of the term in any proper sense of the word, but merely takes and holds as the hand of the court. Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 268; Stokes v. Hoffman House, 167 N. Y. 554, 53 L. R. A. 870, 60 N. E. 667, Affirming 46 App. Div. 120, 61 N. Y. Supp. 821.

And a receiver of a railroad company holding rolling stock under a car-trust lease, title thereto remaining in the lessor until the rental has paid the purchase price, is not bound to adopt such car-trust contract, and does not assume the liabilities of the railroad company thereunder, simply by taking possession of the cars and using them temporarily under his order of appointment. Platt v. Philadelphia & R. R. Co. 28 C. C. A. 488, 55 U. S. App. 452, 84 Fed. 535.

Assignees of a bankrupt, however, are not liable to be charged with rent of premises leased to their assignor and included in the assignment, unless they do take possession. Bourdillon v. Dalton, Peake N. P. Cas. 238, 1 Esp. 233.

And, although an assignment for the benefit of creditors is sufficient to vest the term of leasehold premises in the assignee unless disclaimed, if the assignee does not disclaim assumpsit for use and occupation cannot be maintained against him without proof that he has actually occupied. How v. Kennett, 3 Ad. & El. 659, 5 Nev. & M. 1, 1 H. & W. 391.

But a receiver may become liable for rent of premises leased to the insolvent debtor, though he never took actual physical possession of the leased premises, where he was constructively in possession through the decree appointing him, describing the leasehold by reference, and directing him to take possession, and enjoining all persons from interfering with it. Dayton Hydraulic Co. v. Felsenthall, 116 Fed. 961.

In the above case, Woodruff v. Erie R. Co. 93 N. Y. 609, *infra*, II. f, 1, 3, was distinguished upon the ground that that case is based upon the construction of a statute of the state of New York, which the court construed as vesting title in receivers of insolvent companies.

(b) *Under direction in, or pursuant to purpose of, order or assignment.*

A mere direction in an order appointing a receiver or an assignee or trustee in bankruptcy, or in an assignment for the benefit of creditors to such receiver or assignee, to take possession of leasehold property; or a mere permission to take such possession; and the taking of possession pursuant thereto,—do not charge the receiver or assignee with the rent. There must be a holding under such direction, or some further circumstance showing an adoption of the lease.

Thus, the mere order of the court directing railway receivers to take charge of the property of the insolvent, including its leased lines, and the taking possession thereof by the receivers, do not have the effect to change, either the title to the property, or the right of possession in the property. The receivers thereby become the mere custodians of the property for the court; and they do not, by taking possession, become the assignees of the term. Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 517.

And the action of receivers of a lessee of several different lines of railroad, upon most or all of which there were mortgages, such receivers having been appointed on application of the lessee acknowledging insolvency, in taking possession of, and that of the court in ordering possession of, such leased lines, do not make the receivers the assignees of the leases, and as such bound by their terms to an extent which would bind the property for the rent, in preference to the lien of the mortgages. Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 259.

So, a common-law receiver, who takes possession of a hotel operated under a lease, is not required to pay the rent by a clause in the order appointing him, authorizing him to take possession of and carry on the hotel, and to do any and all other things which may be necessary and proper to be done in the general and ordinary conduct of similar places of business. Stokes v. Hoffman House, 167 N. Y. 554, 53 L. R. A. 870, 60 N. E. 667, Affirming 46 App. Div. 120, 61 N. Y. Supp. 821.

In the above case, Woodruff v. Erie R. Co. 93 N. Y. 609, *infra*, II. f, 1, 3, was distinguished upon the ground that the holding in the case was with relation to a statutory receiver. And Frank v. New York, L. E. & W. R. Co. 122 N. Y. 197, 25 N. E. 332, *infra*, II. f, 3, was distinguished upon the ground that the decision in that case related to the liability of a corpora-

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Machinery Co. v. *Hughes*, 174 Ill. 155, 51 N. E. 179.

The receivership was procured by fraud and collusion.

Stirlen v. *Jewett*, 165 Ill. 410, 46 N. E. 259; *Highley* v. *Deane*, 168 Ill. 266, 48 N. E. 50; *McAnrow* v. *Martin*, 183 Ill. 467, 56 N. E. 168; High, Receivers, 3d ed. § 796; Beach, Receivers, § 773; *Gill* v. *Crosby*, 63 Ill. 190; *Heidenbluth* v. *Rudolph*, 152 Ill. 316, 38 N. E. 930; *Phillips* v. *Kesterson*, 154 Ill. 572, 39 N. E. 599; *Schumacher* v. *Bell*, 164 Ill. 181, 45 N. E. 428.

Carter, J., delivered the opinion of the court:

We are of the opinion that the facts contained in this record show that there was collusion between the appellant and the Eggette company, and that the creditors' bill was filed to secure to appellant the control of the Eggette company's plant through appellant's treasurer, who was appointed receiver, and for whose benefit appellant advanced a large sum of money, trusting for repayment to his success in managing the experiment it had entered upon with the Eggette company's property. The effect of the whole proceeding was to hinder other creditors from asserting their rights at law, and, when appellee applied to the lower court for leave to assert his rights at law, his petition was denied. Although no actual fraud may have been contemplated by appellant, yet, as it had not exhausted its legal remedy to satisfy its judgment at law, no bona fide attempt to collect its debt by execution against the property of the Eggette company having been made (*Durand* v. *Gray*, 129 Ill. 9, 21 N. E. 610; *Stirlen* v.

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tion which had purchased on foreclosure and become assignee of the term. And Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861, *infra*, II. d, 8, was distinguished on the ground that in that case no question was made that a chancery receiver did not take title by his appointment and possession, but it was sought to relieve the defendant on the ground that he was appointed receiver only of the rents and profits, and not of the property itself. And United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86, *infra*, II. g, 3, was distinguished and criticised, the court, by Cullen, J., saying that, as a matter of fact, in that case the lessors were not allowed the rental of the whole period during which the receiver was in possession of the leased railroad, but only for rent accruing subsequent to an order made by the court, on application of the lessors, that the receiver either pay rent or surrender the road; and that the case was really disposed of on equitable considerations; but that, if the right of the lessor to the rent depended upon privy of estate between the receiver and the lessor, it is not entirely clear how this result was reached.

A receiver is considered to have adopted the terms of his insolvent's lease, however, during the time he occupies the leasehold under the order of the court for the continuance of the business of the insolvent, where he continues the business of the insolvent, paying to the owner of the premises the rent specified in the lease held by the insolvent. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179, Affirming 62 Ill. App. 318.

And receivers of a railroad company under a court order authorizing them to take charge of all the company's property and continue the business of the road are bound to perform the covenants of the railroad company as to care and return of sleeping cars leased to the railroad company. Easton v. Houston & T. C. R. Co. 38 Fed. 784.

And where the purpose of a receivership is to prevent the disintegration of a railroad system composed in part of leased lines, and to preserve it as a going concern, and the receiver is expressly directed to continue the leased lines, the general rule is to hold the receiver liable for his use and occupation.

Thus, an order of the court appointing a receiver of a railroad system consisting of several leased lines, made on application of the lessee, expressly providing that the interest of the system requires the payment of the rental of one of the leased lines and the preservation of that property in the system, warrants the lessor of 59 L. R. A.

that line in relying upon it and accepting the payment of his rent, though he has not asserted his right, as lessor, to the surrender of the leased property. Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 259.

And receivers of a railroad company having a leasehold interest in the property of another railroad company, which interest by the terms of the lease is liable to be forfeited for nonpayment of rent, who are invested, under the order of the court, with the entire estate of the lessee company, including its leasehold, and who were appointed in a suit commenced for preserving intact the whole system for the benefit of the company and its creditors and stockholders, are liable for the rent and interest accruing during the term of their receivership. Brown v. Toledo, P. & W. R. Co. 35 Fed. 444.

So, when a receiver authorized by order of court to operate a railroad has enjoyed terminal facilities which are indispensable to the successful operation and management of the line, and which had been previously enjoyed by the railroad company under contract, it is right and proper that the receiver should at least be held liable to pay for his use and occupation of the premises; and it is, therefore, error to sustain a demurrer to the whole petition for the allowance of rent claimed to have accrued before and during the receiver's possession. Savannah, F. & W. R. Co. v. Jacksonville, T. & K. W. R. Co. 24 C. C. A. 437, 52 U. S. App. 51, 79 Fed. 35.

And the act of a receiver of a railroad and the court, after due investigation, in deciding that a lease of a portion of the railroad is indispensable to its successful operation, and notifying the lessors of that fact, constitutes an adoption of that lease, and renders the receiver liable for the rent therefor. Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 517.

And a court which may legitimately compel the operation of a railroad in the hands of a receiver in order to discharge the obligation of the company to the public should burden the receivership and the property in charge of the receiver with the expenses connected with the operation of the road, including reasonable rentals for the property used and necessary for such operation. Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950.

The mere appointment of receivers for a railroad system, and their act in taking possession of a leased road which is a part of the system, however, do not render them assignees of the lease, or require their adoption thereof, so as

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Jewett, 165 Ill. 410, 46 N. E. 259), and as the creditors' bill was in reality filed for the purpose of getting control of the plant of the Eggette company and shielding it from its creditors, the acts of appellant operated as a fraud on appellee, and it is immaterial whether appellant intended to injure appellee or not. *Heidenbluth* v. *Rudolph*, 152 Ill. 316, 38 N. E. 930; *Phillips* v. *Kesterson*, 154 Ill. 572, 39 N. E. 599; *Commercial Loan & Bldg. Asso.* v. *Trovette*, 160 Ill. 390, 43 N. E. 769. Where the receivership is procured under the assertion of an unjust and wrongful claim, as finally found by the court, the costs of the receivership may be taxed against the complainant procuring the appointment of such receiver. In *Highley* v. *Deane*, 168 Ill. 266, 48 N. E. 50, the complainant was ordered to pay the costs of the proceeding and costs and expenses of the receiver. In *McAnrow* v. *Martin*, 183 Ill. 467, 56 N. E. 168, it was said that, when the appointment of the receiver is without authority of law, the court should order the complainant in the suit to pay the receiver's charges and disbursements, as a part of the costs in the case. In case of the illegality of the appointment of the receiver, and where his compensation is to be paid by the complainant who obtains such appointment, the amount of the receiver's compensation should be taxed against the complainant, the unsuccessful party in the cause. High, Receivers, 3d ed. § 796; *Radford* v. *Folsom*, 55 Iowa, 276, 7 N. W. 604; *Highley* v. *Deane*, 168 Ill. 266, 48 N. E. 50.

We are of the opinion that appellant is liable to appellee for the balance remaining unpaid of his rent which accrued during the receivership, as the receiver was ordered by

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to make the rent a preferred claim against the funds in their hands, though the bill shows that the receivership was applied for, for the purpose of preventing a disintegration of the system. New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 269.

So, in Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257, it was held that when the court appoints receivers who are directed to take possession of leased lines of railway operating in connection with a main line, they take by order of the court, and do not, by the mere act of taking possession, become assignees of the terms; since, on account of the public nature of the enterprise in the transportation of the mails, the performance of the duties of the common carrier must not be permitted to be interrupted; and the road must be kept a going concern.

And in that case, Brown v. Toledo, P. & W. R. Co. 35 Fed. 444, *supra*, was disapproved, the court saying that the doctrine therein laid down by Judge Gresham, that receivers take as assignees when appointed to prevent the disintegration of a system of road partly consisting of leased lines, is not sustained by the case.

The fact that a lessee is solvent does not authorize a receiver of his estate to disregard an order directing him to assume the lease. Empire Distilling Co. v. McNulta, 23 C. C. A. 415, 46 U. S. App. 578, 77 Fed. 700.

See also Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 79 Fed. 158, *infra*, II. d, 7, (b.)

8. Attempt to utilize leasehold.

A mere attempt on the part of the assignee for the benefit of creditors to make leasehold property held by his assignor available to the estate is not such an exercise of ownership as will create an implication of assent on the part of the assignee to the transfer of the leasehold. Lindsay v. Limbert, 12 Moore P. C. C. 209, 2 Car. & P. 526; Hastings v. Wilson, 1 Holt, 290.

Trustees under an assignment for the benefit of creditors are entitled, like assignees, under the bankrupt and insolvent debtors' acts, to a reasonable time to ascertain whether property held under a lease by the debtor can be made available for the benefit of creditors or not. Carter v. Warne, 4 Car. & P. 191, M. & M. 479.

Thus, the act of assignees for the benefit of creditors, of putting up a leasehold vested in their assignor for sale, does not bind them to pay rent. Hastings v. Wilson, 1 Holt, 290; Journeay v. Brackley, 1 Hilt. 447 (*dictum*).

And where assignees of a bankrupt advertise a lease of premises, held by their assignor, for sale at auction, without stating themselves to be the owners, and, no bidder offering, they never take possession of the premises, they will not be deemed to have taken the term, their act being a mere experiment to ascertain the value of the lease, and whether or not it was beneficial to the creditors. Turner v. Richardson, 7 East, 335, 3 Smith, 330.

So, assignees of a bankrupt lessee, who allow his effects to remain upon the leased premises for nearly a year after the bankruptcy, and pay arrears of rent to prevent a distress, stating at the time that they do not mean to take the lease unless it can be advantageously disposed of; and who sell the bankrupt's effects on the premises and then remove therefrom; and who put up the lease for sale, but fail to sell it for want of bidders, though they omit to return the key to the landlord for nearly four months thereafter,—are not liable to the landlord as assignees of the lease, where they are not asked for the key, and make no other use of the premises. Wheeler v. Bramah, 3 Campb. 340, 1 Rose Bankr. 363.

But where assignees for the benefit of creditors put up premises held by their assignor under a lease at auction, and a purchase is made, and they receive a deposit, but the contract of sale afterwards fails, and they fail to enforce the contract, and show no reason for the failure, they are liable, as assignees of the insolvent, for the rent to the lessor. Hastings v. Wilson, 1 Holt, 290.

And the act of an assignee in bankruptcy of a debtor having a lease of premises and also a reversionary interest therein, of selling the estate and reversionary interest, constitutes an acceptance of the lease. Page v. Godden, 2 Starkie, 309.

So, in *Re* Oak Pits Colliery Co. L. R. 21, Ch. Div. 322, 51 L. J. Ch. N. S. 768, 47 L. T. N. S. 7, 30 Week. Rep. 759, it was held that if a liquidator of a lessee has retained possession of leased premises for the purpose of winding up, or has kept it in order to sell it, or do the best he can with it, the lessor will be allowed to distrain for rent which has become due since the winding up.

4. Holding to close up business.

In determining the liability of a receiver, an assignee for creditors under a lease of premises occupied by him, the question seems to be whether he used his qualified right in a reasonable time, to be judged by the circumstances, or used the premises beyond that time for the benefit of the estate. Sedgwick, Ch. J., in

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the court to take possession of appellee's property and pay rent for it. If the receiver had actually paid the rent, he would be entitled to recover it from appellant as part of his charges and disbursements. Besides, appellant greatly prolonged the receivership and the possession of appellee's property by the receiver by litigating appellee's claim of priority in the payment of his rent.

But it is contended that appellee is estopped from asserting any further claim for rent because he participated in the proceeds of the receivership, and virtually assented to the proceedings. Appellee came into the case as an intervener who owned the property occupied by the receiver, alleging in his petition fraud and collusion between appellant and the Eggette company, and asking leave to proceed at law for the collection of the rent for such property, and to distrain therefor, which petition appellant opposed, and it was denied, and he was relegated to a lien upon the funds coming into the hands of the receiver. In the order denying his petition it was recited that "said Hughes, without waiving any of his rights against said company or said receiver under the lease mentioned in his petition, or accruing to him by virtue of the acts of the receiver, or which are his by virtue of any matter, cause, or thing," consented to a certain order of the court then made. In the former case between the same parties (174 Ill. 155, 51 N. E. 179) an effort was made by appellant to have the proceeds of the receivership prorated, and this court expressly held that appellee's lien was prior to all others. Appellee has throughout insisted on the priority of his claim, and has been compelled to appeal to this court to have such priority

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Draper v. Salisbury, 11 Misc. 573, 32 N. Y. Supp. 757.

A receiver does not assume a demised lease where, soon after his appointment, the landlord demands that he pay the rent or vacate, and he repudiates promptly all liability under the lease, except for the time that the premises were occupied by him. Stoepel v. Union Trust Co. 121 Mich. 281, 80 N. W. 13.

And an ordinary chancery receiver, by entering upon premises demised to the debtor, and taking possession and selling and disposing of the goods and effects of the lessee thereon under the order of the court, does not make himself liable as assignee or tenant of the premises for rent falling due after the goods were sold or removed; since he is not assignee of the term, either in fact or by operation of law, but is an officer of the court, managing property *in custodia legis*. Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309.

In the above case, Martin v. Black, 9 Paige, 641, 38 Am. Dec. 574, *infra*, II. g, 2, was distinguished upon the ground that in that case the receiver claimed and entered upon the premises, not only as receiver, but as assignee of all the property of the tenant. And Horwitz v. Davis, 16 Md. 313, *infra*, was distinguished upon the ground that there the plaintiff was assignee under a deed of trust which embraced the tenant's interest in the unexpired term of the demised premises, and accepted the assignment, and entered upon and used the premises in selling the goods thereon, by reason of which he was held liable as tenant.

So, the bare possession of leased premises a comparatively brief time by an assignee for the benefit of creditors of the lessee, for the purpose of disposing of a stock of merchandise constituting a large share of the assigned estate which was on the leased premises at the time of the assignment, is not sufficient to indicate an acceptance of the lease by the assignee which will render him liable for rent thereunder. Weinmann's Estate, 164 Pa. 405, 30 Atl. 389. But see Horwitz v. Davis, 16 Md. 313, *infra*.

An assignee for creditors is not liable for the rent of premises upon which he enters for the purpose of performing his duties as such assignee, and occupies the premises for that purpose for a reasonable length of time, and no longer than is reasonably necessary for that purpose. Johnston v. Merritt, 10 Daly, 308.

And no action against an assignee for creditors who occupies the leasehold premises of his assignor temporarily, in the performance of his trust, will lie, even for use and occupation, there being no privity of contract between the landlord and the assignee for creditors, where the latter has not elected to take the lease. Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 689.

So, an assignee for the benefit of creditors may, in order to relieve himself from liability for rent of premises leased to his assignor, send the assigned goods, after having them packed, to an auction house, or place them on sale at auction on the premises; such acts, when promptly done, not indicating an intention to accept the lease. Myers v. Hunt, 8 N. Y. S. R. 338.

And the facts that the machinery, plant, and chattels of an assignor were sold by an assignee for the benefit of creditors upon premises leased by the assignor, and that such premises were in the assignee's possession for the purpose of liquidation, do not render the assignee liable for rent under the lease. *Re* Bridgewater Engineering Co. L. R. 12 Ch. Div. 181, 48 L. J. Ch. N. S. 389.

Likewise, an assignee for the benefit of creditors is an officer of the court under the Minnesota insolvency law; and the mere fact that he goes upon leased premises, and there performs his trust by selling the assigned goods, or even continuing the business for a short time under the direction of the court, will not amount to an election on his part to take the lease,—especially if no step is taken by the lessor or assignor to require him to elect; in such case the assignee may act in a reasonable manner without incurring the liability of taking the lease. Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 689.

So, to establish that a receiver or an assignee for the benefit of creditors had actually occupied premises leased to his assignor so as to render himself liable to an action for use and occupation, it is not sufficient to prove that he placed persons temporarily on the premises to take care of and sell goods which were a part of the assigned property, and that such goods were sold on the premises. How v. Kennett, 3 Ad. & El. 659, Nev. & M. 1, 1 H. & W. 391; Tradesman Pub. Co. v. Knoxville Car Wheel Co. 95 Tenn. 634, 31 L. R. A. 593, 32 S. W. 1097.

And when an assignee for creditors does not occupy the demised leasehold otherwise than for a reasonable time to make an inventory of the assigned property and to remove it, all having been concluded on the third day after the assignment was executed, he is not liable for a quarter's rent, which became due on the day after he vacated the premises, as such entry does not indicate an intention to take the lease. Lewis v. Burr, 8 Bosw. 140.

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recognized. He cannot be held, under all the circumstances in this case, to have waived or forfeited any of his rights in the case; he never having in any manner consented to share with others, but always insisted on his priority.

There still remains the question whether appellee can recover his rent in this proceeding. It is urged that the receivership was never actually vacated, and that appellee took all the proceeds, and that, as far as this proceeding is concerned, he has exhausted his remedy. A court of equity, having by its receiver taken possession of appellee's property, and having by its orders taken his rights under its protection, is bound to protect them, without driving him to a suit at law to enforce such rights. It is a familiar principle that a court of equity, having once taken jurisdiction of a cause, will retain such jurisdiction to administer full justice to all parties, even if the relief granted could be obtained at law. The appointment of the receiver having been improvidently and illegally made at the instance of appellant, and nothing more remaining to be done than to compel payment of the balance of the rent charge incurred by the receiver, we see no reason why the necessary order may not be made, and the court do full justice in the matter, without vacating prior proceedings. The only purpose of the petition is to compel payment of the balance of the rent for which appellant has, by its wrongful act in the premises, become liable.

The judgment of the Appellate Court is right, and it will be affirmed.

Rehearing denied April 5, 1902.

And assignees for creditors do not assume the obligations of a lease of premises which they occupied temporarily in disposing of assignor's property thereon, by transferring their assignor's lease thereof, disclaiming that they had any right, title, or interest therein, and expressly stating in writing that the transfer was for the purpose and intention of transferring such interest, if by any possibility they had it; the landlord having no information of the transfer, and the sheriff, not the assignees, having the custody of the assignor's property on the premises, the assignees only entering to remove desks and like furniture after the sheriff's sale. Judd v. Bennett, 28 Misc. 558, 59 N. Y. Supp. 624.

The time necessary for the proper removal by a receiver or assignee of goods from leased premises is not necessarily the limit of an equitable delay in placing the landlord in possession; if more time is necessary for the preservation of the personal estate, or if goods will not bear removal, or if great loss can be avoided by sale on the premises, and a reasonable sum for the occupation will be full and equitable compensation to the landlord, a court of equity should give such weight to these considerations as fair minded and reasonable men would give to them in practical affairs, and should, if possible, preserve the substance of the rights of all by adapting its decree to the practical situation before it. *Re* Chambers, 98 Fed. 865.

Assignees of a bankrupt who enter upon and take possession of his leasehold property, however, become chargeable with the covenants in the lease, although the bankrupt's effects were upon the premises, and they delivered up the keys immediately after the effects were sold. Hanson v. Stevenson, 1 Barn. & Ald. 303.

And it has been held that an entry by a trustee for the benefit of creditors upon premises leased to his assignor, and the taking possession thereof and using them for the purpose of selling the goods assigned, constitute such an entry and acceptance of the assignment of the term as will make him liable for the rent as assignee of the lease. Horwitz v. Davis, 16 Md. 313.

See also *Re* Oak Pits Colliery Co. L. R. 21 Ch. Div. 322, 51 L. J. Ch. N. S. 768, 47 L. T. N. S. 7, 30 Week. Rep. 759, *supra*, II. d, 3.

5. *Holding to make intelligible election.*

(a) *General rules as to.*

A receiver has the option within a reasonable time after his appointment to accept a demised leasehold and assume the obligations of the lease, or to renounce the former, and refuse to be bound by the latter. Ames v. Union P. R. Co. 60 Fed. 967, Affirming 60 Fed. 674; Clyde v. Richmond & D. R. Co. 63 Fed. 21; Carwell v. Farmers' Loan & T. Co. 20 C. C. A. 282, 43 U. S. App. 300, 74 Fed. 88; Mercantile Trust Co. v. Farmers' Loan & T. Co. 26 C. C. A. 383, 49 U. S. App. 462, 81 Fed. 254.

And he is entitled to a reasonable time, after taking possession of the insolvent's leasehold, to make election whether he will continue the lease. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179, Affirming 62 Ill. App. 318; Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 259; Park v. New York, L. E. & W. R. Co. 57 Fed. 799; Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 517; Dayton Hydraulic Co. v. Felsenthall, 116 Fed. 961; Nelson v. Kalkhoff, 60 Minn. 305, 62 N. W. 335.

A reasonable time must necessarily be taken to ascertain the situation of affairs placed in the hands of a chancery receiver, and he can use that time to determine whether or not it appears to be to the interest of his trust that he accept a lease, without becoming liable for rent as tenant. Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795; United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86.

And during the reasonable time to which a receiver is entitled in which to elect whether to accept or reject a lease he may enter upon and occupy the demised premises for the purpose of selling, under the direction of the court, personal property belonging to the trust estate, without thereby accepting the lease. Nelson v. Kalkhoff, 60 Minn. 305, 62 N. W. 335. But see Horwitz v. Davis, 16 Md. 313, *supra*, II. d, 4.

Thus, a receiver of an insolvent railroad holding leased lines is entitled to a reasonable time in which to ascertain the value and importance of the lease, and to make his election as to whether he will surrender or adopt it. Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 38 U. S. App. 604, 86 Fed. 517.

And mere possession of a railroad for a reasonable time by a chancery receiver of a lessee railroad corporation pending determination as to the advisability of accepting the lease does not operate as an election to accept the lease with its attendant liability for rent, when the receiver did not resist or interpose impediments to the lawful re-entry of the lessor, either for breach of covenant, or by order of court.

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Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795.

And such a receiver, who, in a reasonable time, surrenders another road which has been leased to the company of which he is receiver, is not liable for the rent of the leased railway, where the cost of its maintenance, before such surrender, exceeded its total earnings. Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787.

So, a receiver of a railroad upon taking possession is entitled to a reasonable time to elect whether he will adopt a contract for the leasing of rolling stock with an option to buy and with the privilege of returning the rolling stock if the company is unable to pay for it, or return the property, paying the stipulated rental. Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025, 12 Sup. Ct. Rep. 235.

And the same rule applies to a receiver of a railroad company holding rolling stock under a car-trust lease, title thereto remaining in the lessor until the rental has paid the purchase price. Platt v. Philadelphia & R. R. Co. 28 C. C. A. 488, 55 U. S. App. 452, 84 Fed. 535.

And the continued operation by receivers of a lessee of a railroad during a reasonable time in which to determine whether to adopt the lease does not impose upon them the obligation to perform for such period a contract of the company guaranteeing interest on the bonds of the lessor. Ames v. Union P. R. Co. 60 Fed. 967.

But a receiver who occupies a demised leasehold longer than is necessary to determine whether or not he will take the lease is bound to carry out the terms of the lease. De Wolf v. Royal Trust Co. 173 Ill. 435, 50 N. E. 1049.

And if a receiver with the consent of creditors elects to take the place of the insolvent, and to perform a lease for the remainder of the term, and does so receiving the benefits therefrom, a court of equity will not permit him to repudiate the obligation to pay the contract price whether the lessor had a right of re-entry for nonpayment or not, or whether or not he had a right to declare a forfeiture. Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250, Affirming 58 Ill. App. 637.

And an order formulated with the consent of the lessors of a railroad by their attorney, which in effect constituted an agreement between the receiver of the lessee and the lessors that the receiver should pay two thirds of the amount fixed as rent under the lease for the use and occupation of the land of which he was in actual possession, the lessors agreeing to receive that amount and credit it upon the rent due, made without prejudice to the right of the lessors at any time, requires the receiver to elect between an assumption of the covenants of the lease or a complete surrender, and dispenses with the necessity of considering the effect of the receiver's conduct in retaining possession of the road for a long period of time, as an implied assumption of the lease, since his possession is not to be traced to the lease, but to the agreement. Thomas v. Cincinnati, N. O. & T. P. R. Co. 77 Fed. 667.

So, an assignee for the benefit of creditors is entitled to a reasonable time to ascertain whether a lease held by his assignor can be made available to creditors. Journeay v. Brackley, 1 Hilt. 447; Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92; Judd v. Bennett, 28 Misc. 558, 59 N. Y. Supp. 624; Smith v. Goodman, 149 Ill. 75, 36 N. E. 621; Raud. McN. & Co. v. Francis, 168 Ill. 444, 48 N. E. 159; Lehman v. Henry Sears Co. 30 Chicago Legal News, 309, 16 Nat. Corp. Rep. 487; Carter v. Warne, 4 Car. & P. 190, M. & M. 479.

And during the reasonable time to which he is entitled to ascertain whether or not a lease held by his assignor can be made available to creditors, he may take such steps as may be necessary to make the assigned property productive. Journeay v. Brackley, 1 Hilt. 447; Nelson v. Kalkhoff, 60 Minn. 305, 62 N. W. 335.

And an assignee for creditors is not liable for rent of premises occupied by a sheriff while in the possession and custody of the assigned property under an attachment levied prior to the assignment, since he was not called upon to elect whether or not he would take the term until the sheriff vacated. Stephens v. Stein, 30 N. Y. S. R. 391, 9 N. Y. Supp. 806.

But assignees for the benefit of creditors must make their election to take, or not to take, a lease held by the assignor promptly. Hanson v. Stevenson, 1 Barn. & Ald. 303.

And assignees deliberately taking possession of property leased to their assignor, who wish to curtail the full legal effect of such act, should, upon entry, protest that their entry is not for the purpose of possessing themselves of the premises as assignees; and if they do not do so they subject themselves to the payment of the rent. *Ibid.*

(b) *What period is reasonable.*

What constitutes a reasonable period within which a receiver or assignee should elect whether or not to assume a lease to the insolvent debtor is governed by the facts of the particular case and the surrounding circumstances.

Thus, sixty-five days is a reasonable time within which a receiver should reach his conclusion as to whether he shall adopt a lease of a road included in a vast railroad system such as the Union Pacific system. Ames v. Union P. R. Co. 60 Fed. 967, Affirming 60 Fed. 674.

And a chancery receiver does not retain possession of a leasehold estate for a period unreasonable and unnecessary to enable him to make an intelligible election, and therefore become liable for rent under the lease, when the circumstances tend to show that the retention of possession by him does not indicate an intention to adopt the lease, or to retain possession against the will of the lessor,—as, pending negotiations kept alive by the lessor, during ten months to determine a reasonable rent; it being evident that the receiver never had the slightest intention of adopting the lease. Carswell v. Farmers' Loan & T. Co. 20 C. C. A. 282, 43 U. S. App. 300, 74 Fed. 88.

And a receiver of a lessee, who kept a large portion of the assigned estate, consisting of manufactured goods and merchandise, stored in the demised premises at the time of making the assignment on such premises, for four months, and paid rent up to the time of their removal, did not thereby accept the lease as an asset of the estate, where, when asked if he could fix a date when he could surrender possession, he said that he was unable to do so, and that he might desire to retain the lease as an asset; and it is apparent from the conduct of both parties that they both understood that the assignee had not elected to accept it. Smith v. Goodman, 149 Ill. 75, 36 N. E. 621.

But the act of the receiver of a drug company in obtaining from the court authority to carry on the business of the company on the leased premises, and in carrying on such business under such order for nearly two years, constitutes an election to accept the lease of the store, and binds him to pay rent provided for therein.

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Morrison v. Blackall, 68 Ill. App. 504, Affirmed in 170 Ill. 152, 48 N. E. 705.

So, the retention by an assignee for the benefit of creditors of premises leased to his assignor for six days is insufficient, alone, to indicate an election on his part to continue the lease so as to render him liable for the rent reserved therein. Judd v. Bennett, 28 Misc. 558, 59 N. Y. Supp. 624.

And the fact that an assignee for the benefit of creditors remained in a store leased by his assignor for a term of years, selling the resident assignor's stock for thirty-six days, part of it at private sale and part of it at auction, does not show an election by the assignee to become assignee of the lease so as to render him liable for rent thereunder, where, when he took possession he notified the lessor that he did not intend to take the building, and would have nothing to do with the lease, and vacated at once after the goods were sold, when the lessor took possession and collected rent from tenants of the lessee. Journeay v. Brackley, 1 Hilt. 447.

But an assignee for creditors, who takes and continues in possession of the assignor's leasehold with full knowledge of the lease, is liable for the rent reserved in the lease for the time he is in possession, which liability rests upon the covenants of the lease, and not upon use and occupation. Cameron v. Nash, 41 App. Div. 532, 58 N. Y. Supp. 643.

And such an assignee, who immediately entered on property demised to his assignor, and occupied the same as assignee until within a few days of the expiration of the lease, collecting rents from subtenants, and giving no notice to the lessor that he did not intend to accept the term as assignee, is liable to the lessor for rent as assignee of the lease, in the absence of anything to show that he entered merely to remove the goods, and that his occupation was no longer than reasonably necessary for that purpose. Jones v. Hausmann, 10 Bosw. 168.

6. *Holding in ignorance of claim.*

A receiver does not make himself liable for rent as assignee of a lease by going into possession of the leasehold and other property of an insolvent debtor by virtue of his appointment, and remaining in possession, not knowing that the owner claimed rent until he demanded payment of the rent which was then due, which the receiver refused to pay. Mariner v. Crocker, 18 Wis. 251.

And where an assignment for the benefit of creditors does not disclose the existence of a lease for an unexpired term held by the assignor, and it does not appear that the assignee was aware at the time of accepting the assignment of the existence of such lease, such assignee does not become liable for subsequently accruing rent by the fact that he entered on the premises for the purpose of taking possession of the assigned goods, where he did no act manifesting an intention to accept the lease. Lewis v. Burr, 8 Bosw. 140.

Nor will an assignee of a bankrupt lessee of a mill, who carried on business in the mill not knowing of the lease until several months after his appointment, who, when applied to for rent, denied his liability and removed the bankrupt's goods from the premises, having derived no benefit from their use, be deemed to have accepted so as to render him liable for rent thereunder. *Re* Washburn, 11 Nat. Bankr. Reg. 66, Fed. Cas. No. 17,211.

So, when assignees for creditors accept the assignment of a stock of merchandise, and take the key to the store on leased premises without knowledge of, or reference to, the lease, for the sole purpose of securing the assigned goods therein, and within eleven days take an inventory and make public sale of the goods, they will not be deemed to have entered into the possession of the demised premises so as to bind them to pay rent as assignees of the lease. Pratt v. Levan, 1 Miles (Pa.) 358.

But, although an assignee for the benefit of creditors enters into possession of premises leased by his assignor in ignorance of the existence and terms of the lease, if, after being informed he continues to occupy, such continuance will be regarded as an election to accept the interest of the assignor, if such continuance lasts longer than is reasonably necessary for the removal of the goods. Smith v. Ingram, 90 Ala. 529, 8 So. 144.

7. *Holding to continue business.*

(a) *General rules as to.*

The act of a receiver or assignee, of continuing the business of an insolvent lessee on leased premises for a material portion of the time of the lease, constitutes an election to adopt the lease, which will render him liable for rent thereunder.

Thus, when a receiver enters upon and occupies premises which had been leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease, the liability being the common liability of the assignee of a lease, and not for debts due from the corporation; and, where facts are undisputed, it is proper for the court to direct the receiver to make payment to the lessor without a reference to determine the matter. Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257.

And the act of a receiver in continuing the business of the insolvent lessee for a reasonable time, paying to the owner of the premises leased the rent specified in the lease, raising no question as to the terms or conditions thereof, constitutes an adoption by him of its terms during the time he occupies under order of the court for the continuance of such business. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179.

And if a receiver elects, with the consent of the equitable owners of the property in his hands, to take the place of the insolvent in a leasehold estate for the remainder of the term, and receives the benefit therefrom, a court of equity will not permit him, at the end of the term, when it is too late for the lessor to take any action for his own interests, to say that he did not assume the obligation to pay the stipulated rental. Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250, Affirming 58 Ill. App. 637.

And where a lease is, of itself, a thing of value, and a receiver of the lessee under the order of the court takes possession of the leased premises, and conducts the business which the insolvent was unable to continue, and, without any act of disaffirmance or notice to the owner of the premises indicating that he will not be bound by the terms of the lease, continues to hold the premises and conduct the business under order of the court, receiving all the benefits of the possession of such premises, he has no right to repudiate the contract and pay rent for the premises on the basis of *quantum meruit*. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179; Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250, Affirming 58 Ill. App. 637, Blackall v. Morrison, 170 Ill. 152, 48 N. E. 705.

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So, a business cannot be run upon premises leased, even by an assignee for the benefit of creditors, without rendering the party running it liable for rent thereof. Myers v. Hunt, 8 N. Y. S. R. 338; *Re* Oak Pits Colliery Co. L. R. 21 Ch. Div. 322, 51 L. J. Ch. N. S. 768, 47 L. T. N. S. 7, 30 Week. Rep. 759.

And an assignee for the benefit of creditors, who enters into possession of premises demised to his assignor, and uses them as a part of the assigned estate, is liable to the lessor for rent accruing during such occupancy. Morton v. Pinckney, 8 Bosw. 135.

And the fact that an assignee for creditors went upon the insolvent's leasehold and occupied the premises under the assignment is evidence from which a jury may find that the assignee used and occupied the premises as tenant of the lessor, and as assignee for the lessee. Horwitz v. Davis, 16 Md. 313.

So, although a common-law assignee for creditors notifies the assignor's landlord that he does not accept the assignment of the lease, if he remains in possession, actually carrying on the assignor's business, and thereby enjoys the beneficial use of the property, knowing that the landlord proposes to hold him under the covenants of the lease, he is held to have given conclusive evidence of an intention to accept under the lease. Morrison v. Bruce, 1 Ohio N. P. 106, 1 Ohio S. & C. P. Dec. 190.

And where the owner of a coal mine leased to a company has power to distrain for rent in arrear, and gives notice to the liquidator of the company requiring payment of a half year's rent which became due after the winding up of the company, or that the working of the mine must be stopped, and the liquidator neither pays the rent nor stops, he will be deemed to have elected to continue the working of the mine for the advantage of the lessee, and must pay full rent out of the first assets. *Re* Silkstone & D. Coal & I. Co. L. R. 17 Ch. Div. 158, 50 L. J. Ch. N. S. 444, 44 L. T. N. S. 405, 29 Week. Rep. 484.

And a receiver of the lessee of a railroad, the lessor of which, immediately upon his appointment, demanded of him and of the court, either an adoption of the lease, or a surrender of the road, who delays, against the lessor's protest, for several months in order to determine which policy is expedient, should be required to pay full rental therefor during the time he thus retains possession,—especially where he was appointed at the request of the mortgagees, and upon their allegation that the system must be held together and operated as a unit in order to prevent sacrifice. Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257.

In the above case, Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025, 12 Sup. Ct. Rep. 235, *supra*, II. d, 5, (a), was distinguished upon the ground that there the lessor sought to obtain preference over a mortgagee in applying for a receiver, seeking to obtain rental pursuant to the lease when he was a party to the suit, and could have asked and would have received possession, but allowed the road to be operated by the receiver knowingly at a loss, while here possession of the leased lines was asked for by the trustees of the mortgagees upon ascertaining that the severance of the line would result in ruinous sacrifice, and was continued against continuing protest of the lessors.

So, the rejection by the receiver of a corporation which had purchased 39 straw paper mills and closed 9 of them, one of which was leasehold property upon which the corporation had paid rent until it became insolvent, of a demand of the lessor for possession or to adopt the lease and provide for the rent, except on condition that all rent claimed be released and the lessor assume all back taxes, imposes a condition which he has no right to make, and is equivalent to an election to retain his constructive possession of the property, which will bind the receivership for the payment of rent from that time, though he never took actual physical possession of the leasehold properties. Dayton Hydraulic Co. v. Felsenthall, 116 Fed. 961.

Nor is the liability of an assignee for the benefit of creditors of a lessee as to payment of rent of demised premises affected by arrangements between him and his assignors, or by the fact that other persons occupy, provided he is in possession and control. Smith v. Wagner, 9 Misc. 122, 29 N. Y. Supp. 284.

And where an equitable assignee of a lease, who has entered into possession of the leased premises, makes an assignment for the benefit of creditors, and his assignee enters upon the demised premises and occupies them as assignee until compelled to surrender by legal proceedings for his dispossession, the assignee for the benefit of creditors is liable for rent becoming due during his occupancy. Astor v. Lent, 6 Bosw. 612.

In the above case, Journeay v. Brackley, 1 Hilt. 447, *supra*, II. d, 5, (b), was distinguished on the ground that in that case the assignees shortly after the assignment notified the landlord that they did not intend to take the leased premises and would have nothing to do with the lease, and surrendered possession before any rent became due.

An assignee for creditors of a bank, however, is not liable for the rent of a room in which the books of the assigning bank were deposited after the assignment, by the president of the bank, where it does not appear that the assignee exercised any control over the room, or had any use of such books. Gould v. Kerr, 52 Ga. 619.

And a release of an under tenant by the assignees of a bankrupt tenant does not amount to an acceptance by them of the original lease. Hill v. Dobie, 8 Taunt. 325, 2 J. B. Moore, 342.

(b) *What a sufficient continuance of business.*

The question as to what constitutes a sufficient continuance of the business of the debtor on leased premises to render his receiver or assignee liable for rent depends, both upon the duration of the occupation, and the character of the acts performed on the leased premises.

Thus, an assignee for the benefit of creditors, who locates on premises leased to his assignor, and puts up his sign and continues clerks and employees, and does business substantially as his assignor had previously done, for about three and one-half months, adopts the lease of the premises, and becomes liable for the rent reserved therein. Myers v. Hunt, 8 N. Y. S. R. 338.

And an assignee of a bankrupt lessee, who carries on the business of the assignor on the leased premises for the benefit of creditors for nearly half a year after the assignment, himself occasionally superintending it, thereby elects to accept the lease for the benefit of creditors, so as to render himself liable for rent, notwithstanding the fact that he disclaimed the lease during such time by a letter to the landlord. Clark v. Hume, Ryan & M. 207.

And where an assignee for the benefit of creditors files his bond, and takes possession of property leased to his assignor, and uses the premises for the purpose of storing lumber which he finds thereon, and sells the lumber and delivers it from the premises, and holds possession until about six months thereafter, he accepts the lease, and is bound to pay rent

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in accordance therewith. Draper v. Salisbury, 11 Misc. 573, 32 N. Y. Supp. 757.

So, where an assignment for the benefit of creditors was made in the latter part of November, and the assignee thereupon took possession of the premises demised to the assignor, and occupied them until the last of the following March, he will be deemed to have held the premises under agreement to pay rent reserved in the lease, or to have become liable to pay rent by reason of his occupancy and use of the property as general assignee of the lease. Reitmeyer v. Ehlers, 9 N. Y. S. R. 63.

And an assignee of a bankrupt who was lessee of pasture land, chosen on the 8th of the month, who allowed cows of the bankrupt to remain upon the demised premises until the 10th, and ordered them to be milked there, thereby became the tenant of the lessor, so as to entitle the lessor to follow and distrain the cows, where they were removed on the 10th to avoid a distress. Welch v. Myers, 4 Campb. 368.

And without some agreement, tacit or expressed, between the parties, the possession by a receiver of a railroad under an order of the court made with the consent of the lessor of a line leased to the insolvent for three and one-half years, can be attributed to nothing but the lease, and must be construed as an election to assume the lease for the benefit of the trust. Thomas v. Cincinnati, N. O. & T. P. R. Co. 77 Fed. 667.

So, the rental due on leased lines of railroad in the hands of a receiver should be declared to be a receivership obligation contracted under the authority of the court, where the receiver took possession and operated the leased line for eighteen months, and kept no separate account of its earnings and expenses, but applied them for the benefit of the entire system of which it was treated as a part, and rent falling due shortly after the appointment was paid without objection by any of the parties, and the bills for the appointment of the receiver, and the orders of the court thereon, looked to the maintenance and preservation of the entire system including the leased line, and judicial admissions had been made from time to time that the rent was a debt for which the receivers were required to provide. Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 79 Fed. 158.

In the above case, Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787, *infra*, and *supra*, II. d, 5 (a), and St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795, and United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86, *supra*, II. d, 5, (a), were distinguished upon the ground that in the present case no separate account of the earnings and expenses of the leased road was kept, and its earnings were applied for the benefit of the system under authority of the court, and at no time during the possession of the receivers was the railroad company proceeded against as an insolvent.

But where a railroad company leases a line of road extending its line, agreeing to pay a percentage of its gross earnings therefor, and covenanting for forfeiture for breach of the covenants therein contained, and takes possession under the lease, and afterwards a receiver is appointed to avoid a multiplicity of suits which will prevent it from a discharge of its duties as a public carrier, and the receiver takes possession and holds it for less than a month, and the rental during such time is largely in excess of the net earnings from the leased property, and the lessor carefully refrains from declaring a forfeiture,—it cannot be held that the receiver has retained possession for such unreasonable time, or under such circumstances, as will spell out an election on his part to accept the lease, and warrant an order directing the receiver to perform all the obligations thereof. Park v. New York, L. E. & W. R. Co. 57 Fed. 799.

And the mere act of a chancery receiver of a railroad corporation in operating a leased line for less than a month pending election as to taking the lease does not indicate an intention to take the term, and to become liable for the rent as tenant, where the receiver, as well as the corporation of which he is receiver, is under a public duty to keep up and maintain the railroad as a going concern. Quincy, M. & P. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787.

And a Federal court, by ordering a receiver of a railroad company, which had leased the property of a connecting road and thereafter become insolvent, to notify the leased road as to the conditions of its properties, and that the leased road should make known to the receiver whether it desired its property to remain in his hands with a right on its part to claim the net results of the operation of its property to the extent of the rental contract, or whether it desired a surrender of the leasehold property, does not treat the lease as being in force and effect during the entire period of the litigation connected with the insolvency of the lessee road, but in fact treats it as abrogated during a portion of the time the litigation was in progress. Farrar v. Southwestern R. Co. (Ga.) 42 S. E. 527.

Nor can it be said, as a matter of fact or law, that an entry by an assignee for the benefit of creditors upon premises leased by his assignor, and the occupation thereof for nineteen days until the lease expired, were more than sufficient for the purpose of taking possession of the goods assigned and their removal, so as to render him liable as assignee of the lease. Johnston v. Merritt, 10 Daly, 308.

And the fact that the liquidator of an insolvent lessee left the lessee's plant and machinery on the leased premises, where he found them, for between three and four months, and took no steps to surrender the lessee's interest in the leased premises, does not entitle the lessor to distrain for rent, or to be paid in full. *Re* Oak Pits Colliery Co. L. R. 21 Ch. Div. 322, 51 L. J. Ch. N. S. 768, 47 L. T. N. S. 7, 30 Week. Rep. 759.

An assignee for the benefit of creditors, however, who takes possession of a store leased by his assignor for the purpose of using it as a place to sell the goods assigned to him thereby accepts and elects to be bound by the lease of the store to his assignor, and is liable for rent according to its terms. Dorrance v. Jones, 27 Ala. 630; Horwitz v. Davis, 16 Md. 313.

And a receiver who has enjoyed the use and occupation of premises, leased to the bankrupt, while disposing of the bankrupt's stock of goods thereon, is liable for the rent. *Re* Gerson, 8 Pa. Dist. R. 277, 2 Am. Bankr. Rep. 170.

And the assignee of a bankrupt coach maker, who was tenant from year to year of certain premises and had several coaches on hire, who entered upon the premises and kept the coaches in repair, pursuant to the bankrupt's contracts, and sold the bankrupt's effects and paid the rent to the Michaelmas following the sale, is liable for the quarter's rent due on the following Christmas, when he delivered the key of the premises to the bankrupt. Ansell v. Robson, 2 Cromp. & J. 610.

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8. *Payment of rent.*

The act of a receiver or assignee, of paying rent of premises leased to the insolvent debtor, is an act of adoption raising a presumption of acceptance of the lease, and absolutely establishing such acceptance when long continued or accompanied by other acts of ownership and control.

Thus, where a receiver is appointed, and he subsequently qualifies and pays rent for leasehold property held by the debtors for whom he was appointed, for nearly two years, according to the terms of the lease, the title to the demised term will be deemed to have passed to and become vested in him as receiver, and he will be held liable for rent subsequently accruing. Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861; Moore v. Higgins, 2 Silv. Sup. Ct. 298, 5 N. Y. Supp. 895.

And the act of receivers in giving a check for rent of premises leased by the insolvent debtor after a threat of ejectment made by the owner constitutes an election on their part to pay a dividend upon the rent, but does not constitute an election to pay rent according to the terms of the lease for the full period provided therein. Com. v. Franklin Ins. Co. 115 Mass. 278.

The payment of rent when it falls due, by a receiver in possession of leasehold property, however, is not equivalent to an election to accept the leasehold estate, and does not bind the receiver to pay rent until the expiration of the lease, where the payment was made in pursuance of a compromise entered into with the lessor in regard to the occupation of other property rented by the same lessor to the lessee. *Ibid.*

And a receiver of an insolvent lessee of property, who paid rent, but claims that he did not take possession of the property leased, has the burden of showing that he did not do so, in order to relieve himself from liability for further payment of rent. Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861.

And the burden of proof rests with an assignee for the benefit of creditors, who entered into possession of premises leased by his assignor and paid rent therefor for two months, to disprove the presumption therefrom of acceptance of the lease. Smith v. Ingram, 90 Ala. 529, 8 So. 144.

So, assignees for the benefit of creditors, who accept the assignment and pay rent for premises leased by their assignor for a quarter of a year, thereby adopt the lease, and become tenants for the year under a lease for the year. Grant v. Gill, 2 Whart. 42.

But the payment by an assignee for the benefit of creditors, of rent, of premises leased to the assignor to the landlord for a half year, during which the assignment took place, does not render the assignee liable to the assignor in an action for use and occupation, where the payment was made under a mistake of law. How v. Kennett, 3 Ad. & El. 659, Nev. & M. 1, 1 H. & W. 391.

And the mere fact that an assignee for creditors paid a quarter's rent when it became due, and took a receipt therefor, will not bind him to the payment of rent after he vacates the premises, which he occupied eleven days in inventorying and disposing of the goods, when the assignee at the time of the payment protested against being considered as consenting to accept the lease by this or any other circumstance, and, up to the time of refusing the assignee's tender of the key when this payment was made, the landlord had never demanded the key, nor in any way assented to the assignment of the lease, wherein it was agreed that it should never be assigned without the lessor's written consent, which he never gave. Pratt v. Levan, 1 Miles (Pa.) 358.

And where assignees of a bankrupt hotel keeper close the hotel with the exception of the tap, which is occupied by a tenant of the bankrupt, which tap is supplied by the assignees with beer and spirits at a slight advance over cost price, the proceeds of the sale being credited to the bankrupt's estate, and the license is renewed in the bankrupt's name by the assignees, and they, upon distress for rent, ask for time, but pay rent and costs for the purpose of saving the furniture, which is afterwards removed by them, and the tap is afterwards closed by their order,—the assignees will not be deemed to have elected to adopt the lease. Goodwin v. Noble, 8 El. & Bl. 587, 27 L. J. Q. B. N. S. 204, 4 Jur. N. S. 208.

See also *Re* Ten Eyck, 7 Nat. Bankr. Reg. 26, Fed. Cas. No. 13,829, *supra*, II. c; Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 79 Fed. 158, *supra*, II. d, 7,(b).

e. *Estoppel or waiver of right to enforce.*

A lessor of premises which pass to a receiver or an assignee of the lessee must assert his rights by requiring an election to adopt the lease, or a surrender of the premises, and, in case of his failure to do so, his claim for rent is waived and lost,—at least in the absence of assets properly applicable to that purpose.

Thus, where the circumstances are such that there is a doubt whether assignees are adopting a lease held by their assignor, it is the duty of the lessor to take steps to compel them to elect. Goodwin v. Noble, 8 El. & Bl. 587, 27 L. J. Q. B. N. S. 204, 4 Jur. N. S. 208.

And the fact that receivers of a railroad system continue to operate a leased line constituting a part of the system for some time does not effect an adoption of the lease, where the lessor never demanded a surrender of its road, although it was entitled to do so for nonpayment of rent. New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 269.

And the court will not order a receiver of railroad property to pay the rent of a leased part of the road to the trustee under a trust deed or mortgage thereon, where the receiver has not received therefrom sufficient funds to pay such rent over running expenses, and such trustee has not asked the court for its surrender, but has permitted it to remain in the receiver's hands. United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1083, 14 Sup. Ct. Rep. 86.

So, the lessor of a railroad line cannot claim rent as expense of administration when he lies idly by while the lessee corporation is in the throes of dissolution, utterly insolvent and hopeless of recovery, upon the pretense that his inactivity is in reliance on an expectation held out by the lessee's chancery receivers that the rental will be paid, no matter what becomes of the rights of other parties, when there is no fund or assets from which the rental can be paid. St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795.

And a chancery receiver of a railroad corporation is not liable for rent as expense of administration, when the rental claimed originated in no process of administration by the court, but in the performance by the receiver of his duty to the public in maintaining a public highway, the receiver having surrendered possession as soon as the lessor would take the property, and the mortgagees of the road never having consented to have the claim charged upon the corpus of the property in preference to their mortgages;

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and there can be no pretense that the lessor or the trustees were encouraged to remain inactive after the appointment of the receiver for his lessee, in reliance on payment of rental under order of court, unless the earnings of the leasehold justify it. Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787.

So, where a lessor demands the immediate possession of leased premises in the hands of the lessee's receiver, because of breach of covenant, but waives the delivery of the leasehold for thirty days, he cannot insist upon the payment of rent for that period. United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86.

And an assignee for the benefit of creditors, who cannot be held liable for rent under a lease because no rent fell due while he was in possession, cannot be held liable for use and occupation of the premises, since the lessor might have at once removed both assignor and assignee from the premises by reason of the assignor's failure to pay rent previously due. Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92, Affirming 14 App. Div. 310, 43 N. Y. Supp. 1049.

If receivers or assignees are confronted with the alternative of an immediate ejection from premises leased to the insolvent debtor, with the subsequent depreciation of the personal estate, or the assumption of an undesirable lease and the payment of a large sum for unsecured rent, whereby an unsecured creditor will secure a preference, a court of equity should relieve them from the situation. *Re* Chambers, 98 Fed. 865.

When a receiver has been appointed over leasehold property, and the lessor seeks leave to bring action for the recovery of possession for nonpayment of rent, the court has jurisdiction to interpose the condition that the proceedings shall not be brought within a specified time; but conditions will only be imposed when necessary for the benefit of the estate, and when they are not likely to cause the lessor any appreciable injury. *Re* Battersby, Ir. L. R. 31, Eq. 73.

And where a Federal court has taken into its custody and control the entire estate of a bankrupt, including a leased building, property in its possession cannot be disturbed by processes issued out of another court; and where a lessee is adjudicated a bankrupt, and a receiver of his estate is appointed, and he is authorized to continue the bankrupt's business until further order of the court, and he qualifies and enters upon the premises and carries on the business, it will enjoin an action brought by the lessor against the bankrupt and the receiver to eject them from the premises. In such case the remedy of the landlord must be sought in the Federal court, which, in the exercise of its equitable powers, will direct the surrender of possession by the receiver at the expiration of such time as may be reasonably necessary for the execution of his trust, and award the landlord suitable compensation for their occupation in the meantime. *Re* Chambers, 98 Fed. 865.

Upon the other hand, however, a lessor of property for whose lessee a receiver has been appointed will not be deemed to have waived his lien for unpaid rent because possession of the leased property was offered him and he refused it, where the offer was conditioned upon his consent to the removal of property thereon upon which he had a lien under the lease, since he was under no obligation to make the sacrifice demanded in order to get possession. Hughes v. Link Belt Machinery Co. 95 Ill. App. 323, Affirmed in LINK BELT MACHINERY CO. v. HUGHES.

And see also Dayton Hydraulic Co. v. Felsenthall, 116 Fed. 961, *supra*, II. d, 7, (a); Woodruff v. Erie R. Co. 93 N. Y. 609, *infra*, II. g, 3.

So, an independent agreement, express or implied, by the lessor with the receiver or assignee as to rent, is a waiver of the lessor's claim for rent under the lease.

Thus, if the liquidator of a lessee of premises has retained possession of the leased premises by arrangement of the lessor and for his benefit, as well as for the benefit of the lessee, and there is no agreement on the part of the liquidator to pay rent, the landlord cannot distrain. *Re* Oak Pits Colliery Co. L. R. 21 Ch. Div. 322, 51 L. J. Ch. N. S. 768, 47 L. T. N. S. 7, 30 Week. Rep. 759.

So, the fact that the contract of lease of a railway line provided that the rent was to be measured by the gross receipts does not affect the liability of the lessee's receivers, who have refused to adopt the lease, but in effect hold and operate the line at the lessor's request, and have offered him what in equity and justice they should pay,—namely, the net receipts from the leased line, as they are the lessor's entire contribution to the fund in the receivers' hands; since (1) the lessor has no right to any specific dollar or part of a dollar going to the lessee, and, if this were otherwise (2) that provision of the unadopted lease is no more binding on the receivers than any other. New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 268.

But a lessor of premises, the creditors of whose lessee procure the appointment of a receiver for the lessee upon an unjust and wrongful claim for the purpose of securing to a creditor the control of the lessee company's plant, without interference on the part of other creditors, is not estopped from asserting any other claim for rent by participating in the proceeds of the receivership, where the receivership is greatly prolonged by litigation, and he came into the case as an intervener who owned the property, and never in any manner consented to share with others, but always insisted on his own priority. Hughes v. Link Belt Machinery Co. 95 Ill. App. 323, Affirmed in LINK BELT MACHINERY CO. v. HUGHES.

And while there is no privity of contract or estate between a mortgagee of a railroad and a lessee thereof,—at least until the mortgagee has taken possession of the property and become the assignee of the rights of the mortgagor,—where the trustee asserts its right under the mortgage to the possession of the road by filing a bill for foreclosure, and insists upon its right to have immediate surrender of the road, and possession is withheld from it, and without its assent, it is equitably entitled to the rent during the period it is thus withheld, though it would not be entitled to rent during delay to which it consented. United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86.

As to the effect of agreement with receiver or assignee as to the rent, see also *infra*, II. f, 4.

And see also Knickerbocker L. Ins. Co. v. Patterson, 75 N. Y. 580, *infra*, II. h.

f. *Extent of liability.*

1. *General rule.*

The general rule whether the occupation is temporary or continued, is that assignees for the benefit of creditors are bound to pay rent to the landlord for the period during which they actually occupy the premises leased for the purpose of discharging the duties of their trusts. Morris v. Parker, 1 Ashm. (Pa.) 187; Foster

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v. Oldham, 4 Misc. 201, 23 N. Y. Supp. 1024; Smith v. Wagner, 9 Misc. 122, 29 N. Y. Supp. 284.

Though it may be that they are liable on a *quantum meruit* only, and not under the lease. Foster v. Oldham, 4 Misc. 201, 23 N. Y. Supp. 1024; Smith v. Wagner, 9 Misc. 122, 29 N. Y. Supp. 284.

And the principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, so as to render him legally and equitably chargeable with payment of rent under a lease to the debtor for such time as he continues to occupy the property demised. Woodruff v. Erie R. Co. 93 N. Y. 609.

And a receiver or assignee under an assignment for creditors is generally held to be liable for rent of premises demised to the assignor only while he occupies them. Foster v. Oldham, 4 Misc. 201, 23 N. Y. Supp. 1024; Smith v. Wagner, 9 Misc. 122, 29 N. Y. Supp. 284.

The general rule is that an assignee of a lease is only bound by the covenants therein contained so long as he retains possession by himself or his tenants of the demised premises, and that he is not liable to a reversioner upon the ground of privity of contract, but liable solely by virtue of his act of occupation and beneficial enjoyment; possession being the foundation and boundary of his liability. Smith v. Ingram, 90 Ala. 529, 8 So. 144.

And where a railroad company sells rolling stock under a car-trust lease, title thereto to remain in the lessor until the rental has paid the purchase price, the lessor is entitled to reasonable compensation as rental for the use of such rolling stock by a receiver of the railroad company, even though the cars are afterwards returned to him. Platt v. Philadelphia & R. R. Co. 28 C. C. A. 488, 55 U. S. App. 452, 84 Fed. 535.

And stockholders of a railroad leased to another railroad company, which became insolvent, and a receiver was appointed, and thereafter the lease was abrogated and the leased road operated in connection with the insolvent road by the receiver; and, on a sale of the insolvent road, a sum was set apart as belonging to the leased road as the result of its operation, —are only entitled to a dividend out of such fund for the time during which the road was operated by the insolvent road prior to the abrogation of its lease, and not to the balance of the fund, which, under the new contract, went directly to the road, and not to the stockholders in the form of a dividend. Farrar v. Southwestern R. Co. (Ga.) 42 S. E. 527.

Nor can a receiver of a railroad system set off against a claim for rent of a line leased by the insolvent any cross demand alleged to have accrued to the lessee prior to the receivership. Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257.

And the fact that the lessor of a railroad was insolvent does not give the receiver of the lessee a right to set off, as against a claim for rent, any cross demand accruing prior to the receivership, where the lease provides for an arbitration of the matter out of which the set-off grew; and declares that the pendency of such arbitration shall not interfere with the operation of the lease. *Ibid.*

So, a sum, deposited with a lessor by his lessee, which it is stipulated shall apply on the last payments under the lease, if not forfeited to the lessor as liquidated damages in case of lessee's failure to carry out the lease, cannot be applied by the receiver as part payment of the rent for the time the premises were occupied by him, where the damages sustained by the lessor because of the lessee's insolvency and consequent breach were in excess of that sum. Blackall v. Morrison, 170 Ill. 152, 48 N. E. 705, Affirming 68 Ill. App. 504.

2. *When occupation is temporary.*

A receiver is only liable for a reasonable rent, under the terms of the insolvent's lease, for the time of his actual occupancy of the leased premises, where he has repudiated the lease. Stoepel v. Union Trust Co. 121 Mich. 281, 80 N. W. 13.

And an assignee for creditors, who does not assume the insolvent's lease, is only chargeable with rent for the time he occupied the premises. Rand, McN. & Co. v. Francis, 168 Ill. 444, 48 N. E. 159, Affirming 67 Ill. App. 225.

And an assignee for the benefit of creditors is liable for rent of property leased to his assignor which remained for some time in the possession of the sheriff under an attachment, only for the time he was in possession, and not for the time the sheriff had possession thereof. Stephens v. Stein, 38 N. Y. S. R. 391, 9 N. Y. Supp. 806.

So, lessors of a company which went into voluntary liquidation, the business of which was continued under the supervision of the court, which was possessed of machinery and other things on the premises, which was sold at auction thereon, are not entitled, on motion, to a direction to the liquidator to pay rent accruing before and after the liquidation out of the proceeds of sale. *Re* Bridgewater Engineering Co. L. R. 12 Ch. Div. 181, 48 L. J. Ch. N. S. 389.

But where temporary possession is taken by a receiver of a leased line of railroad, compensation for such possession must, as a general rule, be measured by the terms of the instrument under which such possession was originally acquired. Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257.

And even if an assignee for creditors is not liable for rent under the assigned lease, but on a *quantum meruit*, it will be assumed that the rent agreed to be paid by the assignors to the landlord is the reasonable rent. Foster v. Oldham, 4 Misc. 201, 23 N. Y. Supp. 1024.

The rule has been adopted to some extent, however, that the liability of a receiver or assignee for rent of property leased to the insolvent depends upon whether or not he was in possession at the time when rent became due and payable, there being no liability if he was not in possession at that time, and the liability extending to the whole payment period if he was in possession at that time, whether he occupied during all of such period or not.

Thus, an assignee for the benefit of creditors of a lessee for a term of years, the rent of which was payable quarterly, who enters upon the leased premises in the middle of a quarter and occupies them until the rent for the current quarter becomes due and payable, is liable for the rent of the whole quarter. Young v. Peyser, 3 Bosw. 308; Muir v. Glinsman, set forth in Journeay v. Brackley, 1 Hilt. 455.

But in such case he does not, by continuing to occupy the premises fourteen days thereafter, when he surrenders to the lessor, who accepts the surrender and takes possession, render himself liable for the rent of the premises for the fourteen days. Young v. Peyser, 3 Bosw. 308.

And when the rent is payable monthly in advance, and the assignee entered in the middle of the month, he is not liable for any portion of the rent for the current month. Pilzemayer v. Walsh, 2 N. Y. City Ct. Rep. 244.

And where the rent was payable quarterly, and the assignee for creditors in disposing of

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the assigned merchandise, occupied the leasehold for eleven days within a quarter, he is not liable for rent which accrued during the quarter up to the time of his entry. Morris v. Parker, 1 Ashm. (Pa.) 187.

And where rent under a lease is due January 1, it is payable on that day, notwithstanding the fact that it is a legal holiday; and where an assignment for the benefit of creditors is made, and the assignee takes possession on the 2d day of January, but surrenders possession before the next rent day, he is not liable, since, during the period of his occupancy, no rent fell due. Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92, Affirming 14 App. Div. 310, 43 N. Y. Supp. 1049.

So, when an assignee for the benefit of creditors enters premises leased to his assignor for the purpose of disposing of the assigned effects in an expeditious and summary manner, no action can be maintained against him by the lessor for use and occupation, since the privity of estate is not changed, and the leasehold still remains in the assignor, the occupation of the assignee being solely by his permission and authority. Journeay v. Brackley, 1 Hilt. 447.

In the above case, Muir v. Glinsman, *supra*, recited in the opinion of the former case, was distinguished upon the ground that there the assignee was in possession when the quarter's rent fell due, which was not the case here, and the action there appears to have been an equitable one for a decree that the assignee pay the quarter's rent out of the funds of the insolvent in his hands, whereas no such judgment was given here.

In Swansea Bank v. Thomas, L. R. 4 Exch. Div. 94, 48 L. J. Exch. N. S. 344, 40 L. T. N. S. 558, 27 Week. Rep. 491, however, it was held that where an assignee for the benefit of creditors assigns over a term vested in his assignor during a current quarter the lessor is entitled to recover against him for a proportionate part of the quarter's rent up to the time of the assignment.

And rent payable at stated periods during the term provided for in a lease will be considered, under U. S. Rev. Stat. § 5071, providing that when a bankrupt is liable for rent falling due at fixed and stated periods a creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, when the lessee becomes a bankrupt,—as accruing from day to day; and an action will lie against the lessee only for the part accruing after the insolvency. Treadwell v. Marden, 123 Mass. 390, 25 Am. Rep. 108.

3. *Where occupation is continued.*

Where a receiver or assignee has not exercised his authority to repudiate the lease and surrender the property, or to secure a modification of the terms of the lease, he must be held to have continued his acceptance under the terms and conditions of the existing lease as to the payment of rent thereon, and to be legally and equitably chargeable with the payment of rent under the lease for such time as he continued to occupy the property demised. Woodruff v. Erie R. Co. 93 N. Y. 609, Reversing 25 Hun. 246; Walton v. Stafford, 14 App. Div. 310, 43 N. Y. Supp. 1049; Morrison v. Bruce, 1 Ohio N. P. 106, 1 Ohio S. & C. P. Dec. 190.

But he is liable on the covenants of the lease, and not for use and occupation; for, having taken the land under the lease, he assumes all of the covenants while he remains in occupation, the election to take having established a privity of contract between him and the lessor. Morrison v. Bruce, 1 Ohio N. P. 106, 1 Ohio S. & C. P. Dec. 190; Walton v. Stafford, 14 App. Div. 310, 43 N. Y. Supp. 1049.

And a receiver will not be permitted to say that he intended to hold premises under a *quantum mcruit*, and not under the terms of his insolvent's lease thereof, where he had not signified an intention to hold them under other or different terms from those named in the lease, but continued in possession of the premises and for a time paid the rent provided for in the lease, made no request to the court to direct him whether or not the rent shall be continued, and made no other or different arrangements with the landlord on the question of amount or terms of the lease. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179, Affirming 62 Ill. App. 318.

A receiver cannot take, nor can a court authorize him to take, his insolvent's leasehold except as a whole and upon the terms of the lease, as he cannot be permitted to use his position as an officer of the court to sequester property of a landlord and hold the same without his having any redress. When a receiver elects to adopt under the order of the court, his insolvent's lease, he becomes vested with a right to the leasehold estate, and a privity of estate is thereby created between him and the lessor, by which he becomes liable upon the covenant to pay the rent. De Wolf v. Royal Trust Co. 173 Ill. 435, 50 N. E. 1049, Reversing 72 Ill. App. 411.

And compensation measured by the stipulations of the lease must be made for the occupation of a leased road by receivers of the lessee, where the possession was continued against the continued protest of the lessor, who, almost from the date of the filing of the bill, sought to compel the receivers to determine whether or not they would maintain possession, adopting the lease, and, if not, to surrender possession to the lessors. Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257.

So, a receiver who is in possession of a leasehold, receiving the benefits and enjoying the advantages thereof, during the running of the period of redemption subsequent to a master's sale in foreclosure proceedings against the leasehold, as against the purchaser at such sale, is liable for the ground rent which accrues pending the running of the period of redemption. Bartlett v. Amberg, 92 Ill. App. 377.

And the entry by a receiver into possession of premises leased to the debtor for whom he was appointed will be deemed, in the absence of agreement between the parties, to be under the lease, and the lessor will be equitably entitled to be paid for the use of the premises out of the trust estate during the time they were occupied, at the rate of rent reserved in the lease, although the reasonable value thereof may have been greater or less than the stipulated rent; since, if the receiver was of the opinion that the stipulated rent was greater than the advantages, he ought not to have retained possession after the refusal of the lessor to make an agreement with him. Nelson v. Kalkhoff, 60 Minn. 305, 62 N. W. 335.

And where a receiver is appointed for an assignee of a lease, rent should be required to be paid by him to the original lessor; and the assignee is bound to see that the rent reserved in the lease is paid to such lessor, and a payment to the lessee will not release him. Morrison v. Blackall, 68 Ill. App. 504, Affirmed in 170 Ill. 152, 48 N. E. 705.

Nor is it a defense to a demand for rent by a landlord against an assignee of a bankrupt, who occupied premises leased to the bankrupt after the bankruptcy for storing goods of the bankrupt estate, that all the assets of the co-

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tate had been consumed by the general expenses of the bankruptcy. *Re* Commercial Bulletin Co. 2 Woods, 220, Fed. Cas. No. 3,060.

In Bell v. American Protective League, 163 Mass. 558, 28 L. R. A. 452, 40 N. E. 857, however, it was held that a receiver of an insolvent corporation, by taking possession of its leasehold estate, becomes liable only for a reasonable rent while he retains possession, and does not become liable on the covenants of the lease as an assignee of the term. And the same was held in Johnston v. Amos, 114 Iowa, 530, 87 N. W. 491.

And the general rule is that the liability of an assignee ceases upon his eviction, or his assignment of the lease, or surrender of possession. Walton v. Stafford, 14 App. Div. 310, 43 N. Y. Supp. 1049; Frank v. New York, L. E. & W. R. Co. 122 N. Y. 197, 25 N. E. 332.

And under this rule, if a lease made to an insolvent proves to be an unprofitable one for the insolvent's receiver to continue, it is optional with the receiver at any time to terminate it, and thus avoid liability by surrender of the demised premises. Woodruff v. Erie R. Co. 93 N. Y. 609; Willard v. World's Fair Encampment Co. 59 Ill. App. 336.

And the rental of rolling stock of a railroad in the hands of a receiver of the lessee should be fixed, not at actual mileage, but at reasonable value irrespective of the amount of actual use, and not diminished by the fact that more was taken possession of than was actually needed. Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950.

So, where assignees of a bankrupt keep possession of premises leased to the bankrupt, the lessor is entitled to a reasonable compensation for the time they occupy. *Re* Hamburger, 12 Nat. Bankr. Reg. 277, Fed. Cas. No. 5,975.

And an assignee of a bankrupt, who elects to take a term belonging to the bankrupt under a lease, must take with it the burden of the accruing rent, and not merely the obligation from the time he begins to occupy. *Ex parte* Faxon, 1 Low. Dec. 404, Fed. Cas. No. 4,704; *Re* Merrifield, 3 Nat. Bankr. Reg. 98, Fed. Cas. No. 9,465.

Nor can an assignee who adopts a lease given to his assignor annul it for the running year at any time he choses; he is bound until the end of the year, if the lessor insists upon it. Grant v. Gill, 2 Whart. 42.

And assignees of a bankrupt, who had agreed to take land upon a building lease upon the terms of paying the rent half yearly, who enter into possession thereof during a broken quarter, are liable for the whole year during which they entered, though they do not occupy all of that time. Gibson v. Courthope, 1 Dowl. & R. 201.

So, when a receiver of personal property has been in possession of a leasehold, it is presumed that he was in possession from the date of filing his bond,—and if he did not then take possession, it is incumbent on him to show it to avoid liability for rent under the lease. Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861.

But the appointment of a separate receiver for the lessor of a leased railroad, and his assumption of possession and control of the leased line, when the chief consideration for the lease was that the leased road should be operated in harmony with the road of the lessee and under the lessee's supervision, operates as a withdrawal of the consideration, and justifies receivers of the lessee company in renouncing the lease from that time. Ames v. Union P. R. Co. 60 Fed. 967.

And, although an assignee for creditors has become vested with the assignor's lease of premises which he occupies, and is therefore entitled to its privileges and liable on its covenants, he is not liable for rent which became due before his appointment; so that the assignee is not liable for January rent under a lease which he has assumed, when the rent was due January 1, and the assignment was made four days later, since the January rent became due while the assignor was lessee, and the amount of it is provable as a claim against the assigned estate. Anderson v. Hamilton, 16 Daly, 18, 8 N. Y. Supp. 858.

And where a tenant from year to year of a house at a yearly rent becomes a bankrupt in the middle of the year, and his assignees enter and hold possession for the remainder of the year, the lessor cannot maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, unless it is proved that the occupation by the bankrupt was at the special instance and request of the assignees. Naish v. Tatlock, 2 H. Bl. 319.

4. *Under special agreement.*

An agreement or understanding between the lessor and the receiver or assignee of an insolvent lessee as to the extent to which the receiver or assignee should be liable for occupation of the leasehold, if within the scope of his authority, supersedes the original contract between lessor and lessee, and furnishes the standard of the extent of liability of the receiver or assignee.

Thus, where an assignee for the benefit of creditors takes possession of property leased to the assignor, not under the lease assigned, but under a new arrangement by the month at a reduced rent, the new arrangement abrogates the lease held by the assignor, and the assignee's liability is based on the new arrangement. Stephens v. Stein, 30 N. Y. S. R. 391, 9 N. Y. Supp. 806.

And an assignee for creditors is not liable for a deficiency in rent received by a landlord, who, under the covenants in the lease, voluntarily re-enters and relets at a lower rental premises that have been occupied by the assignee under the assignor's lease and then surrendered, the rent having been paid in full to the time of surrender, since the deficiency is merely contingent, and is a deficiency which did not and could not exist at the time of assignment; and a provision in the assignment for the payment of "debts and liabilities now due, or to grow due," does not include liabilities thereafter to be created by the lessor. *Re* Hevenor, 144 N. Y. 271, 39 N. E. 393, Affirming 70 Hun, 56, 23 N. Y. Supp. 1092; *Re* Willis, 44 N. Y. S. R. 470, 18 N. Y. Supp. 412.

And a receiver, by his continued occupancy, does not make himself liable for rent as lessee of premises which he occupies for a time sufficient to indicate an election to take the lease, when possession is not under the lease, but under a special agreement making him a tenant at will at a reduced rental; so that, where a railroad receiver, after paying certain instalments of rent, refused thereafter to pay more that two thirds of the rent reserved, and this amount was refused until, by agreement of the parties, the court ordered that the receipt of that amount should be without prejudice to lessor's right to sue for the remainder, to forfeit the lease and dispossess the company, to make the receiver a party to any action to accomplish these ends, and also at any time to require him to elect either to assume the lease or surrender the premises; and it was expressly provided that the receiver's payments theretofore or thereafter ordered for the use and occupation of the premises should not constitute him an

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assignee of the lease or a sublessee, or make him liable under the covenants of the lease,—the possession of the receiver is to be traced to the agreement, and not to the original lease; the lessor's remedy is limited to compelling an election by the receiver as to whether or not he will adopt the lease, and the receiver who elects to refuse the lease when thus called upon is only liable for the rent due for use and occupation. Thomas v. Cincinnati, N. O. & T. P. R. Co. 77 Fed. 667.

So, an assignee for creditors is liable for rent of a leasehold which he has accepted, although he did not keep possession all the time, and tendered to the landlord a surrender of the premises three days after the commencement of the quarter for which rent is alleged to be due and unpaid, when he became tenant by contract, and retained control over the leased premises under a subcontract. Grant v. Gill, 2 Whart. 42.

And the admission of evidence that an assignee for the benefit of creditors promises to pay rent of premises leased to his assignor in an action against him by the lessor for rent is not error, since, if he occupies, he is bound to pay rent, even without a promise. Foster v. Oldham, 4 Misc. 201, 23 N. Y. Supp. 1024.

A receiver, however, is not such a general agent of the debtor or creditor as to have implied power to enter into a contract of lease involving a large annual expenditure, and extending beyond the receivership, so as to make the contract a proper charge against the trust estate under the administration of the court; such power must be found in the order of appointment, or his acts must be approved by the court before they acquire validity. Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819, 14 Sup. Ct. Rep. 915.

And the approval by the court of a receiver's expenditures in the way of rental for general offices is not such a confirmation by the court of a lease of such offices made by the receiver, involving a large annual expenditure and extending beyond the receivership, as will conclude the court, and make the lease a proper charge against the trust property. *Ibid.*

And the assignee, under an assignment for creditors directing that the estate be distributed equally among the creditors of the assignor after payment of the preferences named, cannot enter into an agreement to pay a lump sum for the cancelation of the lease and release of the rent therefor, in addition to the stipulated rental which he pays for his use and occupation. *Re* Ludeke, 22 Misc. 676, 50 N. Y. Supp. 932.

g. Preference over general claims.

1. *In ordinary receiverships, assignments, and bankruptcies generally.*

As a general rule claims for rent of leasehold property while in the hands of receivers, assignees for the benefit of creditors, or trustees in bankruptcy, are allowed a preference over ordinary indebtedness of the insolvent lessee by being first paid as a part of the expense of the administration of the insolvent estate.

Thus, the use and occupation of property leased by a receiver or liquidator of the lessee cannot be enjoyed without paying the rent. The rent in such case would not be a claim to be paid *pro rata* with other debts, but would be like the receiver's necessary expenses, a charge on the fund; since, if he chose to occupy and enjoy, he would be bound to pay the consideration therefor, which is the rent. People v. Universal L. Ins. Co. 30 Hun, 142; White v. More, 54 Ill. App. 606; Willard v. World's Fair Encampment Co. 59 Ill. App. 336; Bartlett v. Amberg, 92 Ill. App. 377; Brown v. Toledo, P. & W. R. Co. 35 Fed. 444; *Re* Oak Pits Colliery Co. L. R. 21 Ch. Div. 322, 51 L. J. Ch. N. S. 768, 47 L. T. N. S. 7, 30 Week. Rep. 759.

And where a receiver, by order of the court, sells a mortgaged stock of goods kept in a store leased to the mortgagors pending litigation as to the validity of the mortgages, and the mortgagees become liable for rent by taking possession of the stock and continuing to occupy the building, the court may direct payment of the rent out of the proceeds of the sale, though charging the fund in court with rent has the effect of reducing the amount which the mortgagees must credit on their mortgage debt from such proceeds. Hatch v. Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 938.

And where a receiver of one to whom a restaurant commission in the Columbian Exposition buildings was granted was ordered to reopen the restaurant and conduct the business in the manner in which it had theretofore been conducted, and proceeded to do so until the exposition closed; and it appears that all the value that was possessed by the insolvent estate was its rights thereunder, and that, unless the receiver was allowed to conduct the business permitted by the contract, its only assets would be wasted and lost,—rent and other expenses incurred by the receiver under such orders should be paid out of funds in his hands in preference to other creditors. Spencer v. World's Columbian Exposition, 58 Ill. App. 637.

But a claim for rent of premises leased to a corporation, which has been placed in the hands of a receiver in a suit in which the lessor joined, which accrued subsequently to the appointment of the receiver, cannot be made a preferred claim against the funds in his hands, where he has not in fact adopted the lease. Tradesman Pub. Co. v. Knoxville Car Wheel Co. 95 Tenn. 634, 31 L. R. A. 593, 32 S. W. 1097.

And a lessor of premises has no such lien or claim upon goods and chattels sold from the demised premises by a receiver of the lessee before the rent became due as entitles him to preference over other creditors, as against the proceeds of the sale of such goods and chattels. Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309.

So, a court of equity will recognize and allow an equitable claim for rent of leasehold premises in the hands of an assignee for the benefit of creditors of the lessee during the time the assignee used the premises, as a part of the expenses of performing the trust. Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 689; Smith v. Goodman, 149 Ill. 75, 36 N. E. 621; Willard v. World's Fair Encampment Co. 59 Ill. App. 336; Weinmann's Estate, 164 Pa. 405, 30 Atl. 389.

But a lessor's claim for rent which fell due while the lessee was still in possession of the leased premises is not a preferred one, or, what would be the same, not a personal one against an assignee for the benefit of creditors of the lessor, and is provable only as an ordinary claim against the estate. Anderson v. Hamilton, 16 Daly, 18, 18 N. Y. Supp. 858.

And a lessor of premises, who also made an assignment for the benefit of creditors to one who did not accept the lease and become liable for performance of its covenants, is not entitled to priority of payment of a claim for a loss caused by the failure of the assignee to surrender the premises, by reason of which they remained vacant for a long time, over general claims. Smith v. Goodman, 149 Ill. 75, 36 N. E. 621.

Though damages for the breach of the covenants of a lease become a claim against the as-

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signee thereof by an assignment for the benefit of creditors, which may be proved against the estate like any other claim. *Ibid.*

And a lessor of hotel property, whose lessee becomes insolvent and assigns for the benefit of creditors, who received on account of rent the entire proceeds of the sale of the hotel, has no claim, except as a general creditor, for what may be due him from the lessee for attorneys' fees under a provision therefor in the lease. Willard v. World's Fair Encampment Co. 59 Ill. App. 336.

So, an assignee for the benefit of creditors cannot, by agreement with the lessor of premises demised to the assignor, without the consent of the lessor, contract for the cancelation of the lease and a release of rent after a specified date, and for the payment of a bonus for the cancelation, thus making the lessor a preferred creditor; and, in case of such an agreement and the payment of such bonus, though based on an order of the court, it is properly disallowed as an expenditure of the assignee. *Re* Ludeke, 22 Misc. 676, 50 N. Y. Supp. 952.

The fact that a lessor, however, claimed and insisted upon priority of payment of rent by an assignee of the lessee over other creditors of the assigned estate does not affect his claim against the trust estate generally, if otherwise properly presented and allowable. Smith v. Goodman, 149 Ill. 75, 36 N. E. 621.

So, the trustee of a bankrupt lessee may, after the adjudication of bankruptcy, occupy and use the leased premises for the estate; but, under such circumstances, the rent is chargeable to the estate, not as rent under the bankrupt's contract, but as cost and expense of administering the trust. Bray v. Cobb, 3 Am. Bankr. Rep. 788.

And a landlord is entitled, out of the proceeds of personal property upon premises demised to a tenant in the hands of a receiver or trustee in bankruptcy under the Pennsylvania bankrupt act of July 1, 1898, to priority in payment of rent due at the time of the filing of the petition in bankruptcy, not exceeding one year, as upon an execution, but not to cost of a distress levied after the filing of the petition. *Re* Gerson, 8 Pa. Dist. R. 277, 2 Am. Bankr. Rep. 170.

But a lessor of a store, whose lessee made an assignment, and finally became a bankrupt, does not stand on any better footing with reference to his claim for rent than the other creditors, and acquires no priority over them, where the assignee took no steps towards rendering the lease an available asset and the lessor did nothing to regain possession under it, hoping that the assignee might realize more than he could realize by an immediate sale, or simply allowed the matter to drift until the assignment was avoided by the assignor becoming a bankrupt three months later. *Re* Kingman, 5 Am. Bankr. Rep. 251.

See also *Re* Silkstone & D. Coal & I. Co. L. R. 17 Ch. Div. 158, 50 L. J. Ch. N. S. 444, 44 L. T. N. S. 405, 29 Week. Rep. 484, *supra*, II. d, 7, (a).

2. *Rule that priority depends on lien or right to distrain.*

The rule has been adopted to some extent that the preference of a lessor under assignment for the benefit of creditors by a lessee arises from his right to distrain the goods assigned; and when that right does not exist, or when he omits to exercise it and suffers a bona fide sale and removal by the assignee, he stands in the same position with respect to the proceeds of the sale as any other creditor. Morris v. Parker, 1 Ashm. (Pa.) 187.

Within this rule, an assignee under a voluntary assignment for the benefit of creditors of a lessee stands in the same position with respect to the lessor as a bona fide purchaser, and the goods assigned are liable for the rent in arrear while they remain on the premises; but when no rent is in arrear, or if the goods are bona fide sold and removed from the demised premises, the landlord has no specific lien for his rent thereon, and no preferred claim on the avails thereof in the hands of the assignee for distribution. *Ibid.*

And where an assignment is made by an insolvent debtor, and the property is taken possession of by the assignee before the levy of any distress warrant by the lessor for rent, the assignee takes it free and clear of any prior lien by the landlord for unpaid rent, and the landlord stands in the same position as any ordinary creditor, and will be entitled to payment *pro rata* with other creditors. Rand, McN. & Co. v. Francis, 168 Ill. 444, 48 N. E. 159.

And the removal of goods from leased premises by assignees of the lessee cannot be regarded as fraudulent, so as to authorize the lessor to follow and seize the goods for rent. Morris v. Parker, 1 Ashm. (Pa.) 187.

So, under this rule, the right of a lessor of premises to distrain for rent is gone, where a receiver had been appointed for the lessee, and the lessee has assigned his property to such receiver, and the receiver takes possession of the property and removes it from the leased premises; and the lessor has no right to follow the goods, as they were no longer the goods of the lessee at the time of their removal. Martin v. Black, 9 Paige, 641, 38 Am. Dec. 574.

Where, however, goods of a lessee remain on demised premises at or after the time when the rent becomes due, and the landlord seeks his right to distrain, and the only impediment to the exercise of that right is the possession of the court by its receiver, the rule is to order the receiver to pay the arrears of rent out of the proceeds of the property, and permit the landlord to proceed with his distress notwithstanding the possession of the receiver. Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Martin v. Black, 9 Paige, 641, 38 Am. Dec. 574.

The act of a receiver in taking possession of premises leased to the insolvent under the order of the court, does not change the lease; and, if the lessor previously had a lien against the property for rent, he also has a lien against the property after it has thus passed into the hands of the receiver. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179; *Ex parte* Till, L. R. 16 Eq. 97, 42 L. J. Bankr. N. S. 84, 21 Week. Rep. 574.

And a lessor of premises, whose lessee has assigned his property for the benefit of his creditors, the trustee of whom brings suit to settle the estate, need not sue out a distress warrant or attachment for his rent under the Kentucky statutes, in order to enforce his lien; and, where the trustee brings his suit within three months after the lessor's claim for rent becomes due, it is immaterial whether or not the lessor asserts his lien within that time, the property remaining in the custody of the court. Loth v. Carty, 85 Ky. 591, 4 S. W. 314.

And the Kentucky statutory provision that, if property be removed openly and without fraudulent intent from leased premises, and not returned, the lien of the landlord is lost, unless asserted within fifteen days from the time of removal, does not apply to a removal by an assignee for the benefit of creditors of a tenant. *Ibid.*

A lessor, however, though he has a lien on

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property of the lessee to secure the payment of rent due or to become due during the ensuing year by a state statute, cannot prove his claim, when it falls due after the bankruptcy, for the year's rent as a secured debt, and be entitled to priority of payment out of the assets of the bankrupt's estate. *Re* Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206.

But a landlord's lien for rent under a state law, due at the date of the petition, will be upheld in a bankruptcy court, and the assignee will take title subject to it; and the landlord may prove his claim for the unexpired term beyond one year, even though his rent up to the end of the year is preferred under the state law. *Re* Wynne, 4 Nat. Bankr. Reg. 23, Fed. Cas. No. 18,117.

In England a lessor, who has not put in a distress for rent before the commencement of the winding-up of the business of an insolvent lessee, is an unsecured creditor, and can prove for the rent in arrear under the companies act of 1862, § 158; but his right to distrain for rent is taken away by § 163 thereof, unless circumstances exist requiring it; and in all cases in which he seeks to distrain after a winding-up order, or seeks to be paid his rent in priority to other creditors, he must show reasons for being accorded such an advantage over other creditors. *Re* Oak Pits Colliery Co. L. R. 21 Ch. Div. 322, 51 L. J. Ch. N. S. 768, 47 L. T. N. S. 7, 30 Week. Rep. 759.

And a landlord is not entitled to distrain for, or to be paid in full, rent accruing after the commencement of the winding up of the affairs of the lessee, where the liquidator has done nothing except to abstain from trying to get rid of the property held under the lease. *Ibid.*

And if a lessor is a legal creditor of an occupant of the leased premises in respect to rent in arrear at the commencement of the winding up of the affairs of the lessee, he cannot distrain for the arrears of rent, but must prove his debt like any other creditor; though, if he is not a legal creditor by reason of the occupant being his tenant, he may distrain even for rent in arrear at the commencement of the winding up, and although the liquidator offers to allow the arrears to be proved as a debt in the winding up. *Ibid.*

And a lessor of premises, the lessee of which continues in the occupation of the premises after a winding-up order, leaving goods thereon, is not prevented from distraining goods of the lessee for rent accruing after the winding up. *Re* Lundy Granite Co. L. R. 6 Eq. 462, 40 L. J. Ch. N. S. 588, 24 L. T. N. S. 922, 19 Week. Rep. 609.

And a lessor has the right to distrain for a year's rent, due under a statute giving him a right to do so after the commencement of bankruptcy, after a liquidation petition has been filed; and a receiver in bankruptcy, as distinguished from a chancery receiver, whose possession is not usually permitted to be disturbed, has been appointed for the insolvent lessee, and he has taken possession of the debtor's property. *Ex parte* Till, L. R. 16 Eq. 97, 42 L. J. Bankr. N. S. 84, 21 Week. Rep. 574.

And lessors of a company in the course of liquidation, the assignee of which retained, for the convenience of the winding up, possession of leasehold premises under a lease containing the usual proviso for re-entry by the lessors, are entitled to leave to distrain for rent accruing after the commencement of the winding up, but not for rent accruing before that time, after which they must prove as creditors in the winding up. *Re* North Yorkshire Iron Co. L. R. 7 Ch. Div. 661, 47 L. J. Ch. N. S. 333, 38 L. T. N. S. 143, 26 Week. Rep. 367.

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3. In railway receiverships.

The rule is general, though not universal, to allow rentals of leased railroads in the hands of receivers a preference in payment as operating expenses. But this will not be done as against mortgage or other secured or preferred creditors when the funds of the receivership are not sufficient to satisfy both.

Thus, where the court appoints a receiver of leased lines of railroad property, and he accepts and adopts the leases, the rents reserved become an integral part of the operating expenses of the trust estate in the hands of the receiver as much as the wages of the help, the rent of leased engines and cars, the traffic balances due connecting railroads, or any other ordinary expense of operation, and in this way secure a preference in payment over claims of other claimants. Mercantile Trust Co. v. Farmers' Loan & T. Co. 26 C. C. A. 383, 49 U. S. App. 462, 81 Fed. 254; Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 38 U. S. App. 604, 86 Fed. 517.

And where a receiver of a railroad is unable to procure money for the payment of the rent for a leased line constituting a part of the road, the unpaid rentals may properly be declared a first lien on the property in the hands of the receiver, and be directed to be paid with interest from the proceeds of a sale of the road as a preferential lien. Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 38 U. S. App. 604, 86 Fed. 517.

Likewise, where the owner of a mortgaged railroad leased another road for one year with permission to the lessor to use part of the leased road at a stipulated price, and a receiver was appointed at the instance of the mortgagee, and successive receivers took possession of the leased road and run it as a continuation of the mortgaged road, and part of the rent remained unpaid, and the successive receivers collected the rent monthly from the lessor for the use of the part reserved to it, the lessor is entitled to a preference over the first mortgage to an amount equal to the actual value of the use of the road by the receivers. Miltenberger v. Logansport, C. & S. W. R. Co. 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140.

And where a railroad company leased its road, properties, and franchises for the unexpired term of its charter, and the lessee, after entering into the use and occupation of the property, subsequently leased it to another railroad company; and a receiver of the property was afterwards appointed with authority to continue the operation of the lessee road, and, at his discretion, of roads leased by it; and the receiver took possession of the leased road and continued to hold and operate it with the other roads held by him as receiver,—he is estopped from denying the validity of the lease by the former railroad company, or of that by its lessee to the latter company; and, whatever may be the rights of the parties, as between themselves, to priority in the distribution of the assets of the insolvent corporation, they can only affect the property remaining after the receivership liabilities are fully paid, since the receiver, by taking possession and occupying the leased property, elected to continue the lease, and incurred a liability for the rent accruing according to its terms. Woodruff v. Erie R. Co. 93 N. Y. 609.

Rent for a leased line of railroad accruing prior to the appointment of a receiver, however, is an unsecured liability of the receiver, not entitled to priority of payment. New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 269.

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And the rent of a leased railroad constituting a part of a great railroad system in the hands of a receiver, accruing from time to time in the shape of maturing coupons on its mortgage debt, is not a part of the operating and current expenses of the lessee railroad, and as such entitled to payment out of its earnings and income, in priority to the payment of principal or interest on its own mortgage debt. Central Trust Co. v. Charlotte, C. & A. R. Co. 65 Fed. 264.

In the above case, St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co. 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011, *supra*, was distinguished upon the ground that in the present case no percentage of the gross earnings was payable to the lessor, as in the former case; but the agreement was a promise to pay certain moneys and to do certain things absolutely and at all events. And St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co. 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011, was distinguished upon the ground that in that case the leased line was a part of the main trunk over which all the business of the road passed, and the facts of the case did not bear out the contention that the earnings had been diverted, or enable the court to pass upon the contention that the gross earnings of the leased road were a fund impressed with a trust for payment of the rents; and that, therefore, all that was said as to preference to rent was *obiter dictum*.

So, where receivers of a railroad company have not adopted leases held by the insolvent company, and the payment of the rental therein reserved as a preferred claim might deprive creditors of the same or a higher rank of any payment at all, they will not be required to pay, for the use or operation of the leased lines, any larger amount than the amount those lines have actually earned. Ames v. Union P. R. Co. 60 Fed. 967.

And the lessor of a railroad is not entitled to a preference in the distribution of the proceeds of the sale thereof under a mortgage, over the mortgagee, where the cost of its maintenance before its surrender by the receiver of the lessee to the lessor exceeded its total earnings. Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; Central Trust Co. v. Wabash, St. L. & P. R. Co. 46 Fed. 26.

And where a railroad composed of many subdivisions and separate railroad properties, some of which are leased lines, is, while in operation as a going concern, placed in the hands of a receiver, at its own instance, to preserve the integrity of the system, and any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and to that extent only. Central Trust Co. v. Wabash, St. L. & P. R. Co. 23 Fed. 863.

And when, in such case, a subdivision earns no surplus, but simply pays operating expenses, no rentals or subdivisional interest will be paid, and the right of the lessor or mortgagee, whose rent or interest is unpaid, to insist upon possession or foreclosure, will be promptly recognized, though the court will continue to operate such subdivision until some such application is made. *Ibid.*

Nor will the court order a railroad receiver to pay to a trustee in a mortgage covering a branch of the road a rental equal to the interest of the bonds secured by the mortgage on said branch, where the receiver paid in necessary maintenance, operation, and taxes a large sum in excess of the gross earnings of said branch, and the payment of such rental is not in accordance with the terms of the previous order of the court whereby the receiver took possession, and there was no unnecessary delay by the receiver in giving up possession after application was made therefor by the trustee. Seney v. Wabash Western R. Co. 150 U. S. 310, 37 L. ed. 1092, 14 Sup. Ct. Rep. 94.

And a lessor of a railroad, who has actually received in payment of rent since the lease was made more than the entire net earnings of the leased property, has no equitable right to payment of the amount due for rent out of a fund arising from the sale of the property on mortgage foreclosure, in preference to persons secured by prior mortgage liens. St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co. 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011.

So, rentals of rolling stock of a railroad company while in the hands of a receiver appointed in a suit by a judgment creditor are not entitled to priority in payment over debts secured by first mortgage, out of proceeds of a foreclosure sale of the property of an insolvent railroad company under such mortgage. Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950.

And a claim for the use and depreciation of rolling stock, right of way, etc., in the hands of a receiver of the lessee is not entitled to priority over mortgage bonds, where the receiver was appointed at the instance of a majority stockholder for the alleged purpose of giving the lessee railroad company opportunity to raise money to pay its debts. Union Trust Co. v. Illinois Midland R. Co. 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809.

But the rental value of the rolling stock of a railroad company while in the hands of a receiver of the lessee appointed at the instance of the mortgagee in a suit to foreclose the mortgage, which was used by such receiver in operating the road, is properly allowed as a claim prior to the mortgage indebtedness. Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950.

See also Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257, *supra*, II. d, 7, (a); Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 259, *supra*, II. d, 2, (b).

h. *Personal liability.*

The question for consideration in determining whether an assignee for the benefit of creditors has incurred personal liability for rent of premises leased to his assignor by retaining possession thereof is whether, in keeping such possession and incurring liability for rent by accepting the lease, he acted as a cautious and prudent man would act in his own affairs. *Re* Edwards, 10 Daly, 68.

And the general rule would seem to be that an assignee for the benefit of creditors, who continues in possession of premises leased to his assignor in the conduct of the business of his trust, does not thereby render himself personally liable for rent; to create such a liability, there must be a special agreement; and the fact that he has assets does not authorize a recovery in a personal suit against him. White v. Thomas, 75 Mo. 454.

And, under this rule, an instruction in an action by a lessor against an assignee for the benefit of creditors of a lessee, that, if the defendant, as assignee, continued in possession of the leased storeroom, and occupied it for the purpose of disposing of the property assigned to him under the same terms and conditions as it was occupied by his assignor, the plaintiff should recover; and that, if the defendant occupied under the lease, he is bound to pay full rent,—is properly refused, where the action is

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not one to charge the trust property with the payment of rent, but one to require a personal judgment against the assignee upon an alleged agreement by him to pay a stipulated rent. *Ibid.*

So, where an agreement is entered into in which a lessor, with other creditors of his lessee, joins, advising an assignment by the lessee for the benefit of creditors, which provides that the rent due and afterwards to accrue should be deemed a valid claim, and paid *pro rata* under the contemplated assignment; and the assignee accepts the trust primarily as appointee and agent of the creditor,—he cannot be charged personally as assignee of the lease, and the fact that the assignment is afterwards set aside as void under the statute does not impose such liability, since it would be in contravention of the agreement. Knickerbocker L. Ins. Co. v. Patterson, 75 N. Y. 589.

And where assignees for the benefit of creditors of a lessee of premises leased such premises for the best price they could obtain, and promptly paid to the lessor all that they received, which was accepted by the lessor, and the assignees have fully administered and paid out, according to the terms of the assignment, all moneys received by them from the assigned estate, they can, at most, only be charged personally with the value of the use of the premises; and evidence to determine that value should be received. Jermain v. Pattison, 46 Barb. 9.

In the above case, Martin v. Black, 9 Paige, 641, 38 Am. Dec. 574, *supra*, II. g, 2, was distinguished upon the ground that in that case the only question directly mooted was whether goods removed from the demised premises by a receiver were subject to distress for rent.

Trustees under an assignment for the benefit of creditors, who act in such a way as to render premises leased to their assignor of less value to the lessor, however, or deal with the property as though the lease were vested in them, thereby make themselves personally liable for the payment of rent and the performance of the covenants of the lease. Carter v. Warne, 4 Car. & P. 101, M. & M. 479.

And where a receiver has taken the lease of premises for the benefit of the receivership, and has leased other premises, without authority of the court and with knowledge that the rent contracted for is far in excess of the value of the property used and stored thereon, he can only be made an allowance for rent of such premises according to the benefits received. State Central Sav. Bank v. Fanning Ball-Bearing Chain Co. (Iowa) 92 N. W. 712.

And the fact that a lease to an insolvent manufacturing corporation had a long time to run at the time of the insolvency furnishes no excuse for the act of the receiver in continuing to occupy the premises and operate the plant of the lessee corporation thereon without authority from the court, which will save him from personal liability for the rent. *Ibid.*

And where a receiver of a lessee of premises which are sublet suffers the sublessee to be evicted for nonpayment of rent; and it appears that, during the period intervening between the last payment of head rent and the eviction, he had received rent from the subtenant more than sufficient to pay the head rent, and had applied such subrent in discharge of other demands,—he will be compelled by the court to pay the lessor the arrears of head rent, though he applied the subrent to the other demands under an order of the court. Balfe v. Blake, 1 Ir. Ch. Rep. 365.

But an award of damages against a receiver personally for rent of premises leased to the insolvent, which he had collected, cannot be sustained where the action was brought against him as a receiver, and not individually. Pfeffer v. Kling, 58 App. Div. 179, 68 N. Y. Supp. 641, Affirmed in 171 N. Y. 668, 64 N. E. 1125.

Other cases, however, have held the rule to be that assignees for the benefit of creditors, holding under a lease to an assignor, stand on the same footing as other assignees by deed or act of the parties, as distinguished from assignees in law, such as assignees under bankrupt or insolvent laws; and, when sued for rent, it is not to reach a fund held by them, but as persons who, for convenience or accommodation in the management of their trust, have chosen to take the place of former tenants, and become personally responsible as such tenants. Grant v. Gill, 2 Whart. 42.

And it has been held that a landlord cannot prove against a bankrupt's estate for rent accruing after the bankruptcy, and neither the bankrupt nor his assignee can claim to occupy the leased premises thereafter without paying rent in full, unless it has been prepaid by the bankrupt; and, if either continues to occupy, he is liable personally for the rent, and the landlord has his lien on the goods on the premises the same as against other tenants, and the expenses of the settlement of the estate cannot be deducted from his rent. *Re* Commercial Bulletin Co. 2 Woods, 220, Fed. Cas. No. 3,060; Buckner v. Jewell, 14 Nat. Bankr. Reg. 286.

In the Illinois case of Smith v. Goodman, however, while the appellate court was of opinion (43 Ill. App. 530) that, if an assignee for creditors is charged with rent of the insolvent's leasehold as assignee of the lease, on the ground that he has elected to take, he is charged, not representatively, but personally, the supreme court said (149 Ill. 75, 36 N. E. 621) that there can be no claim for rent of the premises against the assignee other than in his trust capacity.

And when a receiver is held personally liable for the rent of premises occupied by him in the discharge of his official duties, having funds in his hands, the court will reimburse to him anything he is personally compelled to pay. People v. Universal L. Ins. Co. 30 Hun, 142.

See also Anderson v. Hamilton, 16 Daly, 18, 8 N. Y. Supp. 858; *Re* Ludeke, 22 Misc. 676, 50 N. Y. Supp. 952, *supra*, II. g, 1.

III. *Liability of lessee.*

The general rule would seem to be that a lessee remains liable under the covenants of a lease, notwithstanding his insolvency, and the appointment of a receiver of his effects, or his assignment for the benefit of creditors, or his discharge under the bankruptcy laws. But this rule is not universal.

Thus, it has been held that the relation of landlord and tenant ceases when an adjudication of the bankruptcy of the tenant is made, and all personal obligation to the landlord growing out of the lease is ended. *Re* Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; Bray v. Cobb, 3 Am. Bankr. Rep. 788; Bailey v. Loeb, 2 Woods, 578, Fed. Cas. No. 739; *Re* Hays, F. & W. Co. 117 Fed. 879.

And substantially the same was held in Hanson v. Stevenson, 1 Barn. & Ald. 303, and Welch v. Meyers, 4 Campb. 348.

And that a claim for rent of a house under a lease to a father and his two sons as joint lessees cannot be excepted from the operation of a certificate of discharge in insolvency granted to the two sons on the plea that the family consisted of the father, his wife, a daughter, and four sons, including the two defendants, on the ground that the rent was within the class of

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"necessaries," was held in Plympton v. Roberts, 12 Allen, 366.

In *Re* Ellis, 98 Fed. 967, 3 Am. Bankr. Rep. 564, however, *Re* Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206, *supra*, was criticised, the court saying that it thought that the remarks made in that case were made somewhat hastily, unless they are to be taken as limited to the particular lease in question, or made to depend upon some peculiar provision of the state statutes.

And in the former case the rule was laid down that a lease containing no provision for the re-entry by the landlord on nonpayment of rent is not determined by the bankruptcy of the lessee, but only by the re-entry of the lessor after such bankruptcy, the bankrupt remaining tenant as before.

Under this rule, an adjudication that a lessee holding under an unexpired lease is a bankrupt, made at a time when he owes no rent, does not terminate the lease. Bernhardt v. Curtis (La.) 56 Cent. L. J. 107.

And a discharge under the New York insolvent act is not a bar to an action against the lessee on an express covenant to pay rent, brought to recover rent accruing subsequent to the discharge. Lansing v. Prendergast, 9 Johns. 127.

And the bankruptcy of a lessee cannot be pleaded in bar of an action against him by his lessor on a covenant for rent. Mills v. Auriol, 1 H. Bl. 433, 4 T. R. 94; Savory v. Stocking, 4 Cush. 607; Bernhardt v. Curtis (La.) 56 Cent. L. J. 107.

And an indorser of notes given for such rent still remains liable thereon. Bernhardt v. Curtis (La.) 56 Cent. L. J. 107.

And assumpsit will lie against a lessee from year to year upon his agreement to pay rent during his tenancy, notwithstanding the fact that he has become a bankrupt, and that the premises are occupied by his assignees during a part of the time for which the rents accrued. Boot v. Wilson, 8 East, 311.

And a discharge in bankruptcy is not a bar to a recovery against the bankrupt for a quarter's rent falling due after the discharge, where the bankrupt occupied the premises to the end of the quarter. Savory v. Stocking, 4 Cush. 607.

Or to a recovery for rent accruing after presenting the petition in bankruptcy upon a lease held by the bankrupt taken before that time. Stinemets v. Ainslie, 4 Denio, 573.

Nor is it a defense in an action for rent accruing after the decree and before the discharge. Prentiss v. Kingsley, 10 Pa. 120.

And a discharge of an insolvent lessee of real estate for a term of years with covenant to pay rent at stated periods is not a bar to an action by the lessor on such covenant for rent accruing subsequent to the date of the lessee's insolvency. Rodick v. Bunker, 84 Me. 441, 24 Atl. 897.

Nor is a discharge under the Pennsylvania insolvent act of 1814, a bar to an action against the insolvent as a tenant on an express covenant to pay ground rent accruing after the discharge. Hamilton v. Atherton, 1 Ashm. (Pa.) 67.

And a discharge of a debtor under the Massachusetts composition act of 1884, chap. 236, from all debts due to any person does not operate to release the debtor by virtue of Mass. Pub. Stat. chap. 157, § 26, relating to the effect of a discharge in insolvency from rent accruing under a written lease subsequently to the date of the discharge. Mason v. Clough, 155 Mass. 380, 29 N. E. 536.

Until some act is done by an assignee of a bankrupt manifesting his assent to the assignment with regard to a term of years in the assignor, and his acceptance of the term, the term remains in the bankrupt, and the bankrupt, and not the assignee, is liable for the payment of rent accruing subsequent to the bankruptcy. Copeland v. Stephens, 1 Barn. & Ald. 594.

And a waiver by a tenant of a lease made to an insolvent does not amount to a surrender to the landlord; the lease still remains in the insolvent until there is some act of forfeiture as, for instance, nonpayment of rent. Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 689.

In the above case, Hanson v. Stevenson, 1 Barn. & Ald. 303, and Welch v. Myers, 4 Campb. 348, holding the nonliability of the bankrupt, were distinguished upon the ground that they were decided under a bankrupt law which provided that the bankrupt was not liable under the covenants in the lease after the assignee had accepted it.

Nor can receivers, as matter of law, abrogate a lease which was valid and binding between a railroad corporation and its lessee as between lessor and lessee; the lease must stand until it is abrogated by resort to some of the conditions contained in it. New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 269.

And, upon the dissolution of an insolvent corporation, its assets become a trust fund for the payment of its debts, including debts to afterwards mature, as well as accrued indebtedness; and such dissolution will not have the effect of terminating a lease to the corporation, so that the covenant to pay rent will cease to be obligatory. People v. National Trust Co. 82 N. Y. 283.

So, where a railroad lease should be renounced by receivers, no part of the deficiencies resulting from the leased lines of railroad can be charged against or paid out of the incomes or out of the corpus of the trust estate; these deficiencies must all be paid by the railroad which respectively caused them. Mercantile Trust Co. v. Farmers' Loan & T. Co. 26 C. C. A. 383, 49 U. S. App. 462, 81 Fed. 254.

IV. *Liability of third persons.*

Third persons, such as creditors, mortgagees, etc., are sometimes held liable under peculiar circumstances for rent under a lease to an insolvent lessee while the leasehold is in the hands of a receiver or assignee.

Thus, where a creditor of a lessee procures the entry of a judgment against the lessee and a return of execution, and takes out a creditor's bill for the purpose of placing the lessee's property in the hands of a receiver and under the protection of the court in order to prevent creditors, including the lessor, from reaching it by the usual means, and, by litigation, delays other creditors for a long time, the creditor instituting the improper procedure, and procuring the appointment of the receiver, must stand all the cost of the receivership, including the expenses thereof, and will be required to pay the lessor the balance due for unpaid rent as a part of such costs. Hughes v. Link Belt Machinery Co. 95 Ill. App. 323, Affirmed in LINK BELT MACHINERY CO. *v.* HUGHES.

And where the earnings of a railroad held under lease have been applied by the lessee to the payment of the interest on first-mortgage bonds, leaving the rent unpaid, the equity of the lessor, if any, exists as against the holders of the first-mortgage bonds, who actually received the money to which he claims to be equitably entitled, and not against the proceeds of the sale of the railroad on foreclosure. St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co. 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011.

But an unregistered company, which was

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mortgagee in possession of lands subject to a rent charge, which was wound up, after which the liquidators paid the rent charge for some time, and, finding the annual value of the property not equal to the rent charge, they obtained leave to dispose of the land, and gave notice to the tenant in occupation and to the owner of the rent charge that they repudiated it,—is liable for the rent charge only while it was owner of the land, such repudiation of ownership being that of the liquidator; and no subsequent claim can be made for the rent charge. *Re* Blackburn & District Benefit Bldg. Soc. L. R. 42 Ch. Div. 343.

So, where a receiver of a railroad company holding rolling stock under a car-trust lease, title thereto remaining in the lessor until the rental has paid the purchase price, turns over the operation of the road and rolling stock, with the sanction of the court, to another company, which stipulates to pay all the expenses of the operation, the latter company becomes liable to the lessor and owner for reasonable compensation for their use as the agent or representative of the receiver. Platt v. Philadelphia & R. R. Co. 28 C. C. A. 488, 55 U. S. App. 452, 84 Fed. 535.

And a common-law receiver of leasehold property, who, after a judicial sale of it and the placing of the purchaser in possession, pays accrued rent, thereby wrongfully applies a fund in court for the benefit of the purchaser, which the latter may be compelled to repay to him in an action at law in which the rights of all the parties can be adjusted, although, by the terms of the sale, the purchaser was to receive the property free from claims of such rent. Stokes v. Hoffman House, 167 N. Y. 554, 53 L. R. A. 870, 60 N. E. 667, Affirming 46 App. Div. 120, 61 N. Y. Supp. 821.

And such purchaser cannot set up the amount which he had been compelled to pay on account of such rent as a counterclaim in an action against him by the receiver to recover advancements alleged to have been made on his behalf. *Ibid.*

His remedy is by application in the foreclosure suit, and not by an independent litigation with the receiver at law. *Ibid.*

So, purchasers on foreclosure of a railroad system are liable when a reorganization scheme, carried out by the foreclosure, contemplated and included the benefits of a previously executed receivership, as well as the receivership executed under the bill for foreclosure, and the mortgage bondholders had the full benefit of the earnings and advantages of the receivership, and the foreclosure decree expressly stipulated that the purchaser should take the property subject to the receivership debts for the rental of a leased line which was taken possession of by the receivers, that being a receivership obligation. Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 79 Fed. 158.

In Tradesman Pub. Co. v. Knoxville Car Wheel Co. 95 Tenn. 634, 31 L. R. A. 593, 32 S. W. 1097, however, it was held that a purchaser at a chancery sale of an unexpired term of a leasehold in the hands of a receiver is not chargeable with the contract rental of the original lease for the balance of the term.

V. *Conclusion.*

Neither a receiver, nor an assignee for the benefit of creditors or in bankruptcy, is bound, merely because he is such, to payment of rent for premises held under lease by the insolvent at the time of the insolvency. To bind him therefor, his election to adopt or accept the lease must unequivocally appear; and, while at least constructive possession is necessary to render him liable, the mere act of taking possession of the leasehold estate is not generally, alone, sufficient to bind him. Taking possession under an order or instrument specially directing it, however, and directing the payment of rent in terms, constitute an adoption of the lease, which will render him liable for rent thereunder; and the rule is the same with reference to taking possession under an order providing for a receivership, the whole or main purpose of which is to prevent the disintegration of a railroad system composed, at least in part, of leased lines, and to maintain such system as a going concern. But a mere attempt on the part of the receiver or assignee to utilize a lease to the insolvent, and make it available to the estate, such as an attempt to sell it, does not constitute an adoption of the lease which will render him liable for rent. Nor does the mere taking and holding possession for a reasonable time for the purpose of winding up the business and removing the assigned goods; though using the leasehold premises for the purpose of selling the assigned goods at retail would usually be regarded as an adoption of the lease.

Likewise, a mere holding for a reasonable time for the purpose of making an intelligible election as to whether or not he will reject the lease and withdraw or accept it, and become bound for the rent, does not constitute an acceptance; what constitutes a reasonable time within which to make such an election depending upon the character of the leasehold and of the estate and the surrounding circumstances. And holding possession in ignorance that the property is leasehold property is not an election to adopt the lease, where it was promptly repudiated, or possession was promptly surrendered when that fact was learned.

The act of a receiver or assignee, however, in holding premises leased to the insolvent debtor for the purpose of carrying on the business of the lessee, is almost universally regarded as an adoption of the lease which will render him liable for rent thereunder, the extent of the continuance required to have that effect depending upon duration as well as the character of the acts performed, such acts being required to be acts of business as distinguished from acts of removal. And occupation and continued payment of rent according to the terms of the lease sufficiently establish adoption to render the receiver as assignee liable according to its terms.

But, though the acts of a receiver or assignee might amount to an adoption or acceptance of a lease to the insolvent, since the lessor may on the insolvency of the lessee and nonpayment of rent re-enter at any time for conditions broken, it is his duty to require an election if he wishes one,—and, if he fails to do so, and fails to demand possession, his claim will be deemed to have been waived,—at least in the absence of assets from which rents ought to be paid. And since an assignee of a lease is liable only while privity of estate continues, a receiver or assignee is usually held liable for rent only while he occupies, though during such time the liability is usually deemed to be based upon the covenants of the lease, and not upon use and occupation. And, even though the lease was not adopted, a receiver or assignee is usually required to pay for his actual occupation, though in such case it is usually on the *quantum meruit*.

A lessor usually comes in as a preferred creditor against the estate of his insolvent lessee in the hands of a receiver or assignee, for rent during the occupancy of such receiver or assignee on the theory that such rent is a necessary expense of the trust, though some of the cases make the right to priority depend on the ex-

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istence of the right to a lien for rent, or the right to distrain. And rent of leased lines of railroad will not be preferred by being allowed as operating expenses as against a mortgagee or other preferred creditor, when the funds of the receivership are not sufficient for the payment of all such claims.

This liability of a receiver or assignee for rent of leasehold premises, vested in the insolvent at the time of the insolvency, is usually regarded as a liability in his representative capacity, and not a personal one; though some of the cases have drawn a distinction between assignees by the voluntary act of the parties and assignees in law, holding the former liable personally as having voluntarily taken the place of the former tenants. By the decided preponderance of authority, however, neither a receiver, nor an assignee in bankruptcy, nor an assignee for the benefit of creditors, is held personally liable, except under special agreement, or unless he has not acted as a cautious and prudent man would have acted in his own affairs, and the estate has suffered injury therefrom.

An adjudication of the bankruptcy of a tenant has been held to terminate his liability to his landlord under a lease; but the preponderance of authority would seem to be in favor of the rule that, until the re-entry by the landlord, he remains a tenant and liable as such; and, though leased premises are in the hands of a receiver or an assignee for the benefit of creditors, neither the receivership, nor the assignment, affects the insolvent's liability under the covenants of the lease. And a creditor who procures a receivership for his own purposes, thus delaying other creditors and necessitating a continued occupation of leasehold premises, may be held liable for rent during the period of occupation made necessary by his improper acts. And purchasers may also be held liable for rent of premises occupied by a receiver when they take subject to all liens. F. H. B.

IOWA SUPREME COURT.

C. D. MARTIN, Admr., etc., of A. F. Flannagan, Deceased, *Appt.*,
v.
CHICAGO, ROCK ISLAND, & PACIFIC RAILROAD COMPANY.

(.....Iowa.....)

1. **Undertaking to work as brakeman, or continuing at work without complaint,** with knowledge that the railroad company habitually exceeds the speed fixed by ordinance in running trains through a municipality, is an assumption of the risk of such excess of speed so far as the protection of the ordinance is concerned.
2. **To render a railroad company liable for the death of a brakeman** who fell from the train while it was running at greater speed than he had consented to, such speed must have been, not only negligent, but the operating cause of the injury.

(October 25, 1902.)

APPEAL by plaintiff from a judgment of the District Court for Scott County in favor of defendant in an action brought to recover damages for alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **E. M. Sharon** and **Ely & Bush,** for appellant:

The swaying and jolting of the cars was increased by the illegal rate of speed, and it might reasonably have caused the fall; and, where there is but one sufficient cause shown, it is a warrantable presumption that that was the cause of the accident.

Brownfield v. *Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038.

The engineer knew that it would be more hazardous for the brakeman to remain on the cars, whether standing, sitting, or moving, than if the train was running at the rate required by law and the rules of the company; and, knowing all these things, he ran his train at a rate of speed which, not only was admittedly unlawful and in violation of the rules, but which beyond question, under the evidence, was dangerous.

Louisville & N. R. Co. v. *Hiltner,* 21 Ky. L. Rep. 1826, 56 S. W. 654.

It should be presumed that the negligent rate of speed over the switches caused the injury, even if the proximate cause of injury was not a question for the jury.

Ward v. *Chicago, B. & Q. R. Co.* 97 Iowa, 50, 65 N. W. 999; *Brownfield* v. *Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038; *Settle* v. *St. Louis & S. F. Co.* 127 Mo. 336, 30 S. W. 125; *Fish* v. *Illinois C. R. Co.* 96 Iowa, 702, 65 N. W. 995.

The proof that deceased was in his place of duty, and was a careful brakeman, is sufficient proof that he was not negligent.

Burns v. *Chicago, M. & St. P. R. Co.* 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25; *Greenleaf* v. *Illinois C. R. Co.* 29 Iowa, 14, 4 Am. Rep. 181; *Belair* v. *Chicago & N. W. R. Co.* 43 Iowa, 675; *Reynolds* v. *Keokuk,* 72 Iowa, 372, 34 N. W. 167; *Harker* v. *Burlington, C. R. & N. R. Co.* 88 Iowa, 409, 55 N. W. 316; *Fish* v. *Illinois C. R. Co.* 96 Iowa, 702, 65 N. W. 995; *Pringle* v. *Chicago, R. I. & P. R. Co.* 64 Iowa, 618, 21 N. W. 108; *Morbey* v. *Chicago & N. W. R. Co.* 105

NOTE.—As to assumption of risk by, or contributory negligence of, servant in remaining in employment after knowledge of danger, see Limberg v. Glenwood Lumber Co. (Cal.) 49 L. R. A. 33, and *note,* and Sanderson v. Panther Lumber Co. (W. Va.) 55 L. R. A. 908.

As to defense of *volenti non fit injuria* to actions by injured servant, see O'Maley v. South Boston Gaslight Co. (Mass.) 47 L. R. A. 161, and *note.*

As to effect of statute making employer liable to employees for defects in ways, machinery, etc., upon defense of contributory negligence or assumption of risk, see Coley v. North Carolina R. Co. (N. C.) 57 L. R. A. 817, and cases in *note* thereto; also Monteith v. Kokomo Wood Enameling Co. (Ind.) 58 L. R. A. 944.

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Iowa, 46, 74 N. W. 751; *Fox* v. *Chicago, St. P. & K. C. R. Co.* 86 Iowa, 375, 17 L. R. A. 289, 53 N. W. 259.

It would be manifestly impossible to show, affirmatively, that deceased did not stumble or jump from the train; but it is a question for the jury to determine, from all the facts and circumstances surrounding the case, whether he did or not.

Barnhart v. *Chicago, M. & St. P. R. Co.* 97 Iowa, 655, 66 N. W. 902; *Brann* v. *Chicago, R. I. & P. R. Co.* 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; *Muldowney* v. *Illinois C. R. Co.* 32 Iowa, 177; *Dalton* v. *Chicago, R. I. & P. R. Co.* 104 Iowa, 27, 73 N. W. 349; *Hopkinson* v. *Knapp & S. Co.* 92 Iowa, 328, 60 N. W. 653.

The deceased did not know, and had no means of knowing, at what rate of speed this train would be run; but he had a right to presume that the railroad company would obey the law and the ordinance and the rules of the company.

Lonergan v. *Illinois C. R. Co.* 87 Iowa, 755, 17 L. R. A. 254, 49 N. W. 852, 53 N. W. 236; *Moore* v. *Chicago, St. P. & K. C. R. Co.* 102 Iowa, 597, 71 N. W. 569.

The negligence was a violation of the law in the manner of operating the train, and, because it was done once, was no indication that it would be done again; in fact, one has a right to presume the law will be obeyed.

Moore v. *Chicago, St. P. & K. C. R. Co.* 102 Iowa, 597, 71 N. W. 569.

Because a negligent act is a custom, it does not relieve from liability.

Hamilton v. *Des Moines Valley R. Co.* 36 Iowa, 31; *Beard* v. *Illinois C. R. Co.* 79 Iowa, 522, 7 L. R. A. 280, 44 N. W. 800; *Meloy* v. *Chicago & N. W. R. Co.* 77 Iowa, 746, 4 L. R. A. 287, 42 N. W. 563; *Hosic* v. *Chicago, R. I. & P. R. Co.* 75 Iowa, 683, 37 N. W. 963; *Conners* v. *Burlington, C. R. & N. R. Co.* 74 Iowa, 383, 37 N. W. 966.

Continuance of employment can only be a waiver of past damages, and cannot apply to prospective ones.

Harker v. *Burlington, C. R. & N. R. Co.* 88 Iowa, 409, 55 N. W. 316; *Baldwin* v. *St. Louis, K. & N. W. R. Co.* 63 Iowa, 212, 18 N. W. 884; *Greenleaf* v. *Dubuque & S. C. R. Co.* 33 Iowa, 57.

On rehearing.

A verdict will be directed for defendant only when there is no evidence which reasonably tends to establish plaintiff's case.

Isherwood v. *H. L. Jenkins Lumber Co.* 84 Minn. 423, 87 N. W. 931.

The only undisputed fact in the case is that of the death of the decedent.

All the evidence tends to prove, if it does not conclusively prove, that if the train had been run at 6, or 7, or 8 miles an hour, Flannagan would not have been killed.

A high rate of speed, while, perhaps not negligence *per se*, may become an element of negligence; and the jury may find it to be negligence when taken in connection with the surroundings.

Meloy v. *Chicago & N. W. R. Co.* 77 Iowa, 743, 4 L. R. A. 287, 42 N. W. 563; *Gratiot* v. *Missouri P. R. Co.* 116 Mo. 450, 16 L. R. A. 192, 21 S. W. 1094; *Salter* v. *Utica & B. River R. Co.* 88 N. Y. 42; *Artz* v. *Chicago, R. I. & P. R. Co.* 44 Iowa, 284; *Peoria, P. & J. R. Co.* v. *Reynolds*, 88 Ill. 418; *Wallace* v. *St. Louis, I. M. & S. R. Co.* 74 Mo. 594; 2 Thomp. Neg. §§ 1873, 1875, 1876; *Mitchell* v. *Southern P. R. Co.* 87 Cal. 62, 11 L. R. A. 130, 25 Pac. 245.

There is not one word of evidence that decedent had ever ridden upon a train going over this portion of the road at a rate of 25 miles an hour, or even at 17 or 12; or that he knew, or had reason to know, that such trains were run at those speeds over this portion of the track; nor that such trains ever had run at a speed of 15, 17, 25, or 40 miles per hour.

Knowledge of the master's negligence and the danger therefrom is at the bottom of assumption of risk.

San Antonio & A. P. R. Co. v. *Engelhorn*, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; *Snow* v. *Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Maydole* v. *Denver & R. G. R. Co.* 15 Colo. App. 449, 62 Pac. 965; *Southern P. Co.* v. *Yeargin*, 48 C. C. A. 497, 109 Fed. 436.

If decedent had assumed the risk of running at a high rate of speed in good weather, it would not be an assumption of the risk of the same speed in bad weather.

Knott v. *Dubuque & S. C. R. Co.* 84 Iowa, 462, 51 N. W. 57.

Assumption of risk is a matter of contract, expressed or implied.

Narramore v. *Cleveland, C. C. & St. L. R. Co.* 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. 298; *Lloyd* v. *Hanes*, 126 N. C. 359, 35 S. E. 611.

The risks which brakemen assume are only those incident to running the trains in a careful, prudent manner.

Conners v. *Burlington, C. R. & N. R. Co.* 74 Iowa, 386, 37 N. W. 966.

It is only where the evidence leaves the material facts admitted or undisputed, and only when these facts are such that reasonable men can fairly draw but one conclusion from them, that the court can properly draw the case from the jury.

Chicago G. W. R. Co. v. *Price*, 38 C. C. A. 239, 97 Fed. 423; *Sioux City & P. R. Co.* v. *Stout*, 17 Wall. 657, 21 L. ed. 745; 2 Redf. Railways, p. 231; *Quimby* v. *Vermont C. R. Co.* 23 Vt. 387; *Paterson* v. *Wallace*, 1 Macq. H. L. Cas. 748; *Isherwood* v. *H. L. Jenkins Lumber Co.* 84 Minn. 423, 87 N. W. 931; *Gratiot* v. *Missouri P. R. Co.* 116 Mo. 450, 16 L. R. A. 189, 21 S. W. 1094.

The protection of the ordinance is for the benefit of any person for whose protection it will operate.

Pittsburgh, C. C. & St. L. R. Co. v. *Moore*, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290; *East St. Louis Connecting R. Co.* v. *Eggmann*, 170 Ill. 538, 48 N. E. 981; *Illinois C. R. Co.* v. *Gilbert*, 157 Ill. 354, 41 N. E. 724; *Bluedorn* v. *Missouri P. R. Co.* 108 Mo. 439, 18 S. W. 1103.

Messrs. **Cook & Dodge**, for appellee:

That party who last has a clear opportunity of avoiding the accident, notwithstand-

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ing the negligence of his opponent, is solely responsible for it.

Cowles v. *Chicago, R. I. & P. R. Co.* 102 Iowa, 507, 71 N. W. 580.

The servant takes the risk of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work.

14 Am. & Eng. Enc. Law, p. 845.

Injury caused by the formation of ice or snow is a risk assumed by a railway employee.

O'Bannon v. *Louisville & N. R. Co.* 9 Ky. L. Rep. 706, 6 S. W. 434; *Adkins* v. *Atlantic & C. Airline R. Co.* 27 S. C. 71, 2 S. E. 849.

Ladd, Ch. J., delivered the opinion of the court:

The freight train, composed of 13 loaded cars, 26 empties, and the caboose, was made up at Rock Island, from which place it departed at 5 o'clock in the morning. When it reached Perry street, in Davenport, a second engine or "helper" was attached, and together the two pulled the train west to Farnam, where the absence of the head brakeman was first discovered. Evidently he had fallen from the top of the train about 15 or 20 feet west of Fillmore street, in Davenport. The circumstances warranting this inference are: (1) A dint in the snow between the tracks at that place, as though a person had fallen some distance on the hip; (2) his lantern just outside of the track; (3) parts of his body and blood stains from that point to the place where the head and trunk were found. It may also be inferred that he fell between the third and fourth cars from the engine, for blood stains were found on the front trucks of the fourth car, and from there on back. The running board of the third car was about a foot wide, while that on the fourth car was a foot higher, and consisted of three strips about an inch apart, and projecting over at the end 5 or 6 inches. The tops were frosty, but upon examination no indications that he had slipped were discovered. The wind was blowing from the northwest, the direction the train moved, at a velocity of 5 miles an hour. The temperature was 11½° above zero; the humidity of the atmosphere, 90 per cent. Fillmore street is one block west of the semaphore, two blocks west of Marquette street. Between these streets are five switches,—one at the semaphore, connecting with defendant's branch line to the southwest, and the others with tracks to local industries. From Perry street to Fillmore the road was slightly undulating, but from Fillmore street to Farnam, a block less than 2.7 miles away, the up grade was 47½ feet to the mile. Opinions as to the speed of the train differ widely, but the jury might have found it anywhere between 12 and 25 or 30 miles per hour. All agree that it exceeded 6 miles an hour, the limit fixed by the ordinance of the city of Davenport. The defendant, then, was negligent in violating the ordinance, and the three grounds of the motion on which the jury were directed to return a verdict raise the questions: (1) Did such negligence occasion the injury to deceased? (2) Did deceased, by any fault on his part, contribute to his injury? And (3) had he assumed the risk of the high rate of speed at which the train was moving?

1. The ordinance of the city of Davenport prohibited trains from moving within the corporate limits at a speed exceeding 6 miles an hour. The evidence showed that it was customary on defendant's line for trains such as that in question to leave for the west at a much higher speed, in order to make the grade; and, as deceased had been engaged in work as brakeman something like seven months in all, he must have known of this practice. Of course, the mere fact that defendant habitually violated the ordinance does not relieve it from the imputation of negligence. *Hamilton* v. *Des Moines Valley R. Co.* 36 Iowa, 31; *Beard* v. *Illinois C. R. Co.* 79 Iowa, 522, 7 L. R. A. 280, 44 N. W. 800; *Weber* v. *Creston*, 75 Iowa, 16, 39 N. W. 126; *Conners* v. *Burlington, C. R. & N. R. Co.* 74 Iowa, 383, 37 N. W. 966. Nor can it be said that ordinances of this character have for their sole object the protection of those having occasion to go on or across the tracks. They are not thus limited in their terms. Their benefit may be claimed by any person coming within their protection. *Illinois C. R. Co.* v. *Gilbert*, 157 Ill. 354, 41 N. E. 724; *East St. Louis Connecting R. Co.* v. *Eggmann*, 170 Ill. 538, 48 N. E. 981; *Pittsburgh, C. C. & St. L. R. Co.* v. *Moore*, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290; *Bluedorn* v. *Missouri P. R. Co.* 108 Mo. 439, 18 S. W. 1103. Nevertheless, the evident purpose in their enactment is to guard against injury to those using the streets, rather than the employees of the railroad engaged in operating the trains. In undertaking the work of brakeman with knowledge that the ordinance was ignored by the railroad company, or continuing at work without complaint after ascertaining the fact, did deceased assume the risk of the danger incident to its violation? The authorities are in sharp conflict on this proposition. Those holding that such a risk is never assumed go on the theory that, as the assumption of risk is based on an implied contract, it would be opposed to sound public policy to permit one to agree in advance to a violation of a statute or city ordinance. In *Narramore* v. *Cleveland, C. C. & St. L. R. Co.* 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. 298, the statute enjoined on railroad companies the duty of blocking switches, and Judge Taft, after reviewing the decisions, concluded that "'assumption of risk' is a term of the contract of employment . . . by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes, or contributes to cause, the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all; for, under the terms of the employment, the mas-

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ter violates no legal duty to the servant in failing to protect him from dangers, the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. . . . It makes logical that most frequent exception to the application of doctrine by which the employee who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. . . . If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize, as against a servant, an agreement, express or implied, on his part, to waive the performance of a statutory duty of the master, imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract, and it would entirely defeat this purpose thus to permit the servant to contract the master out of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute, and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that." This is perhaps the clearest expression of the reasons persuading some courts to hold that in such cases the maxim, *Volenti non fit injuria*, will not apply. The point appears to have been touched upon in several English cases. See *Thomas* v. *Quartermaine*, L. R. 18 Q. B. Div. 685; *Baddeley* v. *Granville*, L. R. 19 Q. B. Div. 423. In the latter, a statute required a banksman to be present at the mouth of a pit when miners were going up and down. During the night it was the defendant's practice to dispense with him, and of this the plaintiff was aware. The injury was in consequence of this omission. The court held that plaintiff could recover; Wills, J., saying: "There ought to be no encouragement given to the making of an agreement between A and B that B shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal. . . . But it seems to me that if the supposed agreement between the deceased and defendant, in consequence of which the principle of *Volenti non fit injuria* is sought to be applied, comes to this: That the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself, "such an agreement would be in violation of public policy, and ought not to be listened to." A careful reading of the opinions in *Durant* v. *Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484; *Grand* v. *Michigan C. R. Co.* 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; *Litchfield Coal Co.* v. *Taylor*, 81 Ill. 590; and *Boyd* v. *Brazil Block Coal Co.* 25 Ind. App. 157, 50 N. E. 368, 57 N. E. 732, cited in the *Narramore Case*,—discloses that, although the question might have been raised, it was not, in any of them. We think the learned judge, in writing that opinion, assumed too much, in treating the assumption of risk as purely a matter of contract. True, the books speak of it as resting on an implied agreement between the employer and employee. It is more accurate to say that the services of the one are engaged by the other, and from the relationship the law implies certain duties, obligations, and disabilities. No mention is made of these, but they pertain to the relationship of the parties and the status then assumed.

Says Mr. Dresser, in his valuable work on Employers' Liability (§ 82): "The contract of hiring depends upon the same principles as other contracts, yet it has one peculiarity, in that it creates a status or relationship between the parties, to which the policy of the law has affixed certain rights, duties, and disabilities to be observed by each, irrespective of any understanding or supposed agreement between them. These duties and disabilities arise when the relation is created, and continue until it ends, and for the most part are determined by the condition of affairs when the contract of hiring is made. It is usual and convenient to treat them as terms of an implied contract, but it is a contract implied from the relationship, and not from the agreement of the parties, and has none of the incidents of a technical contract." The author then points out that no consideration is essential, as a mere volunteer may be in the same position as though hired, and an infant whose agreements are voidable may assume disabilities as an adult. See *Barstow* v. *Old Colony R. Co.* 143 Mass. 535, 10 N. E. 255. If based on contract alone, then an action for injury by the servant, resulting from a breach of a duty assumed by the master, should be *ex contractu*. As said in Jaggard on Torts, 23: "Such rights and duties are not properly contractual, nor is their breach a contractual wrong." See *Ames* v. *Union R. Co.* 117 Mass. 541, 19 Am. Rep. 426. The breach is of a duty which the law implies from their relationship, and is, like any other omission of duty which the law exacts, negligence. The master's liability may be tested, either by considering the employee's conduct, and answering whether, in view of his undertaking, he took his chance on the particular act of which complaint is made, or by ascertaining whether the employer owed the employee any duty in relation thereto. While the first may be the more convenient, the last is the more logical, as it would seem inquiry

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should be directed to ascertaining the existence of an obligation, before investigating its possible breach. The employee undertakes the performance of duties and services for compensation, and in doing so takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal assumption, the compensation is adjusted accordingly. *Farwell* v. *Boston & W. R. Corp.* 4 Met. 49, 55, 38 Am. Dec. 339. That is, he engages to perform work under certain conditions. If these are not changed, no duty on the part of the master has been omitted. For instance, if he undertakes to operate defective machinery, the master owes him no duty to repair. In such a case there is no waiver of liability, because none has arisen. But if he knew nothing of the defects, and they were not obvious, the law implies the obligation of the master to put it in safe condition for use. As said in *O'Maley* v. *South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119: "The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria*. One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty."

Nor can we approve of the distinction attempted to be drawn between employment under conditions condemned as dangerous at the common law, and those prohibited by a city ordinance. In the absence of an assumption of the risk, an omission of a duty implied by law is precisely as effective in fixing liability as though enjoined by statute. The obligation of the employer to the servant is no greater in the one case than in the other, and we can discover no sound reason for the discrimination which declares the danger in the one case may be assumed, and in the other may not. That advanced in two cited cases, to the effect that permitting the employee to waive the protection of a statute would be in contravention of sound public policy, we regard as untenable. The law implied is quite as much for his benefit, as that enacted by the city council. If he knows and appreciates the danger, and understands his rights under the statute, there is no more reason for putting him under guardianship, and prohibiting him from waiving lapses in duty of obedience to a rule established by an ordinance or statute, than to one which the principles of justice and public policy raise, independent of legislation, for his protection. Beyond the right of action accruing for the violation of the master's obligation, regardless of its source, is the punishment the state inflicts for the violation of the penal ordinance. The remedies are distinct, and the failure of the servant to demand his private remedy does not interfere with the exaction of a penalty by the state; nor, on the other hand, will the omission of the state to prosecute furnish the slightest obstacle to the maintenance of an action by the injured party. As said in the work from which we have already quoted: "It is difficult to see why, if the servant is given an action, he cannot barter it away before the cause of action accrues, as well as fail to bring it when he suffers injury. In neither case is the master's liability to the state affected, and the state ought not to call in the aid of an individual to enforce a policy it is competent itself to protect. For many reasons, the servant may prefer to forego the protection; and, as this does not change the master's obligation under the statute, or affect the welfare of the state, it should be permitted. The means of protection, through information to the proper authorities, are at hand, if the servant or another chooses to avail himself of them; and, if he is content to work without safeguards which he has a right to expect, the loss should be his. . . . If the decisions quoted are to be followed, the odd state of affairs will exist,—of a man who is merely careless being barred, but one deliberately undertaking a dangerous work recovering." Some stress is laid on the impolicy of allowing persons to waive obedience of an ordinance or statute. It would seem quite as inimical to the public good to permit a workman to take advantage of the master's failure to obey the law to which he has consented, as to permit the master to avoid liability because the servant connived with him in such disobedience, by agreeing to work with the conditions as they existed, and according to the method mutually adopted. In other words, it is quite as obnoxious to public policy, independent of the penalty imposed, for the employee to aid and encourage the employer in his disregard of an ordinance, as for the employer to violate it. Our study of the subject has led to the conclusion that, in the matter of assumption of risks, it is immaterial whether they arise from the violation of a common-law duty, or an obligation imposed by statute. As directly in point, see *Knisley* v. *Pratt*, 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986; *E. S. Higgins Carpet Co.* v. *O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Keenan* v. *Edison Electric Illuminating Co.* 159 Mass. 379, 34 N. E. 366; Dresser, Employers' Liability, § 116. Also see 13 Law Mag. & Rev. 19; 3 Elliott, Railroads, § 1345; *Birmingham R. & Electric Co.* v. *Allen*, 99 Ala. 359, 20 L. R. A. 457, 13 So. 8; *Ford* v. *Chicago, R. I. & P. R. Co.* 106 Iowa, 85, 75 N. W. 650. In the first of the above cases,

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the court, speaking through Bartlett, J., in referring to the claim that public policy required the rigid enforcement of a particular statute, and that this would be contravened by permitting an employee by contract to waive its protection, said: "We think this proposition is essentially unsound, and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action, whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or in the declared will of the legislature. Public policy in each case requires its rigid enforcement, and it was never urged in the common-law action for negligence that the rule requiring the employee to assume the obvious risks of the business was in contravention of that policy. . . . The rule as to the risks of the service or ordinary risks is entirely distinct from the rule of obvious risks, and, if the statute has added to the duties which the law enjoins upon the employer before the servant can be subjected to the rule of ordinary risks, then the default of the employer in the discharge of this statutory duty, resulting in injury to the employee, would enable the latter to sue. Such a construction of the statute would not in any way limit the doctrine of obvious risks. . . . We are of opinion that there is no reason, in principle or authority, why an employee should not be allowed to assume the obvious risks of the business, as well under the factory act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does, indeed, contemplate the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs." The appellant urges that as, under our statute, contracts exempting the company from liability are void, there can be no assumption of such a risk. The answer to this is, as already remarked, that in such a case no liability arises, and hence there is none from which the contract exempts. Possibly ordinances or statutes might be so framed as to prevent any assumption of risk, but certainly this is not true of an ordinance general in its terms, limiting the speed of trains in a particular locality. And it can make no difference whether the statute relates to the condition of the place where the work is to be done, or the method to be pursued in performing it. If the employee, with full knowledge of either, undertakes to accomplish the task assigned at the place or in the method proposed he ought not to be permitted to complain when conditions and methods were precisely as he knew they would be, and to which he has assented.

2. The finding that deceased assumed the risk of injury from the excessive rate of speed within the corporate limits of the city of Davenport leads inevitably to an approval of the court's ruling in directing a verdict for defendant. It appears to have been deceased's duty to be on top and near the front of the train until the semaphore was reached. After that it was customary to go to the engine. At the next station the helper engine was usually uncoupled and returned, though it frequently went as far as Turnout, 3.6 miles beyond Farnam. But two witnesses observed deceased shortly before the accident. Staffenbiel, a policeman, testified that he saw the train east of Marquette street, and noticed the head brakeman on top, about six cars from the engine, going forward. McMullen, the rear brakeman, testified: "I stayed on top till near the semaphore. . . . I saw Mr. Flannagan's light about the time I got to the semaphore. It was near the head end of the train. I could not tell how far from the engine. The light was higher up than it would be if it was setting on the car. I could not see the head end of the train, for smoke and steam which came directly back over the train. . . . I was on top till the engine got by the semaphore at Southwest junction." He then went to the caboose. The appellee rightly insists, as we think, that the only reasonable inference to be drawn from the testimony is that deceased fell while attempting to step from the fourth to the third car in going forward to the engine. The latter was a foot lower than the former, and he may have lost his balance in stepping down, possibly not noticing the difference, in the dark and smoke from the engine. From the place where Staffenbiel saw him, he would likely have reached the end of the fourth car in an ordinary walk, while the train was moving, to the point where he fell. The position of the light when last seen by McMullen obviates the inference suggested by appellant that he was sitting down, and he would not be likely to fall where he did when standing still. But whether he fell while attempting to step to another car, or while standing or sitting near the end, there is nothing in the record tending to explain the cause of the fall. It was still dark, with the smoke and steam trailing close to the train. The weather was cold, and rendered more disagreeable by the humidity of the atmosphere. But these were conditions which deceased was bound to anticipate when taking employment as brakeman. Whether they had anything to do with the accident can never be known. The jury could have found that the train was moving at from 12 to 30 miles an hour, but it is utterly impossible to say from the evidence that going faster than 12 miles an hour, with which deceased was familiar, caused him to fall, and that this would not have happened if moving at a less speed. If the cars swayed in passing over the blocks and switches, he knew that fact better than anyone else, and ought not to have attempted to go to the engine until these were passed. Recovery must be had, if at all, because of negligence in the rate of speed. Compliance with the ordinance having been

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waived by deceased, in not only consenting, but assisting in operating defendant's trains at a rate of from 8 to 12 miles an hour, there is no liability, unless it can be said that the speed at which this train ran, above that mentioned, was not only negligence, but that it was the operating cause of the injury. As the speed above that mentioned, the risks of which he had assumed, cannot be said to have occasioned his death, we need not inquire whether defendant was negligent, independent of the violation of the city ordinance.

The ruling of the District Court is approved, and its *judgment affirmed.*

Weaver, J., concurs in the result.

The above opinion was adhered to after rehearing.

KANSAS SUPREME COURT.

Amanda RODMAN, Admrx., etc., of T. M. Rodman, Deceased, *Plff. in Err.*,
v.
MISSOURI PACIFIC RAILWAY COMPANY.

(.....Kan.....)

*1. **When a Federal court, by dismissal without prejudice, and without a determination of the merits, relinquishes its jurisdiction** over the parties to, and subject-matter of, an action removed into such court from a state court, plaintiff therein may again invoke the jurisdiction of the state court, and that court may properly proceed to a determination of the controversy, irrespective of, and unaffected by, the former removal to, and jurisdiction in, the Federal court.

2. **Section 422 of the Civil Code creates a right of action for damages for death** by wrongful act which did not exist at common law, and which does not obtain in the absence of such act. The limitation of two years, prescribed in the act, in which such action must be commenced, is a condition imposed upon the exercise of the right of action granted, and this time is not extended by the pendency and dismissal of a former action, as provided in § 23 of the Civil Code.

(November 8, 1902.)

ERROR to the Court of Common Pleas for Wyandotte County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Mr. **T. P. Anderson**, for plaintiff in error:

Section 23 of the Code applies to actions like this one.

Meisse v. *McCoy*, 17 Ohio St. 225; *Fleming* v. *Southern R. Co.* 128 N. C. 80, 38 S. E. 253; *Swift & Co.* v. *Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969; *Nelson* v. *Galveston*, *H. & S. A. R. Co.* 78 Tex. 621, 11 L. R. A. 391, 14 S. W. 1021; *Manuel* v. *Norfolk & W. R. Co.* 99 Va. 188, 37 S. E. 957; *Ketterman* v. *Dry Fork R. Co.* 48 W. Va. 606, 37 S. E. 683; *Hooper* v. *Atlanta, K. & N. R. Co.* 106 Tenn. 28, 53 L. R. A. 931, 60 S. W. 607; *Seaton* v. *Hixon*, 35 Kan. 663, 12 Pac. 22; *Hobbs* v. *Spencer*, 49 Kan. 769, 31 Pac. 702.

The statute is a remedial one, and should, therefore, be liberally, rather than restrictively, construed.

Vickers v. *Cloud County*, 59 Kan. 86, 52 Pac. 73.

The lower court had jurisdiction to hear and determine this action.

Pittsburgh, C. C. & St. L. R. Co. v. *Bemis*, 64 Ohio St. 26, 59 N. E. 745; *Hooper* v. *Atlantic, K. & N. R. Co.* 106 Tenn. 28, 53 L. R. A. 931, 60 S. W. 607; *Gassman* v. *Jarvis*, 100 Fed. 146; *Carnegie* v. *Hulbert*, 16 C. C. A. 507, 36 U. S. App. 81, 70 Fed. 209; *Hughes* v. *United States*, 4 Wall. 232, 18 L. ed. 303; *Walden* v. *Bodley*, 14 Pet. 156, 10 L. ed. 398; *Spear* v. *Newell*, 13 Vt. 293; *Kern* v. *Huidekoper*, 103 U. S. 485, 26 L. ed. 354; *Wilson* v. *Milliken*, 103 Ky. 165, 42 L. R. A. 449, 44 S. W. 660.

Messrs. **Waggener, Horton, & Orr**, for defendant in error:

The trial court had no jurisdiction of the subject-matter of this action, nor authority to determine the issues therein, as the cause had been properly transferred to the circuit court of the United States for the district of Kansas.

Baltimore & O. R. Co. v. *Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265; *Cox* v. *East Tennessee, V. & G. R. Co.* 68 Ga. 446; *United States* v. *Humason*, 7 Sawy. 252, 8 Fed. 71.

This action, which was commenced in the court below on December 31, 1898, was barred on the face of the petition by the statute of limitations of the state, and is not such an action as comes within the provisions of § 23 of the Civil Code, providing for the recommencement of actions which have failed otherwise than upon their merits.

Cox v. *East Tennessee, V. & G. R. Co.* 68 Ga. 446; *Fitzhenry* v. *Consolidated Traction Co.* 63 N. J. L. 142, 42 Atl. 416; *Baltimore & O. R. Co.* v. *Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265; *Hamilton* v. *Hannibal & St. J. R. Co.* 39 Kan. 56, 18 Pac. 57; *Eureka* v. *Merrifield*, 53 Kan. 794, 37 Pac.

*Headnotes by POLLOCK, J.

NOTE.—As to effect of dismissing action in Federal court, to which it has been removed, on right to bring subsequent action in state court, see also, in this series, Baltimore & O. R. Co. v. Fulton (Ohio) 44 L. R. A. 520; Hooper v. Atlantic, K. & N. R. Co. (Tenn.) 53 L. R. A. 931; and Illinois C. R. Co. v. Benz (Tenn.) 58 L. R. A. 690.

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113; *Barker* v. *Hannibal & St. J. R. Co.* 91 Mo. 86, 14 S. W. 280; *George* v. *Chicago, M. & St. P. R. Co.* 51 Wis. 603, 8 N. W. 374; *Hill* v. *New Haven*, 37 Vt. 511, 88 Am. Dec. 613; *Rugland* v. *Anderson*, 30 Minn. 386, 15 N. W. 676; *Taylor* v. *Cranberry Iron & Coal Co.* 94 N. C. 525; *Hanna* v. *Jeffersonville R. Co.* 32 Ind. 113; *Best* v. *Kinston*, 106 N. C. 205, 10 S. E. 997; *Pittsburg, C. & St. L. R. Co.* v. *Hine*, 25 Ohio St. 629; *Boyd* v. *Clark*, 8 Fed. 849; *Benjamin* v. *Eldridge*, 50 Cal. 612; *Krogg* v. *Atlanta & W. P. R. Co.* 77 Ga. 202; Tiffany, Death by Wrongful Act, § 121; *DeBoth* v. *Rich Hill Coal & Min. Co.* 141 Mo. 498, 42 S. W. 1081; *Cavanagh* v. *Ocean Steam Nav. Co.* 19 N. Y. Civ. Proc. Rep. 391, 13 N. Y. Supp. 540; *Lake Shore & M. S. R. Co.* v. *Dylinski*, 67 Ill. App. 114; *Kansas City* v. *Hart*, 60 Kan. 689, 57 Pac. 938; *Boston & M. R. Co.* v. *Hurd*, 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. 117.

Pollock, J., delivered the opinion of the court:

T. M. Rodman, an employee of the receivers of the Union Pacific Railway Company, was killed by an engine of defendant on its line of road in Kansas City on the 14th day of April, 1896. On the 1st day of August, 1896, Amanda Rodman, his widow, commenced an action against the receivers of the Union Pacific Railway Company and the Missouri Pacific Railroad Company of Missouri to recover damages for the death of Rodman by wrongful act, in accordance with the provisions of § 422*a* of the Civil Code. That action was removed into the circuit court of the United States for the district of Kansas, and thereafter, on the 1st day of December, 1898, was dismissed therefrom by plaintiff, without prejudice to the bringing of a future action. Meanwhile, the widow having been duly appointed and qualified as administratrix of the estate of deceased, this action was commenced by her in her representative capacity in the court of common pleas of Wyandotte county against the Missouri Pacific Railway Company of Kansas, on the 28th day of December, 1898, to recover damages for the death of deceased under the provisions of § 422 of the Civil Code. Defendant answered, among other defenses, denying jurisdiction in the state court to try or determine the controversy, and also pleaded in bar the limitation contained in the act under which suit is brought. The trial court sustained a demurrer to the evidence offered by plaintiff, and entered judgment for costs in favor of defendant. Plaintiff below brings error.

The questions arising upon this record for our determination are well defined, clearly presented, and important. It is affirmed on the one hand, and denied on the other, as follows: (1) The former action having been properly removed into the Federal court, the loss of jurisdiction by the state court over the subject-matter was absolute and final, not alone as to the action so removed, but as to this action brought after dismissal of the former action from the Federal court. (2) The pendency of the former action, wherein the widow, in her personal capacity, was plaintiff, and the receivers of the Union Pacific Railway Company and the Missouri Pacific Railroad Company, alleged to be a corporation of the state of Missouri, were defendants, did not operate to suspend the running of the general statute of limitations as to the present action, wherein the widow, in her representative capacity, as administratrix, is plaintiff, and the Missouri Pacific Railway Company, alleged to be a Kansas corporation, is defendant. (3) Section 422 of the Civil Code creates a right of action for damages for death by wrongful act, in the absence of which no such right of action would exist, and prescribes as a condition to such right of action the time within which the right must be exercised, and, as the present action was not brought within the prescribed time, the right was lost; and this notwithstanding the pendency of the prior action and its failure otherwise than upon the merits within one year next preceding the bringing of this present action.

Upon the first question raised, the authorities are divided. Decisions from courts of high standing and undoubted authority are not wanting in support of this contention of defendant in error,—notably, the decision of the supreme court of Ohio in *Baltimore & O. R. Co.* v. *Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265, and the supreme court of Georgia in *Cox* v. *East Tennessee, V. & G. R. Co.* 68 Ga. 446. We think, however, both the weight of authority and the better reasoning against the conclusion reached in these decisions. When, in an action pending in a state court, cognizable in and removable to the Federal court, there is filed in due time a proper petition and bond for removal to the Federal court, the state court *ipso facto* loses jurisdiction, and any further proceedings taken by the state court in that action, or a subsequent action brought upon the identical subject-matter, between the same parties, during the pendency of the action removed into the Federal court, or after final judgment therein, is *coram non judice* and void. But when the Federal court, by dismissal, relinquishes its jurisdiction over the subject-matter of the action and the parties, without adjudication of the merits, the plaintiff may again invoke the jurisdiction of the state court; and that court may properly proceed to a determination of the controversy, irrespective of, and unaffected by, the former removal to, or jurisdiction in, the Federal court. *Gassman* v. *Jarvis*, 100 Fed. 146; *Bush* v. *Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625; *Hughes* v. *Green*, 28 C. C. A. 537, 56 U. S. App. 56, 84 Fed. 833; *Chamberlain* v. *Eckert*, 2 Biss. 124, Fed. Cas. No. 2,576.

The conclusion reached in this case renders it unnecessary to express any opinion upon the second proposition stated. For, conceding the case at bar to be, in parties and subject-matter, sufficiently identified with the action first brought, and removed into the Federal court, and therefrom dismissed without prejudice prior to a determi-

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nation of the merits, and within one year next preceding the commencement of this present action, to have conserved a right of action governed by the general statutes of limitations, yet we do not think plaintiff can recover. Section 422 of the Civil Code provides: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed $10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Section 422*a* provides: "That in all cases where the residence of the party whose death has been, or hereafter shall be, caused as set forth in § 422, . . . is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is, or has been, appointed, the action provided in said § 422 may be brought by the widow, or, where there is no widow, by the next of kin of such deceased." Under this section, Amanda Rodman, as widow, brought the action which was removed into the Federal court, and dismissed therefrom without prejudice, within a year next preceding the bringing of the present action. Section 23 of the Civil Code provides: "If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure." The question is, Did the pendency of the former action, and the saving terms of this section, suspend the operation of the limitation provided in § 422, and permit the bringing of the action at bar more than two years after the cause of action arose? The question here presented is one of first instance in this court. Our decision is therefore untrammeled by any former controlling opinion, and is based upon and induced by an examination of many decisions arising upon kindred statutes, and the reasoning therein employed. The precise question has seldom arisen. Questions analogous in their nature are of frequent occurrence. At common law, or in the absence of § 422, no right of action would exist in this state in favor of anyone to recover damages for the wrongful death of Rodman. *Mobile L. Ins. Co.* v. *Brame*, 95 U. S. 754, 24 L. ed. 580; *Dennick* v. *Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *The Harrisburg*, 119 U. S. 199, *sub nom. The Harrisburg* v. *Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. The general character and purpose of the act, and the nature of the limitation therein contained, have many times received the consideration of the courts. This court, in *Hamilton* v. *Hannibal & St. J. R. Co.* 39 Kan. 56, 18 Pac. 57, in considering the act of Missouri creating a right of action for wrongful death, said: "The right thus conferred is a conditional one, and the plaintiffs in such action must bring themselves clearly within the prescribed conditions necessary to confer the right of action." In the opinion, Mr. Justice Johnston says: "The provision designating when and by whom the suit may be brought is more than a mere limitation. It is a condition imposed by the legislature, which qualifies the right of recovery, and upon which its exercise depends. The supreme court of Missouri has recently examined and interpreted this statute, and, in an elaborate opinion, reaches the conclusion that the right is a conditional one, and the condition, being annexed to the right as given in the statute, modifies the same, and in fact forms a part of the right itself." In *The Harrisburg*, 119 U. S. 199, *sub nom. The Harrisburg* v. *Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140, Mr. Justice Waite, who delivered the opinion of the court, in speaking of the statutes of the states of Massachusetts and Pennsylvania, said: "The statutes create a new legal liability, with a right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." In *Boston & M. R. Co.* v. *Hurd*, 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. 116, it is said: "It has been universally held that, where a special statute of this character gives a remedy, with an express limitation in the statute, the limitation is inherent in the right of action, and follows the remedy wherever there is an attempt to obtain it." In *Taylor* v. *Cranberry Iron & Coal Co.* 94 N. C. 525, it is held: "The provisions of this statute limiting the time within which the action must be brought is not a statute of limitations. The statute confers a right of action which did not exist before, and it must be strictly complied with. As there is no saving clause as to the time of bringing the action, no explanation as to why it was not brought will avail." Mr. Tiffany, in his work on Death by Wrongful Act (§ 121), says: "These special limitations differ in some respects from those created by the ordinary statutes of limitation. Inasmuch as the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy, but is of the right of action itself. The right is given subject to the limitation, and a subsequent change in the period of limitation will not extend the

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period so as to affect an existing right of action." In 8 Am. & Eng. Enc. Law, 2d ed. p. 875, it is said: "It seems that provisions in the statutes authorizing actions for wrongful death, which limit the time within which the actions shall be brought, are not properly statutes of limitation, as that term is generally used. They are qualifications restricting rights granted by the statutes, and must be strictly complied with. As the statutes confer a new right of action, no explanations as to why the suit was not brought within the specified time will avail, unless the statutes themselves provide a saving clause." See also *George* v. *Chicago, M. & St. P. R. Co.* 51 Wis. 603, 8 N. W. 374; *Hanna* v. *Jeffersonville R. Co.* 32 Ind. 113; *Best* v. *Kinston*, 106 N. C. 205, 10 S. E. 997. The precise question here under consideration arose in *Gerren* v. *Hannibal & St. J. R. Co.* 60 Mo. 405. It is there held: "Under § 5 of the damage act, the new suit brought against a railroad after nonsuit must be commenced within one year after the date of the injury. Section 19 of the chapter concerning limitations, . . . authorizing the commencement of a new action within a year from date of nonsuit, has no application to causes, the time for bringing which is not 'prescribed' by that chapter, . . . but otherwise limited." Also, in *Lake Shore & M. S. R. Co.* v. *Dylinski*, 67 Ill. App. 114, it is held: "Actions for damages resulting from the death of a person caused by the wrongful act of another may be commenced within two years after such death. The time is not extended by a nonsuit in a previous action." Many cases have arisen in which it has been held that minority or other legal disability of the party entitled to bring and maintain the action will not operate to extend the time prescribed in the statute for the bringing of the action, in the absence of a saving clause in the act itself. *Foster* v. *Yazoo & M. Valley R. Co.* 72 Miss. 886, 18 So. 380; *Murphy* v. *Chicago, M. & St. P. R. Co.* 80 Iowa, 26, 45 N. W. 392; *Best* v. *Kinston*, 106 N. C. 205, 10 S. E. 997; *O'Keif* v. *Memphis & C. R. Co.* 99 Ala. 524, 12 So. 454; *Louisville & N. R. Co.* v. *Sanders*, 86 Ky. 259, 5 S. W. 563. In *Beebe* v. *Doster*, 36 Kan. 606, 14 Pac. 150, this court held the general provisions of the statute of limitations ineffectual to extend the special limitation of five years contained in § 141 of the tax law, providing for the bringing of an action to recover lands sold for taxes, notwithstanding the nonresidence of the defendant. It has also held that the contractual limitation contained in a policy of insurance is not governed or controlled by the general statutes of limitations. *McElroy* v. *Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478. A review of the authorities bearing upon the question controverted compels us to hold that the scope and effect of the act above quoted is not merely to provide a remedy for a cause of action existing independent of the act itself, but to create a cause or right of action where, prior to the passage, or in the absence of the act, none existed. As a part of the right of action itself, as a condition imposed upon and in limitation of the exercise of the right granted, it is provided that the action upon which recovery is had must be commenced within two years from the time the right of action arose. No excuse pleaded for delay in the commencement of the action for more than two years will avail, for the reason that no such excuse can, in law, be held sufficient. A limitation upon the time in which a pre-existing right of action may be exercised is governed by the general statutes of limitation, and, in consequence, falls within the saving provisions of § 23, above quoted. But the limitation in time of the commencement of the action here brought under this statute is imposed as a condition upon the exercise of the right itself, is special and absolute in its nature, and is unaffected by the general provisions of § 23.

We are cited by counsel for plaintiff in error to cases in which it is claimed that a doctrine contrary to the conclusion here reached is announced. We have examined the cases cited, and find but one in which the precise question here considered was either raised or determined. The exact question was presented and considered in the case of *Swift & Co.* v. *Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969. No authorities are cited in its support, neither are reasons given for the conclusion reached. Its authority is denied.

It follows, the facts appearing upon the face of the petition, the demurrer lodged against it should have been sustained. Failing in this, the action of the trial court in sustaining a demurrer to the evidence offered by plaintiff, and entering judgment in favor of defendant, is right, and must be *affirmed*.

All the Justices concur.

Joseph SCHMALSTIEG, *Plff. in Err.*,
v.
LEAVENWORTH COAL COMPANY.

(.....Kan.....)

*Chapter 159, Laws 1897, which makes it incumbent upon every mine owner, agent, lessee, or operator of coal mines, to employ a competent fire boss, whose duties, as prescribed by the statute, are to "examine every working place every morning with a safety lamp before miners or other employees enter their respective working places," does not prescribe the limit of care to be exercised by such mine owner or operator towards em-

*Headnote by GREENE, J.

NOTE.—As to liability of employer for negligence of mine boss whom he is required by statute to employ, see Durkin v. Kingston Coal Co. (Pa.) 29 L. R. A. 808; Williams v. Thacker Coal & C. Co. (W. Va.) 40 L. R. A. 812.

For a case holding that a mine boss is a fellow servant of an injured employee, see Petaja v. Aurora Iron Min. Co. (Mich.) 32 L. R. A. 435. *Contra*, Wellston Coal Co. v. Smith (Ohio) 55 L. R. A. 99.

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ployees engaged in working in their mines. This statute increases the duty of the owner or operator of mines by requiring him to employ a competent person to look specially after the condition of the mine; and if, through the negligence of such fire boss, one of the employees is injured by the explosion of gas therein, the owner or operator is liable in damages for such injury.

(December 6, 1902.)

ERROR to the District Court for Leavenworth County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Dawes & Wulfekuhler,** for plaintiff in error:

Under Gen. Stat. 1901, ¶ 4128, if there is any standing gas in any working place, it is the absolute duty of the master to have the same diluted and rendered harmless before any person or persons enter such working place. The failure to do so renders the master liable for damages arising from such failure.

Cherokee & P. Coal & Min. Co. v. *Britton*, 3 Kan. App. 292, 45 Pac. 100; *Sommer* v. *Carbon Hill Coal Co.* 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54; *Knoxville Iron Co.* v. *Pace*, 101 Tenn. 476, 48 S. W. 232; *Deserant* v. *Cerillos Coal R. Co.* 178 U. S. 419, 44 L. ed. 1133, 20 Sup. Ct. Rep. 907; *Linton Coal & Min. Co.* v. *Persons*, 11 Ind. App. 264, 39 N. E. 214; Wharton, Neg. §§ 232, 232*b*; Shearm. & Redf. Neg. §§ 233 *et seq.* 12 Am. & Eng. Enc. Law, 2d ed. pp. 946–949; *Hannibal & St. J. R. Co.* v. *Fox*, 31 Kan. 586, 3 Pac. 320; *Gowen* v. *Bush*, 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349; *Western Coal & Min. Co.* v. *Ingraham*, 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219; *Island Coal Co.* v. *Greenwood*, 151 Ind. 476, 50 N. E. 37.

Messrs. **Atwood & Hooper** and **C. R. Middleton,** for defendant in error:

Plaintiff, Holtgraber, and Liebert were fellow servants.

Buckley v. *Gould & C. Silver Min. Co.* 8 Sawy. 394, 14 Fed. 833; *Troughear* v. *Lower Vein Coal Co.* 62 Iowa, 576, 17 N. W. 775; *Bunt* v. *Sierra Buttes Gold Min. Co.* 24 Fed. 849; *McQueen* v. *Central Branch Union P. R. Co.* 30 Kan. 689, 1 Pac. 141; *Kielley* v. *Belcher Silver Min. Co.* 3 Sawy. 500, Fed. Cas. No. 7,761; *Coal & Min. Co.* v. *Clay*, 51 Ohio St. 542, *sub nom. Consolidated Coal & Min. Co.* v. *Floyd*, 25 L. R. A. 848, 38 N. E. 610; *Mulhern* v. *Lehigh Valley Coal Co.* 161 Pa. 270, 28 Atl. 1087; *O'Boyle* v. *Lehigh Valley Coal Co.* 161 Pa. 270, 28 Atl. 1088; *Berns* v. *Gaston Gas Coal Co.* 27 W. Va. 285, 55 Am. Rep. 304.

Plaintiff was notified that the gas existed in places where he was required to work, and was told to remove it, and he knew that it was dangerous to enter said places with a naked light before removing it.

New Pittsburgh Coal & Coke Co. v. *Peterson*, 136 Ind. 398, 35 N. E. 7; *Russell Creek Coal Co.* v. *Wells*, 96 Va. 416, 31 S. E. 614.

Continuing to work after he had this knowledge, he assumed the risk.

Faulkner v. *Mammoth Min. Co.* 23 Utah, 437, 66 Pac. 799; *Wahlquist* v. *Maple Grove Coal & Min. Co.* (Iowa) 89 N. W. 98; *Rush* v. *Missouri P. R. Co.* 36 Kan. 134, 12 Pac. 582; *Clark* v. *Missouri P. R. Co.* 48 Kan. 654, 29 Pac. 1138; *Davis* v. *Trade Dollar Consol. Min. Co.* 117 Fed. 122.

After the mine owner has complied with the statute, and employed a competent person for examiner or fire boss, he, or it, has performed the measure of care required, and in the manner required by the law, towards his employees; and if, through the examiner's or fire boss's negligence, one of the employees is injured, it would violate every principle of right and justice to make the master respond in damage for such negligence.

Hughes v. *Oregon Improv. Co.* 20 Wash. 294, 55 Pac. 119; *Colorado Coal & I. Co.* v. *Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Waddell* v. *Simoson*, 112 Pa. 567, 4 Atl. 725; *Deserant* v. *Cerrillos Coal R. Co.* 9 N. M. 495, 55 Pac. 290; *Portance* v. *Lehigh Valley Coal Co.* 101 Wis. 574, 77 N. W. 875; *Lineoski* v. *Susquehanna Coal Co.* 157 Pa. 153, 27 Atl. 577.

Greene, J., delivered the opinion of the court:

Joseph Schmalstieg sued the Leavenworth Coal Company for injuries sustained by the explosion of gases in the coal mine in which he was working as a miner. When plaintiff had introduced his evidence, the defendant demurred thereto. The demurrer was sustained, and judgment rendered thereon, to reverse which Schmalstieg prosecutes this proceeding. Without entering into a discussion of the evidence, suffice to say we are of the opinion that the demurrer should have been overruled.

The important and controlling question in the case is, Does a mine owner, agent, lessee, or operator of any coal mine discharge himself of liability to an employee who is injured by the negligent omission of the fire boss to perform the duties imposed upon him by the statute, when such owner, agent, lessee, or operator has exercised ordinary care in the selection of such fire boss? We understand this question was resolved in the affirmative by the court below; hence, the sustaining of the demurrer. The statutes directly applicable to the question under consideration, and relied upon for the contention of the defendant below, are §§ 4150, 4162, Gen. Stat. 1901, which read:

"Sec. 4150. The inspector of mines shall cause the volume of air to be increased, when necessary, to such an extent as will dilute, carry off, and render harmless the noxious gases generated therein. And mines generating fire damp shall be kept free of standing gas, and every working place shall be carefully examined every morning with a safety lamp by an examiner or fire boss before miners or other employees enter their

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respective working places. Said examiner or fire boss shall register the day of the month at the place of the workings, and also on top in a book which shall be kept in the weighmaster's office for such special purpose; and, as proof of inspection, he shall daily record all places examined in said book, and in case of danger where fire damp may have accumulated during the absence of any person or persons employed therein, said examiner or fire boss must notify the miners or those employed therein, or those who may have occasion to enter such places. And the hydrogen or fire damp generated therein must be diluted and rendered harmless before any person or persons enter such working or abandoned part of the mine with a naked light."

"Sec. 4162. In case of noncompliance with §§ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of this act by any owner, operator, agent, or lessee of any mine, or any miner or other employee working therein, upon whom any duty is cast by any of said sections, he shall be deemed guilty of a misdemeanor, and shall, upon conviction of the same, for each offense be punished by a fine of not less than $100 and not to exceed $300, or by imprisonment in the county jail for a period of not less than thirty days and not to exceed ninety days, or by both such fine and imprisonment, in any court having competent jurisdiction: Provided, that this act shall be construed as to affect or apply only to coal mines of this state, or any person or persons operating or owning such coal mines."

It is ably argued that this law takes from the owner, agent, lessee, or operator of every coal mine the exercise of judgment or discretion in determining the volume of air necessary to dilute, carry off, and render harmless the noxious gases generated in such mine, and, in providing that each mine owner or operator shall select some competent person, called an "examiner" or "fire boss," to investigate, determine, and direct how and where the air shall be distributed, and how much will be necessary to dilute, carry off, and render harmless the noxious gases generated therein, has relieved the owner or operator from any responsibility or civil liability to persons injured through the negligent acts or omissions of such examiner or fire boss, provided the owner or operator shall have exercised care in the selection and employment of a competent person as fire boss. This position is sought to be re-enforced by reference to § 4162, above quoted, which makes the neglect of the examiner or fire boss to perform the duties imposed upon him by the statute a misdemeanor, and subjects him to a fine and imprisonment. As stated by counsel: "By this statute the legislature of the state of Kansas has undertaken to prescribe and define the manner and measure of care that shall be exercised by mine owners with reference to the accumulation of gas in the working places of said mine, thereby prohibiting the master from exercising his judgment with reference to the same. After the mine owner has complied with the statute, and employed a competent person for examiner or fire boss, he, or it, has performed the measure of care required, and in the manner required, by the law, towards his employees; and if, through the examiner's or fire boss's negligence, one of the employees is injured, . . . the master is not responsible for the negligence of the examiner or fire boss, ... especially where the statute prescribed a penalty for violation of its provisions. . . ." This contention is plausible, and not without authority in adjudicated cases, but we do not think it sound. The authorities in support of this position base their conclusion on the ground that the fire boss is a creature of the legislature, selected by the mine owner in obedience to the commands of the law, and in the interest and protection of the miners themselves; that, as such, he is a co-employee or fellow servant, and, if he is negligent or careless in the performance of his duties, the miners can at once discover it, and notify the superintendent, while the owner, with every wish to protect the miners, has no such opportunity of information. Some of the authorities sustaining this position are *Hughes* v. *Oregon Improv. Co.* 20 Wash. 294, 55 Pac. 119; *Colorado Coal & I. Co.* v. *Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Waddell* v. *Simoson*, 112 Pa. 567, 4 Atl. 725; *Delaware & H. Canal Co.* v. *Carroll*, 89 Pa. 374; *Redstone Coke Co.* v. *Roby*, 115 Pa. 364, 8 Atl. 593. We do not pretend to reconcile these decisions with the numerous others holding the opposite opinion, which are hereafter cited.

At common law it is the duty of a master to exercise care and diligence to provide his servants with a reasonably safe place at which to work, and reasonably safe and suitable tools and appliances with which to perform the service. This duty can only be satisfied by performance. One of the chief dangers to be guarded against in the mining of coal is the accumulation of noxious and explosive gases and dust. The duty, therefore, at common law, of guarding against these dangers, and making the place reasonably safe for workingmen, is cast upon the master; and he is liable for injuries resulting from a neglect to perform such duties, unless relieved therefrom by statute.

The title of the act in question (Laws 1897, chap. 159) reads: "An Act to Provide for the Health and Safety of Persons Employed in Mines, and Supplementary to and Amendatory of Chapter 66*a*, General Statutes of 1889, and Repealing Chapter 171, Session Laws of 1895, and Providing Penalty for Violation of the Same." We would be surprised, indeed, to find in an act bearing the above title a provision which takes from the miner the strongest protection from personal injuries the law has ever given, namely, the right to make his employer respond in damages for injuries sustained resulting from the negligence of such employer in not providing him a safe place at which to work. The tendency of modern legislation is to magnify, rather than minimize, the individual,—especially the man

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whose vocation is that of a common laborer: to throw around him greater protection, and surround him with better conditions and advantages for self-improvement; and, to secure these objects, increase, rather than decrease, the instances and circumstances under which his employer shall be civilly liable for personal injuries sustained because of the negligence of such employer. Therefore, a statute that would take away from him any of the protection of the common law should be plain, unambiguous, and subject to no other construction or interpretation. Laws 1897, chap. 159, § 3 (being the same act from which the above quotations are taken), provides: "Every mine owner, agent, lessee, or operator of coal mines . . . shall provide and hereafter maintain for every mine, ample means of ventilation. . . . Said volume of air shall be directed or circulated, where any person or persons may be working in any of said mines." It will be observed that the duty is here placed upon the mine owner or operator to provide and maintain ample means of ventilation, and the volume of air thus provided "shall be directed or circulated where any person or persons may be working in any of said mines." We also find in § 4150, Gen. Stat. 1901, the following: "And mines generating fire damp shall be kept free of standing gas, and every working place shall be carefully examined every morning with a safety lamp by an examiner or fire boss before miners or other employees enter their respective working places." While the latter section designates the person who shall make the examination, it is the duty of the owner or operator to keep such mine free of standing gas. The act provides that the owner or operator of mines shall employ a fire boss. It defines his duties, and makes a neglect to perform them a misdemeanor, subject to fine and imprisonment. The only object sought is an additional precaution to secure a safe place for miners to work. It was not intended to relieve the owner or operator from any civil liability for damages resulting to the laborer from the negligent performance of such duties by the fire boss. The act in question in no way limits or takes from the owner or operator the general supervision of the work, or the exercise of judgment in the manner or system of ventilation. He is left free in the selection of the person to perform those duties, to fix the compensation, prescribe and require of him the performance of duties additional to those designated by the statute, and to exercise a general supervision over him in the performance of all of his prescribed duties.

Authorities are numerous holding that, under statutes similar to ours, the employer is not relieved of civil liability for personal injuries resulting from the negligent performance of the duties imposed by law upon the fire boss. In *Knoxville Iron Co.* v. *Pace*, 101 Tenn. 476, 484, 485, 48 S. W. 232, 234, —an action to recover damages resulting from the explosion of dust in the mine,—it was contended that the owner was not liable because the statute provided for the appointment of a fire boss, whose duty it was to keep the mine free of explosive gas. The court said: "The tenth assignment is that the court erred in defining the degree of care required of a master in furnishing a safe room or entry where the plaintiff should work, and it is insisted that the effect of the charge is to make the mine owner an insurer of the safety of the premises where the servant is to work, and an insurer, also, of the skill and prudence of fellow servants. Taking the charge as a unit, we do not think it warrants the construction contended for, and is in accord with the general rule that 'it is the duty of the master to keep his premises used in the prosecution of his business in a reasonably safe condition, and, if he fails to do so, he is liable to the servant for all injuries resulting to him from such defects.'" In speaking of the statute the court further said: "The eighth clause [Acts 1881, chap. 170] provides that, 'to better secure the ventilation to either coal mines or collieries, to provide for the health and safety of the men employed therein, otherwise and in every respect, the owner or agent, as the case may be, in charge of every coal mine and colliery shall employ a competent inside overseer, to be called a mining boss, who shall keep a careful watch over the ventilating apparatus, airways, tramways, pumps, timbering, signaling arrangements, tubes, etc., and all things connected with and appertaining to the safety of the men at work in the mine. He or his assistant shall examine carefully the workings of all mines generating explosive gases every morning before the miners enter the coal mine or colliery, and shall ascertain that the mine is free from all danger.'" *Sommer* v. *Carbon Hill Coal Co.* 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54, 57, was a case arising under the statute of Washington. The statute is identical with our own. The court said: "Disregarding this last averment, as a conclusion drawn from the facts stated, it is clear that, under the law and the allegations of the complaint, Lowery was intrusted with a duty in the performance of which he represented the owners and operators of the mine; and that, if he was negligent in the performance of that duty, and the plaintiff was injured thereby, the latter did not assume the risk of such employment." In *Linton Coal & Min. Co.* v. *Persons*, 11 Ind. App. 264, 275, 276, 39 N. E. 214, 218, the court, in construing a similar statute, said: "In other words, the effect of the contention is that the employment of a competent mine boss is the full measure of the duty of the owner or operator of the mine in such cases. . . . The gist of the action is not the failure to employ a competent mine boss, but grows out of the failure of the employer to discharge the duties resting on him in relation to providing a safe working place for appellee. This duty appellant could not, in our opinion, by virtue of the provisions of the statute, delegate to the mine boss, so as to escape liability on account of the failure to

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perform the acts therein required. The statute prescribes the care which the employer is required to exercise. The employment of a competent mine boss is not the exercise of the care. The failure of the boss to perform the duties designated in the statute is, under the statute, the negligence of the master. . . . In other words, the statute was not intended to lessen the duties of the master, but was intended to increase his duty, to the extent of requiring him to employ a mining boss to give special attention to the condition of the mine. It was not contemplated, however, when the mining boss was employed, that such employment should relieve or exempt the master from liability." We are of the opinion that the construction placed upon the statute in the above-cited opinions is correct, and that the demurrer should have been overruled. There is some contention that, notwithstanding the construction of the statute, the evidence introduced by the plaintiff below was insufficient to prove negligence on the part of the company. We have given this matter no consideration, as a reversal of the judgment must necessarily follow the conclusion we have reached upon the other question.

The cause is reversed and remanded, with instructions to overrule the demurrer to the evidence.

All the Justices concur.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, *Plff. in Err.*,
v.
L. T. MERRILL.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, *Plff. in Err.*,
v.
SAME.

(.....Kan.....)

***1. A railway company which delivers a defective freight car to a connecting line is not liable in damages to an employee of the latter, who is injured by reason of such defects, after the car has been inspected by the company receiving it. The loss of control over the car and over the servants having it in charge relieves the delivering company from responsibility to the employees of the receiving company.**

2. That part of the decision in Missouri, K. & T. R. Co. v. Merrill, 61 Kan. 671, 60 Pac. 819, indicated by the first paragraph of the syllabus, is overruled.

(October 11, 1902.)

*Headnotes by SMITH, J.

NOTE.—As to liability of company transferring defective car to other company for injuries received by the employees of the latter thereby, see also cases in *note* to Cleveland, C. C. & St. L. R. Co. v. Berry (Ind.) 46 L. R. A. 119.

WRITS of error to the Court of Common Pleas for Wyandotte County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

Statement by **Smith**, J.:

Defendant in error, L. T. Merrill, who was plaintiff in the court below, recovered a judgment against the Kansas City Suburban Belt Railroad Company and the Missouri, Kansas, & Texas Railway Company for personal injuries sustained by him in attempting to pass from a flat or coal car to a box car in the yards of the Chicago Great Western Railway Company in Kansas City, Kansas. He was a switchman in the employ of the latter company. The flat car belonged to the Missouri, Kansas, & Texas Railway Company. It was loaded with iron pipe at St. Louis, and the contents consigned to St. Joseph, Missouri. The line of the latter company terminates at Kansas City, Missouri. The car was provided with end gates, which were held in an upright position by wooden cleats, nailed to the inside of the side boards on the outside of the end gates. There were no iron hooks or eyebolts provided, which are generally used to hold the end gates in place. On the arrival of the car in Kansas City, Missouri, it was sent from the yards of the Missouri, Kansas, & Texas Railway Company to the yards of the Suburban Belt Railroad Company, there inspected by the latter company, placed in a train with about twenty-five others, and pushed a distance of 2,000 feet across the state line, to a place where cars were usually left to be received by the Chicago Great Western Railway Company. There the car in question was inspected by an inspector of the latter company. The switching crew of the Chicago Great Western Railway Company, of which plaintiff below was a member, then took charge of the string of cars, and hauled them to the yards of the latter company, and proceeded to make up a train destined for St. Joseph, Missouri, and places beyond. Plaintiff below was near the engine on a box car, when, in the discharge of his duties, he started toward the rear of the train. Coming to the flat car, he walked over the iron pipe, which was about equal in height to the sides of the car and end gates. The pipe had been pushed back from the end gate so that the top of it was about 15 inches therefrom. Plaintiff stepped with his right foot from the end of the pipe to the top of the end gate, and attempted to cross over to a box car attached. In doing so, the thrust of his body caused the end gate to give way, and he fell between the cars while in motion. It would seem that the load on the flat car had pushed the sides outwardly so that the cleats nailed thereto did not hold the end gate in an upright position, and permitted it to move past the cleats and topple over when stepped on.

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Messrs. **Lathrop, Morris, Fox, & Moore** and **Miller, Buchan, & Morris** for plaintiffs in error.

Messrs. **T. N. Sedgwick** and **Silas Porter** for plaintiff in error Missouri, K. & T. R. Co.

Mr. **Robert Dunlap** for Atchison, Topeka, & Santa Fé Railroad Company as *amicus curiæ*.

Messrs. **Angevine & Cubbison**, for defendant in error:

The railroad owed the same duty to the switchmen of the roads to which it sent its car for transportation that it did to its own switchmen, *i. e.*, to provide a car which would be reasonably safe for the service to be performed and for employees of connecting lines to handle.

Missouri, K. & T. R. Co. v. *Merrill*, 61 Kan. 671, 60 Pac. 819; *Moon* v. *Northern P. R. Co.* 46 Minn. 106, 48 N. W. 679; *Pennsylvania R. Co.* v. *Snyder*, 55 Ohio St. 342, 45 N. E. 559; *Roddy* v. *Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, 15 S. W. 1112; *Savannah, F. & W. R. Co.* v. *Booth*, 98 Ga. 20, 25 S. E. 928; *Olson* v. *Pennsylvania & O. Fuel Co.* 77 Minn. 528, 80 N. W. 699; *Garnett* v. *Phœnix Bridge Co.* 98 Fed. 192; *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 503; *Horne* v. *Meakin*, 115 Mass. 326; *Cleveland, C. C. & St. L. R. Co.* v. *Berry*, 152 Ind. 607, 46 L. R. A. 33, 53 N. E. 415; *Teal* v. *American Min. Co.* 84 Minn. 320, 87 N. W. 837.

The questions decided by this court upon the former petition in error in this case are the law of the case, and will not be re-examined by this court.

Headley v. *Challiss*, 15 Kan. 602; *Central Branch Union P. R. Co.* v. *Shoup*, 28 Kan. 394, 42 Am. Rep. 163; *Crockett* v. *Gray*, 31 Kan. 346, 2 Pac. 809; *Western News Co.* v. *Wilmarth*, 34 Kan. 254, 8 Pac. 103; *Sizer* v. *Many*, 16 How. 101, 103, 14 L. ed. 862, 863; *Roberts* v. *Cooper*, 20 How. 467, 15 L. ed. 969; *Wayne County* v. *Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Cleveland, C. C. & St. L. R. Co.* v. *Tartt*, 49 L. R. A. 98, 39 C. C. A. 568, 99 Fed. 369; *Leese* v. *Clark*, 20 Cal. 388; *New Haven & N. Co.* v. *State*, 44 Conn. 376; *Thornton* v. *Lane*, 11 Ga. 459; *Semple* v. *Anderson*, 9 Ill. 546; *Gray* v. *Dickinson*, 14 Ky. L. Rep. 890, 13 S. W. 209; *Meyer* v. *Shamp*, 26 Neb. 729, 42 N. W. 757; *Ayer* v. *Stewart*, 16 Minn. 89, Gil. 77; *Burke* v. *Mathews*, 37 Tex. 73; *Meinzer* v. *Racine*, 74 Wis. 166, 42 N. W. 230; *Rector* v. *Danley*, 14 Ark. 304; *Southwestern R. Co.* v. *Wright*, 68 Ga. 311; *Damon* v. *DeBar*, 94 Mich. 594, 54 N. W. 300; *Mygatt* v. *Coe*, 142 N. Y. 82, 24 L. R. A. 850, 36 N. E. 871; *Hawley* v. *Smith*, 45 Ind. 183; *Adams County* v. *Burlington & M. River R. Co.* 55 Iowa, 94, 2 N. W. 1054, 7 N. W. 471; *Smith* v. *Auld*, 31 Kan. 266, 1 Pac. 626; *Barton* v. *Thompson*, 56 Iowa, 571, 41 Am. Rep. 119, 9 N. W. 899; *Lassing* v. *Paige*, 56 Cal. 142; *Stacy* v. *Vermont C. R. Co.* 32 Vt. 552.

Delivering the car to a connecting road is an invitation to its employees to handle it, and an affirmation that the car is safe and fit for service, and such employees are entitled to repose confidence in the implied assurance that such is the fact.

Moon v. *Northern P. R. Co.* 46 Minn. 106, 48 N. W. 679; *Pennsylvania R. Co.* v. *Snyder*, 55 Ohio St. 342, 45 N. E. 559; *Missouri, K. & T. R. Co.* v. *Merrill*, 61 Kan. 671, 60 Pac. 819.

Whenever a person should reasonably apprehend that as the natural and probable consequence of his act of neglect another will be placed in a situation of danger of receiving an injury, a duty of exercising due care arises.

Levy v. *Langridge*, 4 Mees. & W. 337; *Winterbottom* v. *Wright*, 10 Mees. & W. 114; *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 503; *Garnett* v. *Phœnix Bridge Co.* 98 Fed. 192; *Mastin* v. *Levagood*, 47 Kan. 36, 27 Pac. 122; *Savannah, F. & W. R. Co.* v. *Booth*, 98 Ga. 20, 25 S. E. 928; *Roddy* v. *Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, 15 S. W. 1112; *Godley* v. *Hagerty*, 20 Pa. 387, 59 Am. Rep. 731; *Carson* v. *Godley*, 26 Pa. 111, 67 Am. Dec. 404; *Stenberg* v. *Willcox*, 96 Tenn. 163, 34 L. R. A. 615, 33 S. W. 917; *Coke* v. *Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Nugent* v. *Boston, C. & M. R. Co.* 80 Me. 62, 12 Atl. 797; *Bright* v. *Barnett & R. Co.* 88 Wis. 209, 26 L. R. A. 524, 60 N. W. 418; *Coughtry* v. *Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Devlin* v. *Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Mulchey* v. *Methodist Religious Soc.* 125 Mass. 487; *Hayes* v. *Philadelphia & R. Coal & I. Co.* 150 Mass. 458, 23 N. E. 225; *Elliott* v. *Hall*, L. R. 15 Q. B. Div. 320; *Martin* v. *North Star Iron Works*, 31 Minn. 407, 18 N. W. 109; *Killian* v. *Augusta & K. R. Co.* 79 Ga. 234, 4 S. E. 168; *Snow* v. *Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Smith* v. *New York & H. R. Co.* 19 N. Y. 127, 75 Am. Dec. 305; *Moon* v. *Northern P. R. Co.* 46 Minn. 106, 48 N. W. 679; *Pennsylvania R. Co.* v. *Snyder*, 55 Ohio St. 342, 45 N. E. 559; *Teal* v. *American Min. Co.* 84 Minn. 320, 87 N. W. 837.

Smith, J., delivered the opinion of the court:

The question for consideration is whether a railway company which delivers a defective car to a connecting carrier is liable for injuries sustained by an employee of the latter, by reason of such defect, after the receiving company has inspected the car and taken it in charge for transportation over its line. In a former decision of this case it was held to be within the contemplation of the first carrier that the car would be delivered to another for transportation, and it was also known that connecting carriers employ switchmen to handle such cars, and that their services are necessary in the work of making up trains. It was said: "With this knowledge, it was the duty of both plaintiffs in error to provide a car which would be reasonably safe for the service to be performed and for employees of connecting lines to handle, to the end that freight might be expeditiously carried to its destination. . . . Negligence on the part of the Chicago Great Western Railway Company will not excuse the plaintiffs in error either for their failure to inspect, or, having inspected the car, permitting it

to be delivered to a connecting line in a condition which might be dangerous to switchmen and other employees engaged in the practical part of the business of railway transportation." *Missouri, K. & T. R. Co.* v. *Merrill*, 61 Kan. 671–675, 60 Pac. 820. We are now fully convinced that the doctrine announced in the former decision on the subject in hand runs counter to an unbroken current of authorities, and fails to stand the test of reason. A critical examination of the cases cited in the former opinion to sustain the view then taken will show that they are distinguishable from the case at bar. We will review some of them.

In *Pennsylvania R. Co.* v. *Snyder*, 55 Ohio St. 342, 45 N. E. 559, there was a traffic arrangement between the different railway companies forming a fast freight line by which they were to share in the earnings of the transportation in proportion to the distance the car should be hauled over their respective roads. Under the arrangement, the Pennsylvania company, before delivering its cars to the Lake Shore company, agreed to have them properly inspected and put in safe condition for hauling. The car, when delivered to the Lake Shore company to be taken over its road, was defective and unsafe, which proper inspection would have discovered, and injury was caused thereby to an employee of the Lake Shore company. The case differs from the present one. It was argued in the briefs in that case that by reason of the traffic contracts between them the two railroads were partners, and it is stated in the opinion that under the arrangement the Pennsylvania company, before delivering its cars to the Lake Shore road, was to have them properly inspected, and put in safe condition for hauling. While there is much said in the opinion favorable to the defendant in error on the question before us, yet the peculiar contractual relations of the two roads as to inspection and payment of the cost of repairs do not exist in this case. In the case just commented on, *Moon* v. *Northern P. R. Co.* 46 Minn. 106, 48 N. W. 679, is cited and approved. That decision was given prominence as a precedent in the former opinion in this case. In the *Moon Case* the Northern Pacific and Manitoba railroad companies were connecting carriers, and interchanged cars at certain common points under a traffic agreement. According to a rule adopted by the companies, cars received and delivered were required to be inspected by the car inspectors of both on the transfer track, and, if any repairs were needed, they were to be made by the Northern Pacific company before they were transferred and received by the Manitoba company. Accordingly, the car was so inspected by the car inspectors of both companies. It was examined by them together at the same time, and they agreed that it was in good order. Afterwards, while the car was being operated by the Manitoba company, the plaintiff's intestate was injured by a defective brake. It was claimed that the brake staff was defective, and also that the car was not properly or carefully inspected by the inspectors of the respective companies. It is to be observed that in the *Moon Case* the inspection by the two companies was substantially one act. The Northern Pacific company, through its inspector, at the time the inspection was made, knew that no other or further inspection would be made for the protection of the employees of the Manitoba company. Hence he is held in law to have anticipated that, if his inspection was careless or negligent, the employees of the Manitoba company would be subjected to whatever dangers should arise therefrom. The court said: "In this case the inspection by the two companies was substantially one transaction, in pursuance of a mutual arrangement under which it was made jointly by the two car inspectors." The case of *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 503, was also cited in the former opinion, and is referred to in *Moon* v. *Northern P. R. Co.* 46 Minn. 106, 48 N. W. 679. The facts on which that decision rested were as follows: The defendant, a dock owner, supplied and put up a staging outside a ship in his dock under a contract with the shipowner. The plaintiff was a workman in the employ of a ship painter, who had contracted with the shipowner to paint the outside of the ship, and, in order to do the painting, the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock, and was injured. In that case the staging was supplied for immediate use, and it was not within the contemplation of the parties that the plaintiff's employer should make an inspection of the appliances to ascertain their fitness prior to their use. It was said by Brett, M. R.: "It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use: that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff, a working ship painter." In Beven on Negligence (2d ed. vol. 1, p. 62) the author says: "It is submitted that the principle underlying the decision in *Heaven* v. *Pender* is that the dock owner, having undertaken to supply the staging, thereupon undertook the obligation to supply a fit staging, which obligation the plaintiff was justified in assuming he would discharge. Had there been a duty on the shipowner or on the ship painter to examine the staging, the chain of connection between the plaintiff and the dock owner would have been broken. The decision must, therefore, be taken to imply that there was no duty on the part of anyone subsequent to the dock owner to test the staging supplied, but that, when the dock owner undertook to supply staging, there was an obligation that the staging supplied should be reasonably fit for the purpose for which it was to be used; so that those coming to use it might trust to the performance of the dock owner's duty without any independent examination of their own."

In *Savannah, F. & W. R. Co.* v. *Booth*, 98

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Ga. 20, 25 S. E. 928, the deceased was an employee of a mill located on a railway company's switch. The latter placed cars on the switch to be loaded by the mill hands, and by reason of a defect in the car the employee was killed, and his representative recovered judgment therefor against the railway company, which was sustained. The railway company in that case selected and retained control of the car, and placed it in position, knowing the purpose for which and by whom it would be used; thus extending to the injured servant an invitation to use it. Had the master been a mere hirer, or the company exercised no right as to the selection of the cars to be used, the duty of inspection would have been upon the master, and, in case of injury to his servant in consequence of his furnishing an unsafe appliance, the loss would have fallen upon him.

A recovery has been denied in cases like the one at bar on two grounds: First. There being a positive duty resting on the receiving railway company to inspect the car turned over to it for transportation by another company, to the end that its employees may not be injured by defects existing before its receipt, the omission or negligent discharge of such duty breaks the causal connection between the negligence of the company tendering the defective car and the plaintiff's injury. In such cases the failure to inspect, or the negligent manner of doing it, is the proximate cause of the injury to the employee, and the negligence of the company turning over the unsafe car is the remote cause. The failure to discharge the obligation to inspect interposes an independent agency, which severs the causal connection between the company first guilty of negligence and the hurt. It was so held in *Fowles* v. *Briggs*, 116 Mich. 425, 40 L. R. A. 528, 74 N. W. 1046, a case very similar to this. See also *Lellis* v. *Michigan C. R. Co.* 124 Mich. 37, 82 N. W. 828. The duty of a railway company to inspect cars of other roads received by it is enjoined by law. *Missouri P. R. Co.* v. *Barber*, 44 Kan. 612, 24 Pac. 969; *Atchison, T. & S. F. R. Co.* v. *Penfold*, 57 Kan. 148, 45 Pac. 574; *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777. Wharton, in his work on Negligence (§ 439), says: "There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection." The principle above stated is well illustrated in *Carter* v. *Towne*, 103 Mass. 507. There the defendant negligently sold gunpowder to a child, but the child gave all of the powder to its parents, who afterwards allowed the child to take some of it, by the explosion of which he was injured. The defendant was held not liable, because the effect of his negligence had been cured by the intervening breach of the child's parents in taking charge of the powder, and their consequent negligence in allowing the child to have it again could not restore the connection between the defendant's original negligence and the final injury.

A second, and, we think, better founded, reason for denying the right to recover in cases like the present is that the liability to a servant ceases with the control of the master over his actions. In *Glynn* v. *Central R. Co.* 175 Mass. 510, 56 N. E. 698, the plaintiff was in the employ of the New York, New Haven, & Hartford Railroad Company, in Connecticut, and was injured while coupling a car belonging to a New Jersey railway company, which had a defective coupling apparatus. He sued the latter company. The court, in holding the defendant not liable, said: "There was no dispute that, after the car had come into the hands of the New York, New Haven, & Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point, if not before, we are of opinion that the defendant's responsibility for the defect in the car was at an end. . . . But when a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed. Thus, the case of *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84, shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is, without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given up to a lessee, who, if he does his duty, will keep it safe. In the case at bar the car did not threaten harm to anyone unless it was used in a particular way. Whether it should be used in a dangerous way or not depended, not upon the defendant, but upon another road. Even assuming that the car had come straight from the defendant at Harlem river, the defendant did no unlawful act in handing it over. Whatever may be said as to the responsibility for a car dispatched over a connecting road before there has been a reasonable chance to in-

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spect it, after the connecting road has had the chance to inspect the car and has full control over it the owners' responsibility for a defect which is not secret ceases. See *Sawyer* v. *Minneapolis & St. L. R. Co.* 38 Minn. 103, 35 N. W. 671; *Wright* v. *Delaware & H. Canal Co.* 40 Hun, 343; *Mackin* v. *Boston & A. R. Co.* 135 Mass. 201, 206, 46 Am. Rep. 456." In this case there was no contractual relation existing between the switchmen in the employ of the Chicago Great Western Railway Company and the plaintiffs in error. They did not employ them, and they had no power to discharge them. They could protect themselves against damages resulting to their own servants by reason of defects in the car by giving them notice of its condition, in which event their servants would have the option of assuming the risk or of quitting the service of their employers. There was no relation of confidence between Merrill and the plaintiffs in error. The latter owed a duty to their own servants to see that the cars put in their charge were in a reasonably safe condition and in proper repair, but to extend this duty to every servant of every other railroad in the United States under whose charge defective cars might come would be to formulate a new rule of liability for negligence not sustained by reason or authority. In *Sawyer* v. *Minneapolis & St. L. R. Co.* 38 Minn. 103–105, 35 N. W. 672,—a case in many respects like the present one,—the court said: "At the time of the accident the car was under the management and control of the company operating it, and not of the defendant. It did not come to the hands of the plaintiff through the agency or by the authority of the defendant, and there is no privity between them. It owed him no duty growing out of contract, and was not bound to furnish him safe instrumentalities. As to the defendant, the plaintiff was a mere stranger. [Citing authorities.] . . . The liability of the defendant in respect to the condition of its cars did not extend beyond those to whom it owed some duty by reason of its relation to them as master, employer, or carrier. Any other rule would be found impracticable of application in ordinary business operations." A railway company might have occasion to send a train of defective cars from San Francisco to Boston for repairs, to be hauled over several lines of road. Its own servants, knowing their bad condition, would use a high degree of care to avoid injury from them; but, under the theory of counsel for defendant in error, unless the company forwarding them gave express notice of their condition to every railway employee of the several roads transporting the cars, it would be liable for damages to them in the event they were hurt by reason of such defects. In *Winterbottom* v. *Wright*, 10 Mees. & W. 109–114, the defendant had contracted with the postmaster general to provide a coach for carrying the mail, and agreed to keep it in repair, and fit for use. Other persons had a contract with the postmaster general to supply horses and coachmen for conveying the coach. The vehicle broke down, and injured the driver, by reason of the negligence of the defendant in failing to keep it in proper repair and fit for use. Lord Abinger said: "There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." So a gas fitter was held not liable for damages for negligently hanging a chandelier in a public house, knowing that it would likely fall on plaintiff and others unless properly hung. It fell, and injured the plaintiff. The court held that he had no cause of action, because the declaration did not disclose any duty by the defendant towards the plaintiff for the breach of which an action could be maintained. *Collis* v. *Selden*, L. R. 3 C. P. 495. In *Heizer* v. *Kingsland & D. Mfg. Co.* 110 Mo. 605–617, 15 L. R. A. 821, 19 S. W. 633, a servant of the purchaser of a steam boiler was injured by the explosion of it. He sought to charge the manufacturer of the boiler, and alleged that the latter, when he sold it, warranted it to be free from defects, and of first-class material; that the cylinder was made of poor material, was defective in construction, and too weak to stand the ordinary strain,—all of which defects were known to the defendant's agents at the time of the sale,—and by reason thereof the explosion occurred. The court, in denying a right to recover, said: "Wharton thinks the better reason for the rule is that there is no causal connection between the negligence and the hurt; but, be this as it may, the rule itself is well established in England and in the United States, and we think the case in hand comes within it. It is true the defendant must have known, when it made and sold the machine to Ellis, that other persons would be engaged in operating it; but this is no reason why defendant should be held liable to such other persons for injuries arising from the negligent use of poor material or for defective workmanship. Such knowledge must have existed in the cases which have been cited as asserting the rule, and would have been as good an argument against the rule in those cases as in the case at hand. . . . The plaintiff's case tends to show no more than negligence, and an action based on that ground must be confined to the immediate parties to the contract by which the machine was sold. To hold otherwise is to throw upon the manufacturers of machinery not necessarily dangerous a liability which, in our opinion, the law will not justify." In the case quoted from, a large number of authorities, both English and American, are collected, which sustain the principle announced. See, to the same effect, *Necker* v. *Harvey*, 49 Mich. 517, 14 N. W. 503; *Losee* v. *Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Bragdon* v. *Perkins*-

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Campbell Co. 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109.

One of the principal reasons given in the former decision in this case for holding plaintiffs in error liable was that they knew that this defective car, after it left their hands, must be switched about, and put into trains of connecting roads by switchmen employed by the latter, and, with such knowledge, they were negligent in permitting it to go into the charge of such railway employees in a defective condition. In the many cases cited and quoted from above it was equally well known by the manufacturer of a defective machine—like an elevator, for example—that employees of the purchaser would be called on to use it; yet, there being no privity between the maker of the machine and the vendee's servants who were injured by it, there could be no recovery by the latter against the manufacturer or builder. *Heizer* v. *Kingsland & D. Mfg. Co.* 110 Mo. 605–617, 15 L. R. A. 821, 19 S. W. 633. If responsibility for defects in this car is to be fixed on the two railways, or either of them, then the application of such a rule of liability must, of necessity, be extended to cover the case of a brakeman injured by a negligently constructed car wheel, and permit a recovery by him of damages against a foundry company which cast and furnished the wheel and sold it to the railway company; for it is within the contemplation of a manufacturer of car wheels that they will come into the charge and control of the servants of the railway companies using the cars. If such wheels are negligently constructed, the contemplated purpose of their future use being manifest, the liability of the maker would follow that use everywhere whenever they happened to cause injury to a railroad employee operating them. This liability of the maker could not be defeated by the fact that the defective appliances might have changed ownership and control many times after their first adaptation to railway purposes. As we have seen, the liability of negligent parties so far removed from the injury as the manufacturer in the supposed case finds no support in the authorities. The defective car was not inherently dangerous. It was the manner of its use which caused the injury. The two railway companies that handled the car before its delivery to the Chicago Great Western Railway Company cannot be held to that strict account which the law imposes on one who negligently delivers poisonous drugs to another, imminently dangerous to human life, which fall into the hands of third persons to their injury. In *Roddy* v. *Missouri P. R. Co.* 104 Mo. 234–247, 12 L. R. A. 746, 15 S. W. 1114, it is said: "It cannot reasonably be contended that a railroad car, though supplied with defective brakes, is an imminently dangerous instrument. Unless put in motion, it is perfectly harmless, and when in motion is not essentially dangerous." In *Mastin* v. *Levagood*, 47 Kan. 36–42, 27 Pac. 124, it is said: "There is this marked distinction between an act of negligence imminently dangerous and one that is not so; the guilty party being liable in the former case to the party injured, whether there was any relation of contract between them or not, but not so in the latter case." *Glynn* v. *Central R. Co.* 175 Mass. 510, 56 N. E. 698.

Counsel for defendant in error have invoked the rule *stare decisis*, and insist that the former decision must govern on the second appeal. This would come to us with more force if we were not now considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally. We are fully satisfied that the rule of the former case is shattered by the pressing weight of opposing authority, and that reason is against it. In *Ellison* v. *Georgia R. & Bkg. Co.* 87 Ga. 691, 13 S. E. 809, the learned Chief Justice Bleckley uses the following forcible language: "Some courts live by correcting the errors of others and adhering to their own. . . . Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to and repeated indefinitely; but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not *Stare decisis*, but *Fiat justitia ruat cœlum.*"

The judgment of the court below will be reversed, with directions to enter judgment on the finding of the jury in favor of the defendants below.

All the Justices concur.

Doster, Ch. J., concurring specially:

I believe we were in error in the former determination of this case, and therefore concur in the decision now made. However, I do not believe that our present judgment can be rested on the theory of the breaking of causal connection between the negligent acts of the railway company delivering the defective car and the one receiving it, caused by the latter's failure to inspect, or the making by it of an ineffective inspection. A failure to inspect, or a careless inspection, either one, was a simple failure to do a duty,—an omission, not an affirmative act of wrongdoing; and I think the breaking of causal connection between a series of negligent acts is accomplished only by the doing of something by somebody else which operates as a new and independent producing cause, diverting the first negligent act from its natural end, and giving it a direction and force it would not otherwise have. It is not philosophical to speak of causal connection between act and consequence be-

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ing broken by a mere failure, though a negligent one, of some person, not the original actor, to do something. Causal connection is broken only by the intervention of active agencies, not the occurrence of passive conditions and qualities.

BANK OF HERINGTON, *Plff. in Err.*,
v.
Carl WANGERIN.

(.....Kan.....)

*1. **Where a negotiable instrument is delivered to a payee,** complete in all of its parts, the maker thereof is not liable thereon, even to an innocent holder, after the same has been fraudulently altered so as to express a larger amount than was written therein at the time of its execution.

2. **Such maker is not bound at his peril to guard against** the commission of forgery by one into whose hands such instrument may come.

(October 11, 1902.)

ERROR to the District Court for Marion County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Fred D. Carman** and **Thornton Cooke,** for plaintiff in error:

The material alteration of a note by the payee without the knowledge or consent of the maker does not render that note void in the hands of a bona fide holder, when the note was negligently made by the maker in such a way and under such circumstances that the amount thereof can be increased by simply adding other words in a space left blank and unprotected in the original note, in a manner not making an alteration capable of detection on careful inspection.

Young v. *Grote,* 4 Bing. 253; *Garrard* v. *Haddan,* 67 Pa. 82, 5 Am. Rep. 412; *Yocum* v. *Smith,* 63 Ill. 321, 14 Am. Rep. 120; *Isnard* v. *Torres,* 10 La. Ann. 103; *Bank of Commerce* v. *Haldeman,* 22 Ky. L. Rep. 717, 58 S. W. 587; *Capital Bank* v. *Armstrong,* 62 Mo. 59; *Trigg* v. *Taylor,* 27 Mo. 245, 72 Am. Dec. 263; *Scotland County Nat. Bank* v. *O'Connel,* 23 Mo. App. 165; *Brown* v. *Reed,* 79 Pa. 370, 21 Am. Rep. 75; *Redlich* v. *Doll,* 54 N. Y. 234, 13 Am. Rep. 573; *Merritt* v. *Boyden,* 191 Ill. 136, 60 N. E. 907; *Young* v. *Lehman,* 63 Ala. 519; *Holmes* v. *Bank of Ft. Gaines,* 120 Ala. 493, 24 So. 959; *Stratton* v. *Stone,* 15 Colo. App. 237, 61 Pac. 481; *Farmers' & M. Nat. Bank* v. *Novich,* 89 Tex. 381, 34 S. W. 914.

Mr. **N. F. Miesse** for defendant in error.

Cunningham, J., delivered the opinion of the court:

The defendant in error, Wangerin, executed his note for $60 to one McNaspy, as payee. The note was written by the payee upon a printed blank, and in such a manner that, after Wangerin had signed, McNaspy was enabled to place in the scroll prepared for the figures representing the number of dollars the figure "1" before the figures "60," and to write in the line prepared for the written amount, and before the word "sixty," the words "one hundred and." This was all done in such a manner that no one would be able to discover the change or alteration by the closest scrutiny, and thereby the note appeared to be one executed by Wangerin for the sum of $160. This note was sold for its full value to the plaintiff in error, in the regular course of business, before maturity, and without notice of any change. The question is, whether the bank can recover either the face of the note or the original consideration of $60 from Wangerin. The district court held that it could not. The authorities are at variance upon this proposition; the greater weight, and, as we think, the better reasoned, being that no recovery can be had upon the note. The cases holding the contrary rule do not agree upon the reasons therefor. Some place it upon the ground of negligence on the part of the maker, in this: that in the drawing of a negotiable promissory note, which might or probably will be sold to an innocent holder, he is bound, at his peril, to see that the instrument was executed in such a manner that an alteration therein could not be made so as to deceive and mislead an innocent holder thereof; that it was the duty of the maker to use all such reasonable means as were necessary to guard against the alteration of the note so as to defraud such indorsee. Others hold that the maker is estopped from denying the execution of the note by the equitable doctrine that, where one of two innocent parties must suffer from the wrongdoing of a third, he must suffer who has made it possible for such third party to commit the injury. It does not very clearly appear from the argument of the plaintiff in error which one of these principles it invokes, though it undoubtedly is willing to avail itself of either. We think the former ground is not available, because the proximate cause of the injury to the indorsee was the fraudulent and criminal act of McNaspy in raising the amount of the note, and not the negligence of Wangerin in its execution. Wangerin cannot be held to be negligent for not anticipating that McNaspy would or might commit this act of forgery, such acts being unusual and not to be anticipated. Indeed, we think it may be safely held that no one

*Headnotes by CUNNINGHAM, J.

NOTE.—As to liability of maker or drawer on raised negotiable paper, see also, in this series, Exchange Nat. Bank v. Bank of Little Rock (C. C. App. 8th C.) 22 L. R. A. 686, and *note;* also Walsh v. Hunt (Cal.) 39 L. R. A. 697.

As to effect of alteration of negotiable note as affecting bona fide holders, see also *note* to Citizens' Nat. Bank v. Williams (Pa.) 35 L. R. A. 464.

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can ever be charged with negligence for his failure to make it impossible for another to commit a crime. The equitable principle is not fairly stated by the quotation from plaintiff in error's brief: "Where one of two innocent parties must suffer loss by the fraud of a third, he who has made the loss possible by his negligence must bear the burden of loss." It is better stated: "Where somebody must be the loser by reason of a deceit practised, he who employs and puts trust and confidence in the deceiver should be the loser, rather than the stranger." For, in order to estop one by the acts of another, such other must be in some way clothed with an agency to act for the one sought to be estopped, and the maxim does not apply where the party who did the injury did so himself without warrant or authority, express or implied, from anyone. In this case, as McNaspy can in no wise be said to be the agent of Wangerin, Wangerin cannot be estopped by an unauthorized, much less by a felonious, act of his. In 1877 Chief Justice Gray, speaking for the supreme court of Massachusetts in *Greenfield Sav. Bank* v. *Stowell*, 123 Mass. 196, 25 Am. Rep. 67, after a full review of all the cases on both sides of this question decided up to that time, said: "The alteration of a promissory note by one of the makers, by increasing the amount for which it was made, by the insertion of words and figures in blank spaces left in the printed form on which it was written, avoids the note as to such makers as do not consent thereto, even in the hands of a bona fide holder for a valuable consideration." Since that time the supreme court of Kentucky alone, of all the courts of last resort in this country, in *Bank of Commerce* v. *Haldeman*, 22 Ky. L. Rep. 717, 58 S. W. 587, following its former decisions, has taken the contrary view. On the other hand, the view expressed in *Greenfield Sav. Bank* v. *Stowell*, 123 Mass. 196, 25 Am. Rep. 67, has been sustained in the following cases: *Cape Ann Nat. Bank* v. *Burns*, 129 Mass. 596; *Exchange Nat. Bank* v. *Bank of Little Rock*, 22 L. R. A. 686, 7 C. C. A. 111, 19 U. S. App. 102, 58 Fed. 140; *Knoxville Nat. Bank* v. *Clark*, 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 491; *Fordyce* v. *Kosminski*, 49 Ark. 40, 3 S. W. 892; *Burrows* v. *Klunk*, 70 Md. 451, 3 L. R. A. 576, 17 Atl. 378; *Cronkhite* v. *Nebeker*, 81 Ind. 319, 42 Am. Rep. 127; *Searles* v. *Scipp*, 6 S. D. 472, 61 N. W. 804. The same principle is also announced by the text writers, as follows: Bigelow, Bills, Notes, & Cheques, 216, 221; 2 Parsons, Notes & Bills, 549; 1 Randolph, Com. Paper, § 187. We think the same general principle has been announced by this court in *Horn* v. *Nexton City Bank*, 32 Kan. 518, 4 Pac. 1022. Many cases can be found supporting the rule, and probably the law is, that where an instrument, as uttered by the maker thereof, is in an incomplete form, having blanks which palpably invite addition or change, the maker will be held to have empowered the payee to fill such blanks as his agent, and when such instrument, so changed, is found in the hands of an innocent holder, it should be enforced against the maker; but the case at bar is not of that kind. Here the instrument was complete in every respect when delivered to the payee; and we must hold, following the proper reasoning, and, as we think, the great weight of authority, where a negotiable instrument is delivered to a payee, complete in all of its parts, the maker thereof is not liable thereon to an innocent holder after the same shall have been fraudulently altered so as to express a larger amount than was written therein at the time of its execution.

It is, however, insisted that the plaintiff in error is entitled to recover in this action the original amount for which the note was given. The petition, besides setting out the note in its altered form, discloses all of the facts of the transaction,—among them, that the note was given March 26, 1896. Action was not commenced until July 20, 1900. Admitting that had action been commenced in time, and upon proper allegations, a recovery could have been had as for money had and received, yet in this case the petition, on its face, shows that more than three years have elapsed between the date of the transaction and the bringing of the action; hence recovery is barred by the statute of limitations. It follows that recovery cannot be had either upon the note, for that is not the contract of defendant, or upon the original transaction, as that is barred by the statute of limitations.

The judgment of the District Court will be affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

City of HENDERSON, *Appt.*,
v.
Nannie O'HALORAN.

(.....Ky.....)

1. The contraction of smallpox by a guest from an inmate of the house, who is conceded to have contracted the disease because of the unlawful location of a pest hospital near by, is a proximate result of such unlawful location, so as to render the city making it liable for the injury thereby caused to the guest.

2. One is not guilty of negligence in

NOTE.—As to liability of city for injuries caused by location of pesthouse, see also, in this series, Baltimore v. Fairfield Improv. Co. 59 L. R. A. (Md.) 40 L. R. A. 494; Clayton v. Henderson (Ky.) 44 L. R. A. 474, 53 L. R. A. 145; Frazer v. Chicago (Ill.) 51 L. R. A. 306.

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sleeping with a child coming down with smallpox, where she does not know that there is any smallpox in the neighborhood, and has no reason to doubt the mother's statement that she supposes the child's ailment to be chicken pox, so as to prevent her recovery for injuries caused by contracting the disease, from one whose negligence induced it in the child.

(*Du Relle and Paynter, JJ., dissent.*)

(December 2, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Henderson County in plaintiff's favor in an action brought to recover damages for injuries alleged to have resulted from defendant's wrongful act in locating a pesthouse. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Clay & Clay** and **John F. Lockett** for appellant.

Mr. **Montgomery Merritt** for appellee.

Hobson, J., delivered the opinion of the court:

The city of Henderson established a pesthouse within 1 mile of the city boundary, by reason of which the disease of smallpox was communicated to the family of Mrs. Clayton, who lived near by. It was held that the city was liable to her in damages. *Henderson* v. *Clayton*, 22 Ky. L. Rep. 283, 53 L. R. A. 145, 57 S. W. 1. The appellee, Nannie O'Haloran, was a guest at Mrs. Clayton's house, and contracted the disease while there. This is a suit by her for damages against the city. The agreed facts are: About two weeks after the first case of smallpox had been sent to the pesthouse,—a fact unknown to appellee,—she came to Henderson from her home in the country, and at Mrs. Clayton's invitation went to her house, and spent the night. Upon reaching the house, she found Mrs. Clayton's little boy broken out with some eruption, and asked his mother what was the matter with him. His mother answered that she supposed it was chicken pox. Appellee did not know, and no one else then knew, the child had smallpox. She slept in the same bed with him that night, and returned home the next day. The same day a physician was summoned, and pronounced the breaking out on the child smallpox. In due course of time appellee was stricken with the disease at her home, and was confined to her room about three weeks. Her person was considerably pitted with pockmarks, and she was at expense for nursing and physicians. The pesthouse was located 300 yards from the boundary line of the city, and 250 yards from Mrs. Clayton's house, where appellee contracted the disease. It is agreed as a fact that the pesthouse was maintained by the city authorities, that Perry Clayton contracted the disease from the pesthouse, and that appellee contracted it from him. On these facts the case was submitted to the court without a jury, and he entered a judgment in favor of the appellee for $500.

It is earnestly maintained that the damages sued for are not the proximate or natural result of the defendant's wrong, and that the plaintiff was herself guilty of contributory negligence. In discussing the rule that the proximate cause is not always the nearest agency in time or space within the rule that the law regards the proximate, and not the remote, cause, in 1 Thomp. Neg. § 48, it is said that "'the law does not consider the cause of causes beyond seeking the efficient, predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect.' But at the same time no act is deemed in law to contribute to an injury unless it is near to that injury in the order of causation. This is what is meant by the expression 'proximate cause.' But the nearest — in point of time or space — may not be the responsible agency at all. Thus, A negligently drives on a public street, and thereby comes into collision with the carriage of B. This causes the horse of B to take fright, and run away, injuring C. Here both reason and justice require that A should pay damages to C, and it would be against reason and justice to visit the consequences of the catastrophe upon B, who is the innocent intermediary in the chain of causes. So, a wholesale druggist carelessly put up belladonna, a deadly poison, in a package, and labeled it 'extract of dandelion,' a harmless medicine, and sent it, so labeled, into the market. After passing through the hands of several innocent persons, it was purchased by an apothecary, and administered to the plaintiff's wife, on the faith of the false label, injuring her. Here the negligence of the original vendor was deemed the proximate cause of the injury, and the plaintiff had an action against him. It would have been manifestly unjust to visit the consequences of the mistake upon the last apothecary selling the substance, since he acted innocently, and without negligence. His act, though nearest in point of time, was not nearest in the line of causation. So, where a fire is negligently set out, and travels without interruption to the property of the plaintiff, destroying it, the original negligence of setting it out is deemed in law the proximate cause of the plaintiff's damage, although the immediate cause may have been back fires ineffectually set to arrest the progress of the main fire, the same being swallowed up in its advance. So, where a father, mother, and son were crossing a bridge, in the railing of which an opening had been negligently left, through which the son fell into the water beneath, and the father plunged in after him to save him, and both were drowned,—it was held that the mother might recover damages from the state for the death of the father; for, though the peril of the child was the nearest procuring cause of the action of the father in point of time, yet the negligence of the state in leaving the bridge in a dangerous condition was the *causa causans*,— the proximate cause, which the law would regard. Much the same rule was applied

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where the plaintiff's intestate lost his own life in endeavoring to save the life of a child on a railroad track. So, where the defendant had ascended in a balloon, which descended a short distance from the place of ascent, in the plaintiff's garden, and the defendant, being entangled and in a perilous situation, called for help, whereupon a crowd of people broke through plaintiff's fence into his garden, and trod down his vegetables and flowers,— it was held that, although ascending in the balloon was not an unlawful act, yet, as the defendant's descent, under the circumstances, would ordinarily draw the crowd into the garden, either from a desire to assist him or to gratify a curiosity which he had excited, he was answerable in trespass for all the damages done to the garden of the plaintiff. Nevertheless, it appeared that in point of time the act of the defendant was not so near the injury as that of the crowd." Summing up the authorities, in § 59, he says: "In other words, it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him. It is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault,— such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question." To same effect, see Bishop, Noncontract Law, §§ 45, 46; *Davis v. Paducah R. & Light Co.* 24 Ky. L. Rep. 135, 68 S. W. 140; 1 Sedgw. Damages, §§ 128, 129. In § 131 of the latter work it is said: "Where animals sold have an infectious disease known to the seller, but not to the purchaser, which is communicated to other animals of the purchaser, the latter may recover compensation for the damage done to his other animals. The same rule applies where the defendant's sheep trespass on the plaintiff's land, and communicate disease. And where the defendant's rams trespassed on the plaintiff's land, and got his ewes with lamb out of season, so that the lambs died soon after birth, the plaintiff was allowed to recover the diminution in value of the ewes for breeding and other purposes." In the *Clayton Case* we held that Mrs. Clayton, who took the smallpox from her child, might recover damages therefor on the ground that the purpose of the statute in forbidding the pesthouse being put within 1 mile of the city boundary was to prevent the communication of contagious diseases to other persons from the pesthouse, and that it was the natural result that the mother should take the disease from the children living in the family with her. It is just as natural, and to be as reasonably expected, that other persons who were members of the family, whether temporarily or permanently, would take the disease. If appellee had been cooking for Mrs. Clayton, whether by the day, week, or month, and while cooking there had contracted the disease which had been brought there from the pesthouse, plainly such a result would be no more remote than Mrs. Clayton's contracting the disease; and no sound distinction can be made between a person who lived in the house for twenty-four hours and one living there longer, if they both took the smallpox while there. The guest was a member of the family as much as the servant would be. And while it was not to be anticipated, perhaps, that a particular person would visit at this house at this time, or would be engaged there as a domestic, or be there for any other reason, still it was to be anticipated that persons would come there for various purposes, and the communication of the disease from the persons living in the house to these persons is a result as naturally to be expected as its communication from one member of the family to another. The purpose of the statute is to require the persons having the contagion of these diseases separated from the rest of the community, so as to prevent the spread of the disease. It was a result naturally to be expected when the statute was violated, that the disease would be communicated to the persons living in the neighborhood, and that not only regular members of the family would take it, but also those who might, for any reason, for the time, be living with them. We therefore conclude that the damages to appellee are not too remote to be recovered for.

On the question of contributory negligence, it is conceded that appellee did not know there was any smallpox at the pesthouse, and nothing is shown to justify apprehension on her part that the eruption on the little boy was of a more serious character than his mother supposed.

Judgment affirmed.

Du Relle and **Paynter**, JJ., dissent.

Mary PETRIE, *Appt.*,
v.
S. H. CARTWRIGHT.

(.....Ky.....)

1. **A peace officer acting without a warrant cannot kill** a fleeing person who refuses to stop when commanded to do so, on suspicion that he has been guilty of felony, where the offense was in fact only a misdemeanor.
2. **Upon trial of an action against a peace officer for shooting one fleeing after having a scuffle** with men who had insulted his wife and sister, evidence as to the insult and the complaint of the wife to the husband is admissible as part of the *res gestæ*, where those events—the scuffle and the shooting—all occurred within a short space of time.

(November 12, 1902.)

NOTE.—As to right of officer to shoot person to prevent his escape from arrest, see cases in *note* to State v. Hunter (N. C.) 8 L. R. A. 529; also Thomas v. Kinkead (Ark.) 15 L. R. A. 558, and Brown v. Weaver (Miss.) 42 L. R. A. 423.

59 L. R. A.

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APPEAL by plaintiff from a judgment of the Circuit Court for Todd County in favor of defendant in an action brought to recover damages for the alleged wrongful killing of her husband. *Reversed.*

The facts are stated in the opinion.

Messrs. **Petrie & Standard** for appellant.

Mr. **C. A. Denny** for appellee.

Hobson, J., delivered the opinion of the court:

The appellant, Mary Petrie, was going to her home in Elkton, Kentucky, after night, in company with her husband's sister, Mary Belle. They were followed by two men, named Blye and Crouch; the latter proposing sexual intercourse, and making an exposure of his person. They hurried on, and met Joe Petrie, the husband of Mary. She told him of the conduct of the men, and he immediately went back up the street in the direction of them. When he overtook them, he asked Crouch what he had insulted his wife for. Crouch said, "Damn your wife, and you, too." Petrie then struck him. A scuffle followed, and Crouch fell. Crouch and Blye were white men. Petrie was a negro. The difficulty came up just in front of a billiard saloon. Blye was cutting at Petrie with his knife. Some one called out to Petrie to run, which he did. Appellee, Cartwright, who was the city marshal, was in sight a few yards off, and, seeing Crouch fall, as Petrie ran past called to him to halt, and, when he did not stop, fired his pistol in the ground. He then fired a second time, taking aim at Petrie, and killing him. Petrie's clothes were cut behind. His clothing was cut through and through, and his skin scraped. These cuts were made by Blye while he was scuffling with Crouch. Although the officer called to Petrie twice to stop, he does not appear to have heard him. Neither recognized the other in the dark. Crouch was very drunk, so that he had no recollection of what occurred. He was bruised on the back of the head by the blow or fall, but, except a knot there, received no other injury. The wife, Mary Petrie, then filed this action under § 4 of the Kentucky Statutes to recover for the death of her husband. The defendant pleaded, in substance, that he was acting in his official capacity; that the deceased committed an offense in his presence by striking Crouch, and immediately turned to flee; that he tried to stop him, and place him under arrest, and pursued him for that purpose, but could not overtake him, and was forced to shoot him to prevent his escaping; that he used no more force than was necessary, and that he believed, and had reasonable grounds to believe, that a felony had been committed; and that he had no other means of preventing the escape of the felon but to shoot him. The court instructed the jury that, if the officer believed, in good faith, and had reasonable grounds to believe, that Petrie had committed a felony, and, after using all other available means to arrest him, fired the fatal shot solely in order to procure his arrest, and in doing so used no more force than appeared to him to be reasonably necessary in order to make the arrest, they should find for the defendant. The jury found a verdict for the defendant under these instructions, and the plaintiff appeals.

We think it evident from the proof that Petrie's flight was not to avoid arrest, but only to escape what he conceived to be an impending danger. We think it also clear that the fall of Crouch was due rather to his being very drunk than to any other cause, for he seems to have fallen in the scuffle, and not when he was struck. The jury were warranted in concluding from all the evidence that Petrie had in fact committed no felony. The question, therefore, presented, is, May a peace officer, to make an arrest upon a suspicion of felony, shoot a person who does not stop when called upon to halt? The statute provides: "A peace officer may make an arrest . . . without a warrant when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony." "A private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony." "No unnecessary force or violence shall be used in making the arrest." Crim. Code Pr. §§ 36, 37, 43. In *Dilger* v. *Com.* 88 Ky. 560, 11 S. W. 651, the court, after referring to these statutory provisions, speaking of the officer's authority, said: "Our statute is silent, save as above cited, as to the force he may use. We must, therefore, turn to the common law for guidance. By it, in a case of felony, he may use such force as is necessary to capture the felon, even to killing him when in flight. Where it is a misdemeanor, however, the rule is otherwise. It is his duty to make the arrest, but, unless the offender is resisting to such an extent as to place the officer in danger of loss of life or great bodily harm, the latter cannot kill him. He can only do so, or inflict great bodily harm, when, by reason of resistance, he is placed in the like danger. If he meet with resistance, he may oppose sufficient force to overcome it, even to the taking of life." In the previous case of *Head* v. *Martin*, 85 Ky. 481, 3 S. W. 622, the court announced the same rule. There it is also said: "Human life is too sacred to admit of a more severe rule. Officers of the law are properly clothed with its sanctity. They represent its majesty, and must be properly protected. But to permit the life of one charged with a mere misdemeanor to be taken when fleeing from the officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his posse, and take the offender." The authorities are clear that where the offense is only a misdemeanor the officer cannot, to prevent his escape, take the life of the offender when in flight. *Head* v. *Martin*, 85 Ky. 481, 3 S. W. 622; 21 Am. & Eng.

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Enc. Law, 2d ed. p. 204; *Thomas* v. *Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 18 S. W. 854; note to *Hawkins* v. *Com.* (Ky.) 61 Am. Dec. 162. They are also uniform that an officer may lawfully arrest one who, as he believes, and has reasonable grounds to believe, has committed a felony. *Dœring* v. *State*, 49 Ind. 56, 19 Am. Rep. 669. And it is laid down that in such case he must proceed very cautiously where the person sought to be arrested flees, as flight is different from resistance. Note to *Hawkins* v. *Com.* (Ky.) 61 Am. Dec. 162. But these authorities do not determine the question whether an officer acting without warrant is excusable for killing such a person in flight when he had reasonable grounds to believe a felony had been committed, although in fact the offense was only a misdemeanor. The common-law rule as to the arrest of a felon is thus stated in 2 Bishop, Crim. Law, § 647: "And in cases of felony the killing is justifiable before an actual arrest is made, if in no other way the escaping felon can be taken." See also 4 Bl. Com. 292. In *Conraddy* v. *People*, 5 Park. Crim. Rep. 234, an officer, who had arrested a person on suspicion of felony, shot and killed him when he attempted to escape. The deceased was in fact guilty of only a misdemeanor, and the officer was held guilty of manslaughter. To same effect, substantially, is the case of *People* v. *Kilvington*, 104 Cal. 86, 37 Pac. 799. There an officer saw two men running, the hinder man crying out, "Stop thief!" He commanded the front man to stop. The order was disobeyed. He then shot and killed him. It was held that, as he had reasonable cause to believe a felony had been committed, and shot merely to intimidate the man sought to be arrested, and not with the purpose of hitting him, it was a question for the jury whether he was guilty of criminal negligence.

We have been unable to find any common-law authority justifying an officer in killing a person sought to be arrested, who fled from him, where the officer acted upon suspicion, and no felony had in fact been committed. The common-law rule allowing an officer to kill a felon in order to arrest him rests upon the idea that felons ought not to be at large, and that the life of a felon has been forfeited; for felonies at common law were punishable with death. But where no felony has been committed the reason of the rule does not apply, and it seems to us that the sacredness of human life and the danger of abuse do not permit an extension of the common-law rule to cases of suspected felonies. To do so would be to bring many cases of misdemeanor within the rule, for in a large per cent of these cases the officer could show that he had reasons to suspect the commission of a felony, and it would be left entirely with him to say whether he was proceeding against the defendant for a misdemeanor or for a felony. The notion that a peace officer may in all cases shoot one who flees from him when about to be arrested is unfounded. Officers have no such power, except in cases of felony, and there as a last resort, after all other means have failed. It is never allowed where the offense is only a misdemeanor; and where there is only a suspicion of felony the officer is not warranted in treating the fugitive as a felon. If he does this, he does so at his peril, and is liable if it turns out that he is mistaken. He may lawfully arrest upon a suspicion of felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offense was in fact a felony. "In all cases, whether civil or criminal, where persons having authority to arrest and imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and, if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable." 1 Russell, Crimes, 665. In *Lindle* v. *Com.* 23 Ky. L. Rep. 1307, 64 S. W. 986, this rule was followed where an officer attempted to arrest a person upon reasonable grounds to believe he had committed a felony, and was forcibly resisted by him. But where a supposed offender simply fails to stop when ordered to do so, a different principle applies. Although the rule is otherwise laid down in *State* v. *Evans*, 161 Mo. 95, 61 S. W. 590, the question was not before the court in that case; and, as was well said in *Thomas* v. *Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 18 S. W. 854, the rule as thus stated is not sustained by the common-law authorities.

The court should have allowed the evidence as to what took place between Blye and Crouch and the two women; also as to what took place between them and Joe Petrie; as they were only a short distance from home when the transaction occurred, and before they got home they heard the shots. The whole thing was so closely connected that it should all be regarded as one transaction, and the evidence referred to was competent as *res gestæ*.

Judgment reversed, and cause remanded for a new trial.

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LOUISIANA SUPREME COURT.

Isadore SUGAR *et al., Appts.*,
v.
City of MONROE *et al.*

(108 La. 677.)

*1. **Citizens who have voted to tax themselves** for a specific work of public improvement, the value of which is fixed at $20,000, have a standing in court to complain that the property acquired is not being used for the purpose contemplated, and this court in such a case has jurisdiction of the appeal.

2. **Where a vote has been taken upon a proposition to impose a tax to build a schoolhouse,** and has been favorably acted on, and a building has been constructed with the proceeds of bonds predicated upon such tax, it would be a breach of faith to allow such building to be converted into a theater, or to be used for the purpose of giving theatrical performances, as a business, whether in combination with its use for school purposes or otherwise. It is, however, within the discretion of the municipal authorities having control of the property to make such casual and incidental use of it as may not be inconsistent with or prejudicial to the main purpose for which it was acquired, and changed conditions in the future may justify its use for some other purpose.

(June 16, 1902.)

APPEAL by plaintiffs from a judgment of the Judicial District Court for the Parish of Ouachita in favor of defendants in an action brought to restrain the use of a school building for a theater. *Reversed.*

The facts are stated in the opinion.

Mr. **E. Tyler Lamkin,** with *Messrs.* **Hudson, Potts, & Bernstein,** for appellants.

Messrs. **Stubbs & Russell** and **William F. Millsaps,** for appellees:

The charter of the city of Monroe confers upon the municipality power "to purchase, hold, receive, farm out, lease, convey, mortgage, alienate, or otherwise acquire or dispose of, any property or estate, real or personal," and to erect school and other public buildings.

Act No. 47 of 1900, secs. 1, 2, of § 9.

The power to erect public buildings carries with it the right to determine the plan and mode, and decide upon the form, dimensions, and style, of the edifice.

Dill. Mun. Corp. 209, 507; *Bates* v. *Bassett*, 60 Vt. 530, 1 L. R. A. 166, 15 Atl. 200; *Poillon* v. *Brooklyn*, 101 N. Y. 132, 4 N. E. 191; *Konrad* v. *Rogers*, 70 Wis. 492, 36 N. W. 261.

A municipality may lease to private individuals portions of public buildings not needed for municipal purposes.

French v. *Quincy*, 3 Allen, 9; *Bell* v. *Platteville*, 71 Wis. 139, 36 N. W. 831; *Spaulding* v. *Lowell*, 23 Pick. 71; *Camden* v. *Camden*, 77 Me. 530, 1 Atl. 689; *Worden* v. *New Bedford*, 131 Mass. 23, 41 Am. Rep. 185; *Jacksonville* v. *Ledwith*, 26 Fla. 163, 9 L. R. A. 69, 7 So. 883; *Kingman* v. *Brockton*, 153 Mass. 255, 11 L. R. A. 123, 26 N. E. 998; *Greenbanks* v. *Boutwell*, 43 Vt. 207; *Stone* v. *Oconomowoc*, 71 Wis. 155, 36 N. W. 829.

Courts will not interfere with the exercise of legislative or discretionary powers by municipal corporations, unless there is fraud, manifest oppression, or gross abuse.

State ex rel. Behan v. *Orleans Civil Dist. Judges*, 35 La. Ann. 1075; *Conery* v. *New Orleans Waterworks Co.* 41 La. Ann. 910, 7 So. 8.

Monroe, J., delivered the opinion of the court:

The plaintiffs, as citizens and taxpayers, and as owners and licensees of an opera house, in the city of Monroe, bring this suit to restrain the corporate authorities and Tom Stewart & Co. from using as a theater a school building belonging to the corporation. The facts disclosed by the evidence are that in October, 1898, the mayor and council submitted to the qualified taxpayers of Monroe a proposition to raise, by means of an issue of bonds predicated upon a 5-mill tax, the sum of $155,000 for the construction of certain specified public improvements, including a school building, to which $20,000 of said amount was to be appropriated; and the proposition was favorably acted upon at an election called for its consideration. To the $20,000 thus raised, the city added nearly $50,000, drawn from other public revenues, and the aggregate amount was expended in the construction and equipment of a fine building, intended and now used for the purposes of a high school, and which, among other advantages, is provided with an auditorium capable of accommodating over 1,000 persons. Whether those under whose directions this building was designed originally contemplated making use of the auditorium as a public theater does not appear, but it is quite certain that no intimation of such a purpose was conveyed to the taxpayers to whom the proposition mentioned was submitted. Since the completion of the building, the city authorities have undertaken, under cover of a pretended lease to the janitor, to use the auditorium as a theater, in which the giving of theatrical, operatic, minstrel, and other performances is carried on as a business; and it is this action of which plaintiffs complain, both as taxpayers and as proprietors of a theater which they pay state and city licenses for the privilege of conducting. The so-called lease is a flimsy contrivance, which deserves but little notice. The firm of Tom Stewart & Co. had no existence when it was signed, and, as we think, has no existence now. Tom Stewart had been employed by

*Headnotes by MONROE, J.

NOTE.—As to validity of lease or license of public buildings (including schoolhouse) for private purpose, see State *ex rel.* Scott v. Hart (Ind.) 33 L. R. A. 118, and *note.*

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the plaintiffs as propertyman at their theater, and was paid by them $2.50 for his services during each performance. He was subsequently employed by the city or the school board as janitor of the new high-school building, and his wages were fixed at $45 per month, and either at that time or later, under the name of Tom Stewart & Co., was assigned the role of lessee of the auditorium. The entire management of the auditorium for theatrical purposes has, however, been in the hands of a gentleman who is a member and chairman of the finance committee of the city council, mayor *pro tem.* of the city, and member and chairman of the entertainment committee of the school board, and who also figures on the letter heads of Tom Stewart & Co. as "manager." It is he who makes all the contracts with the minstrel, vaudeville, and other troupes that are engaged to give entertainments; and it is by his direction that the expense of operating the auditorium as a theater is paid, by the checks of the city treasurer, drawn against an account kept in the name of that officer with the fiscal agent of the city. Tom Stewart conducts none of the correspondence with the theatrical agent through whom the troupes are engaged, makes no contracts for exhibitions, keeps no accounts, knows nothing of the business except what he is told, and, in addition to his wages as janitor, receives $3 for each performance, for his services as propertyman. The state license for the theater so conducted is paid as the other expenses are paid, and no city license is exacted. It is said that these payments have been made in the way of advances to Tom Stewart & Co., and that they have not been made from the funds of the city, but from the proceeds of the entertainments given at the auditorium, which are intended, after paying expenses, to be used for the establishment of a library. Tom Stewart is, however, shown to be without means or financial standing, so that making advances to him is merely putting money into the business; and as the money advanced is derived from the use of a building owned by the city, and is paid out on the checks of the city treasurer, the distinction suggested between the city funds and the library fund is of no practical significance. It is also said that the auditorium is used as a theater only when not in use for school purposes, that the one use is not inconsistent with the other, and that it is competent for, and within the discretion of the city authorities thus to administer the city property intrusted to their charge. It appears that the building in question is a large three-story brick edifice, and that the auditorium occupies one side, extending through from the first to the third floor, and separated from the classrooms and other apartments used for school purposes, on the first and second floors, by the main corridor; the entire third floor being used for the purposes last mentioned. After the institution of this suit, an arrangement was made by which those connected with the theater are enabled to obtain access to the stage by means of an entrance upon that side of the building, and a screen has been erected in the corridor, so that patrons or others who are expected to enter the theater through the main entrance are masked from those occupying rooms on the other side. It also appears that there is a heavy brick wall separating the auditorium from the corridor, and that, when the doors leading through are closed, sounds in the one place are not much heard in the other. The fact most relied on, however, is that the building is used as a theater only at night, or upon Saturdays or other holidays, when not in use for school purposes; and some testimony was taken, to which we will refer hereafter, with a view to determining whether such use is inconsistent with or prejudicial to that for which the building was constructed. There is also testimony tending to show that the cost of insurance is increased by reason of the use of the building for theatrical purposes.

On the motion to dismiss.

A motion is made to dismiss the appeal on the ground that the plaintiffs have disclosed no such pecuniary interest as to vest this court with jurisdiction. Upon the facts disclosed, we are confronted with the propositions: (1) That the city of Monroe is engaged in the business of conducting a theater. (2) That in doing so it pays no license to itself, whilst it exacts a license from the plaintiffs and from all other persons engaged in the same business. (3) That it is using as a theater a public building worth nearly $70,000, especially dedicated by those at whose expense, in part, it was erected, to school purposes.

Conceding, *arguendo*, that upon the first two propositions, considered apart from the other, the plaintiffs have not established a pecuniary interest sufficient under our law to give this court jurisdiction, nevertheless, upon the third, which involves the question whether the municipal authorities are diverting or making an illegal use of the building in question, which is public property, any taxpayer has the right to come into court, and, *quoad* the amount, the jurisdiction is determined by the value of the property or of the interest therein represented by the money specially voted for a school building; the case not being materially different from what it would have been if the mayor and council had originally proposed to devote the $20,000 raised for that purpose to the construction of a theater, and had been enjoined from so doing. *Handy* v. *New Orleans*, 39 La. Ann. 107, 1 So. 593; *Conery* v. *New Orleans Waterworks Co.* 39 La. Ann. 770, 2 So. 555; *State ex rel. Orr* v. *New Orleans*, 50 La. Ann. 880, 24 So. 666; *City Item Co-operative Printing Co.* v. *New Orleans*, 51 La. Ann. 713, 25 So. 313; Dill. Mun. Corp. §§ 914–937. The motion to dismiss the appeal is therefore denied.

On the merits.

The charter of the city of Monroe was not offered in evidence, but it is not pretended that it confers, or could confer, authority

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upon that municipality to engage in the business of conducting a theater; and, apart from the fact that, as a municipal corporation, it has no legal capacity to engage in such business, it is manifestly unjust for it to do so in competition with a taxpayer from whom it exacts a license which it does not itself pay. But, passing from these questions, we find that this business, objectionable for the reasons stated, is carried on in a building constructed, in part, with money especially dedicated to the erection of a schoolhouse. It may very well be questioned whether the citizens who voted to tax themselves for the latter purpose would have consented to do so for the purpose of establishing a combination schoolhouse and theater. There are many excellent people who disapprove of theaters entirely, and there are others who disapprove of a combination which brings little boys and girls attending school in such daily juxtaposition with flaring posters and theatrical movement, as must result from having the school and the theater in the same building. And it would be a breach of faith to permit the money voted by either of these classes of citizens for the one purpose to be used for the other.

The proposition upon which the learned counsel for the defendants rely may be fairly stated in the following excerpt from the brief filed by them, which includes an expression from the supreme court of Massachusetts in what is assumed to be an analogous case, to wit: "In the case of *Worden* v. *New Bedford*, 131 Mass. 23, 41 Am. Rep. 185, it was contended that a city or town has no power to let public buildings for private uses. The supreme court of Massachusetts said: 'The ground is untenable. The city could not erect buildings for business or speculative purposes, but, having a city hall, built in good faith, and used for municipal purposes, it has the right to allow it to be used, incidentally, for other purposes, either gratuitously, or for a compensation. Such a use is within its legal authority, and is common in most of our cities and towns.'" We find no reason to dissent from the views thus expressed, and have little doubt that they were appropriate to the case decided. It does not appear, however, that the building there in question had been erected wholly or in part with the proceeds of a tax levied under a provision of the Constitution of the state which specifically controlled its destination. Nor does it appear that the "incidental" use of the property which was sanctioned was inconsistent with, or prejudicial to, the purpose to subserve which the building had been constructed. Whereas, in the case before us, $20,000 of the money used was specifically voted for a school building, and it can hardly be said that the use which the defendants propose to make of the building, as constructed, is "incidental," since the idea is to keep it filled with theatrical attractions as long as the season lasts, merely regulating the performances so as not actually to prevent the school exercises from being conducted; there being also strong evidence in the record to the effect that this method of administering the building is highly detrimental to the purpose for which it was erected. Upon this latter point, we quote the language of the distinguished president of the State Normal School at Natchitoches, examined as a witness in this case, to wit: "I have had twenty-five years' experience in teaching. . . . The State Normal School of Louisiana has an assembly hall or auditorium in the same building as the classrooms. To lease this assembly hall to any private person or corporation for the purpose of a public theater or opera house would have a disastrous effect upon the conduct, discipline, and influence of the institution. The reasons for above statement . . . are as follows: (a) The room is needed at all times for school purposes; is used for morning exercises, general announcements, school lectures, calesthenic drill, and chorus practice; and is a study hall for all students who are not in recitation. Outside of school hours, it is used for piano and school practice, class meetings, Y. M. C. A. meetings, club meetings, gymnastic drill, receptions and social gatherings of students and teachers, and union meetings of the literary societies. To lease this room to outside parties would deprive the school of all these uses for it. (b) The presence in the building of persons who are not familiar with the requirements of the school, and not subject to its control, would interfere with discipline and interrupt class work. (c) Some of the persons connected with traveling theater companies are objectionable in character and conduct. (d) Some of the persons who would attend a public theater here are of disorderly habits, defacing furniture marring the walls, soiling the floors, and meddling with or injuring apparatus or other movable property. (e) A school building stands for the sole purpose of training young people intellectually, morally, and socially. It should be the student's temple of correct taste, right conduct, and pure ethics. Whatever is morbid or unwholesome should be kept out of the schoolhouse. To use part of the school building for a public theater is objectionable for the same reason that it would be objectionable to use part of it for a hospital or a saloon or a jail; that is to say, such a use degrades the building by associating school work with the morbid aspects of life. . . . I have seen the Monroe High School Building. I have never been inside the building since it was completed and occupied. I do not know all the conditions that exist in the building, and I cannot, therefore, give a positive statement of the effect in this instance. But I do not hesitate to say that the leasing of any part of any school building for use as a theater would have a harmful effect on the school conducted in the building. . . . I am a great admirer of the theater, and attend every theater that I have a chance to attend when either a play of merit or an actor of ability is presented." The opinions of the principal

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of the Ouachita High School, and of a prominent citizen of Monroe, who was for some years a teacher, are to the same effect. Upon the other hand, the principal of the Monroe High School gives a qualified approval of the use of the building for theatrical purposes. Thus, being asked whether he was willing to swear that it had no harmful effect upon the city school, he answered: "I can safely say that it has not, up to date, had any harmful effect. I haven't noticed any. I can't say what will take place in the future, but I haven't noticed any." And the mayor and mayor *pro tem.* seem to be of the same opinion. Considering the case in the light of this testimony, the least that we can say is that, whereas we know that the qualified voters of the city of Monroe voted to tax themselves for the purpose of erecting a schoolhouse, we have no assurance that they would have so voted if they had been informed that the building to be erected would be used as a theater as well, and that we should not consider that they were fairly treated if the property for which they are still paying, year by year, should be permitted to be used for a purpose not intended by them, and of which, in all probability, some, if not a majority, of them would disapprove. In expressing this conclusion, we do not wish to be understood as going to the extreme of holding that the city authorities may not make such casual and incidental use of the building in question, not inconsistent with, or prejudicial to, the main purpose for which it was erected, as they may deem advisable, nor as holding that changed conditions in the future may not justify them in devoting it to some other purpose. The question here presented is whether they have the legal right at this time to make use of it, or any part of it, for the purpose of maintaining a theater therein, or of giving theatrical performances, as a business; and this question we decide in the negative.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiffs and against the defendants, the city of Monroe and Tom Stewart & Co., decreeing fictitious and simulated the pretended contract of lease between said parties, and perpetually enjoining and restraining them, or either of them, from further operating or pretending to operate thereunder. It is further ordered and adjudged that said defendants pay the costs in both courts.

Blanchard, J., takes no part.

Petition for rehearing denied November 17, 1902.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Henry O. SAWYER *et al.*
v.
COMMONWEALTH of Massachusetts.

(.....Mass.....)

A business is not property within the meaning of a statute providing a jury trial to determine the damage in case of injury to "property" by the exercise of the right of eminent domain.

(*Barker, J., dissents.*)

(October 30, 1902.)

RESERVATION by the Supreme Judicial Court for Worcester County for the opinion of the full bench of a petition for the appointment of a jury to determine the damages to be awarded to petitioners because of the taking of certain property under the metropolitan water supply act. *Denied.*

The facts are stated in the opinion.

Messrs. **Thayer & Rugg**, for petitioners:

The word "property," as used in §§ 12 and 13, may be different in its meaning from the word as used in § 14.

Sawyer v. *Metropolitan Water Board*, 178 Mass. 267, 59 N. E. 658.

Good will of a business, even though that of a physician, is property in such a sense as to be the subject of sale. In *Earle* v. *Com.* 180 Mass. 579, 57 L. R. A. 292, 63 N. E. 10, it was held that a physician might recover for the injury done to his practice.

Smith v. *Bergengren*, 153 Mass. 236, 10 L. R. A. 768, 26 N. E. 690; *O'Hara* v. *Stack*, 90 Pa. 477.

The provisions of § 15 of the metropolitan water supply act can relate only to such injuries and classes of damage as are enumerated in § 14.

Sawyer v. *Metropolitan Water Board*, 178 Mass. 267, 59 N. E. 658.

"Property," technically defined as used in the Constitution of the United States, is "rights in things which pertain to persons and are created and sanctioned by law. These rights are the rights of user, the right of exclusion, and the right of disposition."

Lewis, Em. Dom. § 54, p. 54.

But "property" has a wider and more general meaning: "The right to possess, use, and dispose of things in such a manner

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NOTE.—As to validity of statute requiring payment of damages for injuries to business from taking of property for public use, see, in this series, Earle v. Com. (Mass.) 57 L. R. A. 292.

As to damages for loss of profits or diminished value of stock caused by removal of business made necessary by condemnation of real property, see Philadelphia Ball Club v. Philadelphia (Pa.) 46 L. R. A. 725, and Becker v. Philadelphia & R. Terminal R. Co. (Pa.) 35 L. R. A. 583.

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as is not inconsistent with the law of the land."

Lewis, Em. Dom. § 54, p. 56.

Mr. **Arthur W. De Goosh** for the Commonwealth.

Holmes, Ch. J., delivered the opinion of the court:

This is a petition for the determination of damages caused by a decrease in value of the petitioners' business in consequence of the carrying out of the metropolitan water supply act. Stat. 1895, chap. 488, § 14. After the decision in *Sawyer* v. *Metropolitan Water Board*, 178 Mass. 267, 59 N. E. 658, the case was referred to a commission upon the present petition, and the petitioners, being dissatisfied with the determination, again claim a trial by jury — this time under § 15 of the act. The material words are as follows: "Said water board, or any person whose property is taken under the right of eminent domain, or entered upon or injured by the taking of said water, if dissatisfied with any determination of damages made by any commission, may . . . claim a trial by jury," etc. The question is whether the petitioners come within these words, and have the right which they claim.

A majority of the court is of opinion that the petitioners are not entitled to a jury. If, indeed, the loss which they have suffered were within the protection of the Constitution, there would be the strongest reason for construing the statute as giving them whatever rights the Constitution secures (compare *Salem Turnpike & C. Bridge Corp.* v. *Essex County*, 100 Mass. 282, 286, 287; Gen. Stat. chap. 48, Commissioners' note; *Bauman* v. *Ross*, 167 U. S. 548, 593, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Lewis, Em. Dom. 2d ed. § 311), but it hardly would be contended that the Constitution is concerned. It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a *quid pro quo*. No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other. See *Smith* v. *Boston*, 7 Cush. 254; *Stanwood* v. *Malden*, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702. It seems to us that the case stands no differently when the business is destroyed by taking the land on which it was carried on, except so far as it may have enhanced the value of the land. See *New York, N. H. & H. R. Co.* v. *Blacker*, 178 Mass. 386, 390, 59 N. E. 1020.

We believe that what we have said is in accord with the general understanding of the profession, although the cases sometimes cited for the proposition may not have gone far enough to decide it. *Whitman* v. *Boston & M. R. Co.* 3 Allen, 133, 142; *Edmands* v. *Boston*, 108 Mass. 535, 549; *Cobb* v. *Boston*, 109 Mass. 438, 444; *Maynard* v. *Northampton*, 157 Mass. 218, 31 N. E. 1062; *Williams* v. *Com.* 168 Mass. 364, 366, 47 N. E. 115; *New York, N. H. & H. R. Co.* v. *Blacker*, 178 Mass. 386, 392, 59 N. E. 1020. See *Stadler* v. *Milwaukee*, 34 Wis. 98; *Coster* v. *Albany*, 43 N. Y. 399; *Mt. Washington Road Co.'s Petition*, 35 N. H. 134, 147; *Moses* v. *Sanford*, 11 Lea, 731; *Fuller* v. *Edings*, 11 Rich. L. 239; *Eddings* v. *Seabrook*, 12 Rich. L. 504; *Ricket* v. *Metropolitan R. Co.* L. R. 2 H. L. 175; *Metropolitan Bd. of Works* v. *McCarthy*, L. R. 7 H. L. 243; Lewis, Em. Dom. 2d ed. §§ 147, 487. See also *Butchers' Slaughtering & Melting Asso.* v. *Com.* 169 Mass. 103, 118, 47 N. E. 599.

Assuming that the petitioners have no right under the Constitution, we have only to construe the statute in a natural way. The words which we have cited seem to us inapt to give the right which the petitioners claim.

Their business is not "taken under the right of eminent domain," or alleged to be. It could not be "entered upon." It is not "injured by the taking of said water." Its value is decreased by the carrying out of the act,— that is, we presume, by the occupation of the land where it was carried on and the adjoining land where customers dwelt,— matters quite different from those mentioned. Their business is not "property" within the meaning of the act, unless it be held that the statute gives it the character of property by providing compensation, and thereupon in § 15 uses the word in a looser and broader sense than that in which it had used it before. In §§ 12, 13, "property" seems to be used with what may be called its constitutional meaning, as was intimated in *Sawyer* v. *Metropolitan Water Board*, 178 Mass. 267, 270, 59 N. E. 658. Moreover we may notice for what it is worth that the remedy given to the petitioners by § 14 is to have their damages determined in the manner "hereinbefore" provided. That which they claim is provided thereinafter in § 15. It seems to us that the provision relied upon plainly corresponds to the first part of § 14, and has nothing to do with the petitioners, who come in by an afterclap at the end of the section. The statute has provided for ordinary constitutional rights in §§ 12, 13, including a jury trial. Then in § 14 it gives a commission to certain owners of real estate taken or injured by the taking of the waters of the Nashua river, or directly or indirectly decreased in value. It will be seen how

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closely related the words of § 15 are to the rights thus given. The rights dealt with are constitutional rights or very near to such, and the jury is preserved. But when the statute did an act of supererogation, however just, it did not enhance its gratuity by leaving it to be determined by a tribunal not peculiarly adapted to deal with the problems involved. It certainly did not do so with any clearness, and the petitioners' rights must be confined to what the statute distinctly says.

Motion denied.

Barker, J., dissenting:

I am unable to agree with the opinion of the court. In my opinion, it was the intention of the legislature by Stat. 1895, chap. 488, § 15, to give all parties aggrieved by the decision of a board of commissioners appointed under § 14 of the statute a right to claim a trial by jury to determine their damages. The metropolitan water board clearly has this right in every instance, whatever may be the nature of the claim against the commonwealth, and it is not to be presumed that the legislature gave to the representatives of the commonwealth the privilege of revising the award of the commissioners by a jury, and denied that privilege to the adverse party to the litigation. Further, I think that the words of the statute, "any persons whose property is taken under the right of eminent domain, or entered upon or injured by the taking of said water," should receive a liberal construction in favor of the subject whose property is injured, and that within the meaning of § 15 any person whose property is injured by the operations carried on under the authority of the statute is a person whose property is "injured by the taking of said water."

Nancy E. SMITH
v.
Mayor, etc., of WORCESTER.

(182 Mass. 232.)

1. To provide a sewerage system for a designated district, the legislature may, within reasonable limits, determine that the cost shall fall upon such district, and fix the principles upon which it shall be apportioned.

2. When the legislature places the cost of sewers for a particular district upon such district, individual landowners within it cannot show that they have received no benefit, because that question has been decided by the legislature.

(October 31, 1902.)

APPEAL by petitioner from an order of the Supreme Judicial Court for Worcester County dismissing a petition for a writ of certiorari to quash a sewer assessment. *Dismissed.*

The facts are stated in the opinion.

Messrs. **Frank Bulkeley Smith, T. H. Gage, Jr.,** and **Frank F. Dresser,** for petitioner:

Special benefits to the property assessed — that is, benefits received by it in addition to those received by the community at large — are the true and only just foundation upon which local assessments can rest.

Dill. Mun. Corp. 4th ed. § 761; *Dexter* v. *Boston*, 176 Mass. 247, 57 N. E. 379.

If the statute in question provides for special assessments "not based upon the peculiar and special benefits of each estate assessed," it is unconstitutional.

Sears v. *Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Dexter* v. *Boston*, 176 Mass. 247, 57 N. E. 379; *Boston* v. *Boston & A. R. Co.* 170 Mass. 95, 49 N. E. 95; *Wced* v. *Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *Sears* v. *Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; *Carson* v. *Brockton Sewerage Comrs.* 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1; *Hall* v. *Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68.

The statute, by permitting a person whose "real estate may be benefited" to be assessed, is invalid because the assessment is not limited to special benefits received, and may exceed such benefits, and may be based upon the common benefit received by all estates.

Sears v. *Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Hall* v. *Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68.

The proportionate share of the whole expenditure of the city for sewers and drains, assessed upon the owner of "real estate upon any street in which any drain or sewer may be laid, etc., or whose real estate may be benefited thereby," may be larger than the benefit received. This makes the statute unconstitutional.

Sears v. *Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; *Lincoln* v. *Boston Street Comrs.* 176 Mass. 210, 57 N. E. 356; *Lorden* v. *Coffey*, 178 Mass. 489, 60 N. E. 124.

If the town or city wished to assess the persons whose estates were in any way benefited within the meaning of the statutes,

NOTE.—As to necessity of benefits as basis of local assessments generally, see also, in this series, *Re* Madera Irrig. Dist. Bonds (Cal.) 14 L. R. A. 755, and *note;* Raleigh v. Peace (N. C.) 17 L. R. A. 330, and *note;* Davis v. Litchfield (Ill.) 21 L. R. A. 563, and *note;* Asberry v. Roanoke (Va.) 42 L. R. A. 636; Weed v. Boston (Mass.) 42 L. R. A. 642; Rolph v. Fargo (N. D.) 42 L. R. A. 646; Sears v. Boston (Mass.) 43 L. R. A. 834; Hutcheson v. Storrie (Tex.) 45 L. R. A. 289; Schroder v. Overman (Ohio) 47 L. R. A. 156; Kersten v. Milwaukee (Wis.) 48 L. R. A. 851; Adams v. Shelbyville (Ind.) 49 L. R. A. 797; Shank v. Smith (Ind.) 55 L. R. A. 564; Ramsey County v. Robert P. Lewis Co. (Minn.) 53 L. R. A. 421; Barber Asphalt Paving Co. v. French (Mo.) 54 L. R. A. 492, Affirmed in 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; King v. Portland (Or.) 55 L. R. A. 812; Webster v. Fargo (N. D.) 56 L. R. A. 156; and People *ex rel.* Scott v. Pitt (N. Y.) 58 L. R. A. 372.

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they could have done it by having the selectmen, or the mayor and aldermen, within a proper time after the sewer was established, ascertain, assess, and certify the proportional part of the charge of making that sewer, to be paid by each of the persons receiving benefit, and notify the persons to be charged.

Brown v. *Fitchburg*, 128 Mass. 282.

Under the statute in question, a real-estate owner may be assessed for expenses of maintenance as distinct from cost of construction. It is therefore unconstitutional.

Sears v. *Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; *Sears* v. *Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876.

This statute violates the 14th Amendment of the Constitution of the United States.

Norwood v. *Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 352, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Loeb* v. *Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Wight* v. *Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Tonawanda* v. *Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Webster* v. *Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; *Detroit* v. *Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; *Shumate* v. *Heman*, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; *Carson* v. *Brocton Sewerage Comrs.* 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860; *King* v. *Portland*, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; *Voigt* v. *Detroit*, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337; *Goodrich* v. *Detroit*, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397.

Messrs. **Arthur P. Rugg** and **Ernest I. Morgan**, for respondent:

The question of the constitutionality of this statute is not now open.

Butler v. *Worcester*, 112 Mass. 541; *Worcester Agri. Soc.* v. *Worcester*, 116 Mass. 190; *Workman* v. *Worcester*, 118 Mass. 168; *Clark* v. *Worcester*, 125 Mass. 226.

The doctrine of *stare decisis* is a most salutary one.

Rogers v. *Goodwin*, 2 Mass. 475; *Holmes* v. *Hunt*, 122 Mass. 505, 23 Am. Rep. 381; *Thayer* v. *Crossman*, 1 Met. 416.

The benefit or advantage is estimated only as a means of apportioning the tax and of providing a fixed limit to the amount to be assessed upon each estate. The fact of such benefit from the improvement furnishes a justification for the imposition of the tax upon a particular class of estates, instead of a levy in the general way of ordinary taxation. But such benefit conferred would not of itself alone warrant the exaction of money by way of compensation therefor. The estates are assessed, not for the benefit conferred, but for the cost of the public improvement. The essential point in the proceeding is the expenditure for a public service, for which taxation in some form is required.

Chase v. *Springfield*, 119 Mass. 556; *Workman* v. *Worcester*, 118 Mass. 168; *Upham* v. *Worcester*, 113 Mass. 97; *Clark* v. *Worcester*, 125 Mass. 226.

Holmes, Ch. J., delivered the opinion of the court:

This is a petition for a writ of certiorari to quash a sewer assessment levied under Stat. 1867, chap. 106. The question whether the petition can be sustained was reserved by a single justice of this court.

We are asked to declare the statute unconstitutional on the ground that the assessment which it purports to authorize may exceed the benefit to the estate assessed, and therefore is bad under the recent decisions of this court. *Sears* v. *Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Dexter* v. *Boston*, 176 Mass. 247, 251, 57 N. E. 379; *Lorden* v. *Coffey*, 178 Mass. 489, 60 N. E. 124. It is admitted that the statute has been before the court repeatedly, and has been upheld after argument as to its validity. *Butler* v. *Worcester*, 112 Mass. 541, 555. See *Worcester Agri. Soc.* v. *Worcester*, 116 Mass. 189; *Workman* v. *Worcester*, 118 Mass. 168; *Clark* v. *Worcester*, 125 Mass. 226. But it is said that the rule of the recent cases cited was not understood at the time of these decisions, and that the latter no longer are authority so far as the present question is concerned.

It would be a misfortune if we were driven to the conclusion contended for by the plaintiff, after the act has stood so long under the shelter of an express decision, and after, as we may presume, very great and costly improvements have been made and probably titles passed in reliance upon the authority which the statute purports to confer. It is only justice to require an argument from which there is no possible escape before we accept such a result. *Rogers* v. *Goodwin*, 2 Mass. 475, 478; *Holmes* v. *Hunt*, 122 Mass. 505, 516, 23 Am. Rep. 381. But we do not suppose the recent decisions of this court to have made such slaughter among the older cases as the petitioner's counsel is inclined to believe, and we find it unnecessary to consider what effect, if any, is to be given to the modification by *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Webster* v. *Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644, 645, and the other cases in the same volume, of the law as laid down in *Norwood* v. *Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, a decision to which while it stood unqualified we were bound to defer.

We are of opinion that the act may be sustained. Under the recent decisions it may be true that when the legislature is passing a law of general future application, and when, therefore, it cannot be supposed to have compared the local benefit with the cost, the only mode in which it can be made certain, apart from the police power, that constitutional rights are preserved is by limiting each assessment upon an estate to the benefit received by that estate. But

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when the legislature has contemplated a certain region and may be supposed to have acted in view of a specific scheme, there is no doubt that within reasonable limits it may determine that the cost of an improvement shall fall upon a designated district, and may fix the principles upon which the cost shall be apportioned. *Re Kingman*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 342, 343, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Parsons* v. *District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Bauman* v. *Ross*, 167 U. S. 548, 593, 42 L. ed. 270, 17 Sup. Ct. Rep. 966. See *Carson* v. *Brockton Sewerage Comrs.* 175 Mass. 242, 245, 48 L. R. A. 277, 56 N. E. 1, 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860. It may deal with the whole improvement as a unit, and charge those assessed with a share of the total expense. *Butler* v. *Worcester*, 112 Mass. 541, 555; *Dorgan* v. *Boston*, 12 Allen, 223; *Leominster* v. *Conant*, 139 Mass. 384, 388, 2 N. E. 690; *Sears* v. *Boston Street Comrs.* 180 Mass. 274, 278, 62 N. E. 397; *Parsons* v. *District of Columbia*, 170 U. S. 45, 47, 42 L. ed. 943, 18 Sup. Ct. Rep. 521. How far it may authorize an inferior body to constitute a special taxing district need not be considered here.

In *Sears* v. *Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876, and *Lorden* v. *Coffey*, 178 Mass. 489, 60 N. E. 124, the statutes under consideration were general provisions for such sewers and streets as should be constructed or laid out in Boston thereafter, and the legislature could not be taken to have passed upon a scheme. In the former case, the act authorized the street commissioners to take into consideration other matters beside the benefit received by the estate, and showed on its face that the legislature had not undertaken to decide anything with regard to that. Of course there may arise cases in which it is difficult to say how far the legislature has a particular region and a particular plan in mind. Perhaps we should have hesitated over the Worcester statute if it had come before us now for the first time. But as it stands now, the act before us fairly may be supposed to have contemplated a system and a more or less specific scheme, even if the scheme was not then complete in its details. This was indicated in *Butler* v. *Worcester*, 112 Mass. 541, 552, and in view of that and later decisions must be assumed. On that footing the legislature determined that the real estate on the line of the sewers, together with possibly some other land, would be benefited as a whole to the extent of the charge put upon it. *Butler* v. *Worcester*, 112 Mass. 541, 555. The language is, "every person owning real estate upon any street," etc., "or whose real estate may be benefited thereby." The antithesis expressed is between estates on the line of the sewer, and thus obviously benefited, and those others which are benefited although not upon the line. *Butler* v. *Worcester*, 112 Mass. 541, 553, 555; *Workman* v. *Worcester*, 118 Mass. 168, 177. The statute, we may remark in passing, does not purport to embrace all the real estate in the city as the region to be taxed, but the real estate along the line of the sewers and some other specially benefited land. The argument that the city is treated as a unit, and that therefore the cost should have gone into the general taxes, proceeds on a false premise.

When the legislature has determined that the cost, or a proportion of it, shall be thrown upon a designated region, the determination must be assumed to have been reached on constitutional principles, unless the court can see that it was unreasonable. On that assumption, the right of individual owners within the designated region is narrowed. When they go before a jury they may contest the apportionment, but they cannot show that they have received no benefit at all. That the legislature has decided. See *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 341, 45 L. ed. 879, 21 Sup. Ct. Rep. 625. For if anyone, then everyone, might contest in detail the question which the legislature has answered once for all. Of course in the case of an estate not identified by the statute as falling within the region, but made to depend for its doing so upon the question whether it was benefited or not, the owner would have the right to deny the benefit by the terms of the statute itself. After the benefit is established, probably he could not go on to inquire into the amount of the benefit. To that extent, at least, it seems likely that the old decisions would stand. *Workman* v. *Worcester*, 118 Mass. 168, 176; *Keith* v. *Boston*, 120 Mass. 108; *Snow* v. *Fitchburg*, 136 Mass. 183. It will be noticed, further, that it was held or implied in *Clark* v. *Worcester*, 125 Mass. 226, that the assessment was not for the special benefit to the particular estate, but an assessment of a proportional share of a tax laid on a legislatively constituted taxing district in respect, it may be presumed if necessary, of the benefit common to all that region and peculiar to it, but not of the special benefits peculiar to the several estates.

It is suggested that the language of the act extends to expenditure for maintaining the sewer, and is bad on that ground. We do not understand it to have that meaning. Therefore it is unnecessary to discuss *Carson* v. *Brockton Sewerage Comrs.* 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1, and *Sears* v. *Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876, which seem to have appeared to the Supreme Court of the United States to be less reconcilable than we had supposed. *Carson* v. *Brockton Sewerage Comrs.* 182 U. S. 398, 404, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860.

If it were necessary in order to sustain the constitutionality of the statute, we should read the words "shall pay such sum as the mayor and aldermen shall assess upon him as his proportionate share of the expenditure," etc., as meaning a share not in excess of the special and peculiar benefit which his estate is adjudged to receive, thus

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bringing the case under *Hall* v. *Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68, rather than under *Lorden* v. *Coffey*, 178 Mass. 489, 60 N. E. 124. But this interpretation would be contrary to the tenor of the decisions, and would give the act an entirely different meaning and scope from that which it has been adjudged to have, and which we have assumed it to have, for the purpose of deciding this case.

Petition dismissed.

Eugene D. HARDY *et al.*
v.
AMERICAN EXPRESS COMPANY.

(182 Mass. 328.)

1. **A carrier which, having transported goods at consignor's risk C. O. D.,** presents a bill to the consignee before delivering them, knowing facts which indicate that they have been damaged in transit, must disclose such facts, or it may be compelled to return the money collected, in case the consignment is rejected by the consignee.
2. **Whether or not a consignee of goods C. O. D., who, before receiving the goods, pays the bill,** which is presented by the carrier with knowledge of facts indicating that the goods are damaged, exercises due diligence in claiming a return of the money because of such damage, is for the jury, when the claim is not made before the money, by due course of mail, would be transmitted to the consignor.
3. **That a carrier who collected the bill for goods carried C. O. D., before delivering them,** with knowledge of their probable injury in transit, has delivered the fund to the consignor, will not absolve him from liability to return the amount to the consignee, in case notice of refusal to receive the goods is given him within a reasonable time.
4. **A notice by a consignee of goods C. O. D. who, before delivery of the goods, paid the bill to the carrier,** who presented it knowing of the probable injury of the goods in transit, that he put in a claim for the entire shipment, and held the goods subject to the carrier's inspection, may be found by the jury to be a sufficient indication of readiness to rescind, although no tender of the goods was actually made and they were of some value, where the circumstances indicate an absolute denial of liability, and that a tender would have been of no avail.

(November 25, 1902.)

EXCEPTIONS by plaintiffs to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover back money paid for goods shipped C. O. D., which resulted in a verdict in defendant's favor. *Sustained.*

The facts are stated in the opinion.

NOTE.—The doctrine that the concealment of a material fact which it is the duty of a party to disclose constitutes fraud is declared in many cases, some of which are cited in a *note* to Tappan v. Albany Brewing Co. (Cal.) 5 L. R. A. 428.

59 L. R. A.

Messrs. **Hutchins & Wheeler,** for plaintiffs:

Where a party pays money to another without knowledge of all the circumstances of the case, or means of knowledge, or the party obtaining payment has suppressed certain facts, or made fraudulent representations,—the party paying shall recover it back.

Martin v. *Morgan*, 3 J. B. Moore, 635; *Bilbie* v. *Lumley*, 2 East, 471; *Hogan* v. *Shee*, 2 Esp. 522.

Defendant deliberately suppressed the fact that the goods had been damaged. A consignee of goods sent C. O. D. has no title until the goods are delivered to him by the carrier.

Lane v. *Chadwick*, 146 Mass. 68, 15 N. E. 121; *Merchants' Nat. Bank* v. *Bangs*, 102 Mass. 291; *State* v. *O'Neil*, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586; *United States* v. *Shriver*, 23 Fed. 134; *State* v. *Wingfield*, 115 Mo. 428, 22 S. W. 363.

The goods being worthless when delivered, the plaintiffs were under no obligation to take and pay for them; and, if they had known the facts, and the defendant's agent, when demanding the amount of the bill, had confessed what he knew, instead of taking pains to conceal it, the defendant would never have obtained the plaintiffs' money. This gives the plaintiffs the right to recover the money paid.

Merchants' Nat. Bank v. *National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120; *Appleton Bank* v. *McGilvray*, 4 Gray, 518, 64 Am. Dec. 92; *Wilkinson* v. *Johnson*, 3 Barn. & C. 428; *Union Nat. Bank* v. *Sixth Nat. Bank*, 43 N. Y. 452, 3 Am. Rep. 718; *Kingston Bank* v. *Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516; *Duncan* v. *Berlin*, 11 Abb. Pr. N. S. 116.

When one "is induced by the fraud of the agent to pay him money, he may recover the money from the agent, whether the latter has paid it over to his principal or not."

Huffcutt's Cases in Agency, 2d ed. p. 256; Wright, Principal & Agent, 454; *Snowdon* v. *Davis*, 1 Taunt. 359; *Smith* v. *Sleap*, 12 Mees. & W. 585; *Moore* v. *Shields*, 121 Ind. 267, 23 N. E. 89; *Larkin* v. *Hapgood*, 56 Vt. 597.

If any person gets money into his hands illegally, he cannot discharge himself by paying it over to another.

Townson v. *Wilson*, 1 Campb. 396; *Miller* v. *Aris*, 3 Esp. 231.

If any offer to return the goods was necessary, in view of the fact that they were practically of no value, the offer made at the trial was sufficient.

Kent v. *Bornstein*, 12 Allen, 342; *Whitton* v. *Mayo*, 114 Mass. 179; *Corner* v. *Pratt*, 138 Mass. 446.

The defendant disclaiming liability, the plaintiffs were not obliged to make a tender which would not have been accepted.

MacDonald v. *Wolff*, 40 Mo. App. 302; *Cort* v. *Ambergate, N. & B. & E. Junction R. Co.* 17 Q. B. 127; *Daniels* v. *Newton*, 114 Mass. 530, 19 Am. Rep. 384.

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Messrs. **Roland W. Boyden** and **Roland Gray**, for defendant:

The plaintiffs cannot recover, because the defendant had, in the regular course of its business, paid the money to its principal three days before any claim for damages, and many months before the present claim for the return of money paid by mistake of fact, was made.

Story, Agency, § 300; *Garland* v. *Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86; *Jefts* v. *York*, 10 Cush. 392, 12 Cush. 196; *Cabot* v. *Shaw*, 148 Mass. 459, 20 N. E. 99; *Hooper* v. *Robinson*, 98 U. S. 528, 25 L. ed. 219.

They cannot recover because no offer to return the goods was made.

Conner v. *Henderson*, 15 Mass. 319, 8 Am. Dec. 103; *Clark* v. *Baker*, 5 Met. 452; *Morse* v. *Brackett*, 98 Mass. 205; *Bassett* v. *Brown*, 105 Mass. 551; *Snow* v. *Alley*, 144 Mass. 546, 59 Am. Rep. 119, 11 N. E. 764.

Holmes, Ch. J., delivered the opinion of the court:

This is an action for money had and received to recover a sum paid to the defendant for fifty sets of Balzac's works and charges on the same, sent to the plaintiffs by Calman, Levy, & Company, from Paris. The goods were to be delivered to the plaintiffs at Boston by the defendant carrier, "C. O. D.," that is to say, on the plaintiffs' paying for the goods and charges. The goods arrived in Boston, and the defendant was notified by the Cunard Company on November 28, 1898, that they showed signs of wet damage. The next day the defendant's agent, knowing of this notice but saying nothing about it, called on the plaintiffs, presented a bill, and asked for a check for the amount in controversy. Earlier on the same day the plaintiffs had been notified that the goods were landed, and that the money would be needed to get them through the custom house. The sum was paid in ignorance of any trouble. The goods were not delivered to the plaintiffs until December 1, or later. On December 5 or 6, the plaintiff Hardy returned from abroad, opened the cases and discovered the damage on December 12 or 13, and on December 19 wrote to the defendant that the goods were ruined and could not be used, adding, "We feel justified in putting in a claim for the entire shipment and hold the goods subject to your inspection." Meantime the defendant had advised its Paris office by mail of the payment, and on December 16, before the plaintiffs made their claim, the Paris office had paid Calman, Levy, & Company. After discussions and delays the plaintiffs wrote again in April, intimating that they had paid relying on the defendant's saying nothing to show that the books were not in proper condition, and pressing for settlement, as they had lost the use of their money for nearly five months. Later, the defendant disclaimed liability, and this suit was brought. The court directed a verdict for the defendant and the plaintiffs excepted.

The first question in logical order is whether the facts stated disclose, or in any degree tend to prove, a breach of duty on the defendant's part. If two persons are at arm's length, and each is acting and is understood to be acting at his peril, one could not recover a payment from the other on the ground of mistake of fact. *Dedham Nat. Bank* v. *Everett Nat. Bank*, 177 Mass. 392, 395, 59 N. E. 62. It may be that this would have been the situation of the plaintiff in *Lane* v. *Chadwick*, 146 Mass. 68, 15 N. E. 121, if he had paid the defendant express messenger on his terms in that case. But the present case is different. It would be a harsh interpretation to charge the defendant with actual dishonesty. But there is ground for maintaining that in point of law it obtained the money by false representations or an unjustifiable suppression of the truth. It did so if it was chargeable with a duty when, knowing what it had been notified of by the Cunard Company, it asked for and received the sum.

We are of opinion that the defendant was subject to such a duty. The defendant was entitled to receive its charges from the plaintiffs only in case the plaintiffs accepted delivery of the goods. The defendant itself contends that it collected the price of the goods, which was the larger part of the sum received, as the agent of the consignors. If the defendant knew facts which would have made it wrongful in the vendors to collect the money without disclosing them, it could not retain the money against a seasonable demand, because it received it only in the vendors' right. The right to retain the charges would fall with the right to retain the principal sum. The evidence is less complete than it might be, but it would seem that these goods were at the consignors' risk, and were not to be delivered until they reached Boston. *Lane* v. *Chadwick*, 146 Mass. 68, 15 N. E. 121; *State* v. *O'Neil*, 58 Vt. 140, 158, 56 Am. Rep. 557, 2 Atl. 586; *State* v. *Wingfield*, 115 Mo. 428, 437, 22 S. W. 363. It was not disputed that the plaintiffs would have been warranted in refusing to receive them, had they known that they were spoiled. See *Lyons* v. *Hill*, 46 N. H. 49, 88 Am. Dec. 189; *Murchie* v. *Cornell*, 155 Mass. 60, 14 L. R. A. 492, 29 N. E. 207. The defendant had notice of signs which made it likely that the goods were spoiled, and therefore had notice of the fact as it turned out. By demanding or requesting payment, the defendant affirmed by implication that it had not notice of facts which exonerated the plaintiffs from receiving the goods or paying for them, because it was receiving payment in the right of the consignors who would have been bound to disclose the facts. See *Martin* v. *Morgan*, 3 J. B. Moore, 635. We consider this part of the case on the assumption that the defendant acted honestly in the ordinary course of duty. But the plaintiffs had a right to make what they could of the ground offered for wanting the money and the fact that it was asked for before the goods were tendered, in favor of a harsher view.

But it is said that the plaintiffs should have given prompt notice, and that they did

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not use reasonable diligence in doing so. We assume that they were bound to use reasonable diligence in that respect, although some of the cases seem to recognize no such rule. See, *e. g.*, *Larkin* v. *Hapgood*, 56 Vt. 597. After all, the defendant did not know of the condition of the goods. It knew only of outside indications. It might be that the plaintiffs would accept them. The plaintiffs must be taken to have known the necessary limitations of the defendant's knowledge, and that in the ordinary course of business the latter would pay over the price to the consignors. To put it at the lowest, a jury would have been warranted in finding that notice within a reasonable time to the defendant was reasonably to be expected by the latter in case a claim was made. See *Hooper* v. *Robinson*, 98 U. S. 528, 541, 25 L. ed. 219, 222. We assume, for purposes of discussion, that the plaintiffs, as soon as they knew the condition of the goods, had notice that the defendant probably had known of the indications of wet damage. But the exceptions are silent upon the point. If our assumption is correct, it is hard to say that the plaintiffs exercised due diligence when they let the time go by in which the money would be and was transmitted or ordered to be paid in Paris by the ordinary course of mail. The court, however, is not prepared to rule upon this as matter of law, but is of opinion that it is a question upon which the jury ought to pass. If the jury should find that notice was given within a reasonable time, the defendant cannot escape on the mere ground that it has paid over. It knowingly has received the money without right, and therefore is under a personal obligation to the plaintiffs, unless and until it is excused by conduct on their part which estops them from setting up their claim. *Snowdon* v. *Davis*, 1 Taunt. 359; *Townson* v. *Wilson*, 1 Campb. 396; *Sharland* v. *Mildon*, 5 Hare, 469; *Ex parte Edwards*, L. R. 13 Q. B. Div. 747; *Moore* v. *Shields*, 121 Ind. 267, 272, 23 N. E. 89.

But a further defense is pressed with force, that there was no offer to return the goods. We agree with the defendant that the plaintiffs were not excused from this by the fact that the defendant was not the vendor. It represented the vendor, and also had a right to be reinstated in its own lien. We agree, also, that the goods were not so absolutely worthless as to excuse the plaintiffs on that ground. *Morse* v. *Brackett*, 98 Mass. 205, 209; *Snow* v. *Alley*, 144 Mass. 546, 551, 59 Am. Rep. 119, 11 N. E. 764. The plaintiffs said they were worth $5 or $6. But the jury might find, and we cannot say that they would not be justified in finding, that from the beginning the plaintiffs showed that they were willing to give up the goods if they got back their money, and that the defendant indicated plainly enough to excuse them from a tender that it repudiated liability in any form. The language which we have quoted from the letter of December 19 ("We feel justified in putting in a claim for the entire shipment and hold the goods subject to your inspection") did not in terms address itself to rescission, but a jury might find that it showed to any reasonable mind that the plaintiffs were ready for rescission,—that they claimed all that they had paid, and were ready to do what was necessary in order to get it. The same was true of the April letter in which the plaintiffs complained that they had lost the use of their money. When the defendant disclaimed liability, a jury might infer that it meant to be understood, and was understood, to deny that the plaintiffs were in a position in which they had or could perfect a claim against it, and that a tender of $5 worth of spoiled paper would not change its mind, and would be vain. We can have little doubt that such was the actual fact, and that the plaintiffs knew it. The only point on which we hesitate is whether the defendant indicated the fact sufficiently to satisfy technical rules.

Exceptions sustained.

MINNESOTA SUPREME COURT.

Charles A. JOHNSON, *Respt.*,
v.
Joseph H. MARTIN *et al.*, *Appts.*

(.....Minn.....)

***1. In an action, as for conversion, brought against a factor by the true owner of personal property** which has come to the possession of the former by the criminal act of another person, has been sold by him, and the proceeds received and paid over to the criminal, less expenses and commission, it is no defense that the factor acted throughout the entire transaction in good faith, without negligence, and in the supposition that the criminal was the real owner of the property.

2. The owner may recover its value of the factor, although a common carrier was guilty of negligence in permitting the property to be diverted from its true destination by means of a forged waybill, and placed in the possession of the factor through a forged bill of lading.

(November 14, 1902.)

*Headnotes by COLLINS, J.

NOTE.—For liability to real owner of broker who, in good faith, receives stolen stock and sells it and pays over the proceeds to his principal, see, in this series, Swim v. Wilson (Cal.) 13 L. R. A. 605.

APPEAL by defendants from an order of the District Court for Hennepin County overruling a motion for new trial after judgment in favor of plaintiff in an action brought to recover the value of a car load of

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wheat of which defendants obtained possession under a forged bill of lading. *Affirmed.*

The facts are stated in the opinion.

Mr. **Thomas Canty** for appellants.

Messrs. **Savage & Purdy,** for respondent:

The fact of agency is not a defense to an action of trover, where the agent has assumed any personal responsibility of his own, and exercised dominion over the property in an independent business.

Hoffman v. *Carow*, 22 Wend. 285, Affirming 20 Wend. 21; *Coles* v. *Clark*, 3 Cush. 399; *Robinson* v. *Bird*, 158 Mass. 357, 33 N. E. 391; *Cerkel* v. *Waterman*, 63 Cal. 34; *Marks* v. *Robinson*, 82 Ala. 69, 2 So. 292; *Williams* v. *Merle*, 11 Wend. 80, 25 Am. Dec. 604; *Anderson* v. *Nicholas*, 5 Bosw. 121; *Suim* v. *Wilson*, 90 Cal. 126, 13 L. R. A. 605, 27 Pac. 33; *Fort* v. *Wells*, 14 Ind. App. 531, 43 N. E. 155; *Arkansas City Bank* v. *Cassidy*, 71 Mo. App. 186; *Bercich* v. *Marye*, 9 Nev. 312; *Spraights* v. *Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Wing* v. *Milliken*, 91 Me. 387, 40 Atl. 138; *Knapp* v. *Hobbs*, 50 N. H. 476; *Cernahan* v. *Chrisler*, 107 Wis. 645, 83 N. W. 778; *Hill* v. *Campbell Commission Co.* 54 Neb. 59, 74 N. W. 388; *Koch* v. *Branch*, 44 Mo. 542, 100 Am. Dec. 324; *Lee* v. *Mathews*, 10 Ala. 682, 44 Am. Dec. 498, *Miller* v. *Wilson*, 98 Ga. 567, 25 S. E. 578.

Defendants were in an independent business of their own; they assumed to exercise dominion over the property themselves, and to dispose of it, on the representations of a man who does not appear to have been known to them except through this very transaction; they sold the same in the course of their separate business; and they retained a part of the proceeds. The finding that the sale was made "according to the usual course of business as such brokers" implies that it was made in their own name, and that they warranted the title.

Ex parte Dixon, L. R. 4 Ch. Div. 133; *Schell* v. *Stephens*, 50 Mo. 375; *Nichols & S. Co.* v. *Minnesota Thresher Mfg. Co.* 70 Minn. 528, 73 N. W. 415.

The independent exercise of dominion and personal interest in the proceeds of the conversion are of essential importance in determining the liability of the defendant.

Dolliff v. *Robbins*, 83 Minn. 498, 86 N. W. 772; *Merchants' Nat. Bank* v. *Trenholm*, 12 Heisk. 521; *Barker* v. *Furlong* [1891] 2 Ch. 172; *Consolidated Co.* v. *Curtis* [1892] 1 Q. B. 495.

Neither good faith, nor innocent intentions, constitute any defense.

Williams v. *Merle*, 11 Wend. 80, 25 Am. Dec. 604; *Hoffman* v. *Carow*, 20 Wend. 21.

The root principle of the doctrine of conversion is, that the exercise of dominion is the wrongful act, and not the final disposition of the property or its proceeds.

Stephens v. *Elwall*, 4 Maule & S. 259; *Everett* v. *Coffin*, 6 Wend. 603, 22 Am. Dec. 551; *Coles* v. *Clark*, 3 Cush. 399; *Robinson* v. *Bird*, 158 Mass. 357, 33 N. E. 391; *Swim* v. *Wilson*, 90 Cal. 126, 13 L. R. A. 605, 27 Pac. 33; *Spraights* v. *Hawley*, 39 N. Y. 441, 100 Am. Dec. 452.

That the railway company might be subject to a suit as well, constitutes no defense for appellants.

Dickson v. *Merchants' Elevator Co.* 44 Mo. App. 498; *Foy* v. *Chicago, M. & St. P. R. Co.* 63 Minn. 255, 65 N. W. 627; 26 Am. & Eng. Enc. Law, pp. 778, 779.

Collins, J., delivered the opinion of the court:

This action was brought to recover the value of a car load of wheat, and the essential facts are undisputed. In September, 1900, plaintiff was the owner of the wheat in question, and shipped it by rail from Running Water station, in South Dakota, to Milwaukee, Wisconsin, receiving from the carrier a bill of lading; the consignees being plaintiff's agents at Milwaukee. When the car reached Canton, another station on the line of road, one Wasser unlawfully obtained possession of the accompanying waybill, and substituted a forgery, which, in terms, consigned the car from one C. B. Pratt to defendants, who were grain brokers or factors in Minneapolis. Wasser also forged a bill of lading purporting to bear the signature of the carrier's authorized agent at another station, in which Pratt was named as consignor, and these defendants as consignees. Under the assumed name of C. B. Pratt, Wasser mailed this forged bill of lading from a town in Iowa to defendants at Minneapolis, directing them to sell the wheat upon his account and remit the proceeds. Pursuant to the forged waybill, the car was diverted from its proper destination to Minneapolis, and delivered to defendants upon their payment of freight charges and surrender of the forged bill of lading. They sold the wheat, and accounted to Wasser, under the name of Pratt, for the proceeds, less the freight charges, inspection fees incurred, expenses of handling, and a commission to themselves of $9.71. They acted in entire good faith, supposing that the bill of lading was genuine, and that their correspondent was the real owner and actual consignor of the property. They were not guilty of any negligence, according to the findings. The appeal is from a judgment in favor of plaintiff entered upon the findings of fact, and a conclusion of law that he was entitled to recover the value of the wheat.

Counsel for defendants relies mainly upon *Leuthold* v. *Fairchild*, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218, and *McLennan* v. *Minneapolis & N. Elevator Co.* 57 Minn. 317, 59 N. W. 628, and practically concedes in his brief that, if the opinions in these cases sustain his contention, they are against the weight of authority in this country, as well as in England. There can be no doubt of this. But the present case is wholly unlike those referred to. The plaintiff's wheat, through no act of his own, but through the rascality of Wasser, and possibly the negligence of the common carrier, passed into the possession of these defendants. They were

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not mere agents for, or servants of, Wasser, disposing of paper evidences of title to the property while it was actually or constructively in the possession of the latter. Through the forgeries the grain itself was delivered to defendants, and apparently they acquired a special property therein for the advances made, expenses of sale, and services rendered. They could have maintained an action of claim and delivery if this grain had been withheld from them by anyone except the true owner. As factors, they could not only insure it for full value, but could sell it in their own names; such a sale being in the usual course of business. A purchaser could implicitly rely upon defendants' responsibility as factors, and had the title failed, as to such purchaser, he would have a remedy against them for the full value of the property. A sale under such circumstances is an exercise of dominion over the property in defiance of, and to the exclusion of, the rights of the owner, and such exercise of dominion constitutes a conversion upon which an action may be based. The defendants acted as factors or commissionmen, and their liability to plaintiff is fixed by their acts, not by what they might be called when performing these acts, or designated by the trial court in its findings. On the facts, the case is controlled by *Dolliff* v. *Robbins*, 83 Minn. 498, 86 N. W. 772. Although the question of the extent of the liability of a commission merchant, who merely acted as an agent in the matter of receiving and disposing of goods shipped to him, was not there passed upon, it was expressly held, upon a state of facts not distinguishable from those now before us, that *Leuthold* v. *Fairchild* was not in point. In the case last referred to, the defendant bank was merely a medium through which payment for certain grain was obtained for the consignor. There was not, nor was there in *McLennan* v. *Minneapolis & N. Elevator Co.* 57 Minn. 317, 59 N. W. 628, that delivery of possession of the property, that independent exercise of dominion over it, and that personal interest in the proceeds of the sale, which are found here. These defendants were not acting simply as servants in collecting money for another. They were connected with the property in a wholly distinctive character, and in their own behalf, with all the powers, duties, and rights of factors, including qualified ownership. They disposed of property which had been taken from the true owner by the criminal acts of Wasser, they received the proceeds of their sale, and cannot justify their acts by claiming good faith, and ignorance of the fact that Wasser was the original wrongdoer, and that they have accounted to him. What was said in *Swim* v. *Wilson*, 90 Cal. 126, 13 L. R. A. 605, 27 Pac. 33, is quite appropriate here, as follows: "It is a matter of everyday experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who it now appears was a thief, and, relying on his representations, aided his principal to convert the plaintiff's property into money; and it is no greater hardship to require him to pay to the plaintiff its value, than it would be to take the same away from the innocent vendee, who purchased and paid for it." The true owner of property appropriated by another person can, under such circumstances, follow and reclaim it wherever found and identified; and he can hold any person responsible, as for conversion, who has assumed the right to sell it and give possession.

This court, in disposing of this case, must be governed by the well-settled principles of law, and cannot grant immunity to defendants because of the hardship which arises from a liability; nor can it be influenced by the fact that a negligent common carrier might have been subjected to an action for the value of the wheat, or, as claimed by counsel, that the action to recover such value ought, in justice, to have been brought against the carrier instead of defendants.

Order affirmed.

Julius CABANNE, *Respt.*,
v.
William GRAF, *Appt.*

(.....Minn.....)

***So much of Laws 1901, chap. 278, as provides for the service of the summons** in a personal action against a natural person who is a citizen of another state, but carries on business in this state, on his agent in charge of the business, without a seizure of his property by the process of the court, is unconstitutional.

(December 5, 1902.)

APPEAL by defendant from an order of the Municipal Court of St. Paul denying a motion to set aside a judgment in plaintiff's favor in an action brought to recover damages for breach of contract. *Reversed.*

The facts are stated in the opinion.

Messrs. **Crooks & Fry,** for appellant:

Laws 1901, chap. 278, violates § 1, art. 14, of the Federal Constitution; also § 2, art. 4, of the Federal Constitution.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed.

*Headnote by START, Ch. J.

NOTE.—As to validity of personal judgment rendered upon constructive service of process against nonresident, see also, in this series, *note* to Moyer v. Bucks (Ind. App.) 16 L. R. A. 231; National Telephone Mfg. Co. v. DuBois (Mass.) 30 L. R. A. 628; Murray v. Murray (Cal.) 37 L. R. A. 626; and Kemper-Thomas Paper Co. v. Shyer (Tenn.) 58 L. R. A. 173.

As to what service of process is sufficient to constitute due process of law as basis of judgment *in personam*, see *note* to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 577.

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565; *Lydiard* v. *Chute*, 45 Minn. 279, 47 N. W. 967; *Plummer* v. *Hatton*, 51 Minn. 181, 53 N. W. 460; *Brooks* v. *Dun*, 51 Fed. 138; *Ralya Market Co.* v. *Armour & Co.* 102 Fed. 530; *Caldwell* v. *Armour & Co.* 1 Penn. (Del.) 515, 43 Atl. 517; *Hobson* v. *Peake*, 44 La. Ann. 383, 10 So. 762; *Laughlin* v. *Louisiana & N. O. Ice Co.* 35 La. Ann. 1185; *Barnes* v. *People ex rel. Moloney*, 168 Ill. 425, 48 N. E. 91.

Mr. **George W. Walsh**, for respondent:

The defendant entered into the contract as William Graf, of Milwaukee, Wisconsin, the owner and proprietor of the Springer Cigar Company of St. Paul, Minnesota. He is doing business in the name of a company, and by his own act and recital fixes the residence or *locus* of the company as within this state.

The legislature has the power to declare what shall constitute personal service.

Start, Ch. J., delivered the opinion of the court:

Action in the municipal court of the city of St. Paul to recover damages for a breach by the defendant of a contract whereby he agreed to employ the plaintiff for a stated period. Judgment was entered by default against the defendant for the sum of $496.92 costs and damages. The proof of the service of the summons was to the effect that it was served by the plaintiff's attorney upon the defendant by handing to and leaving with his agent and representative (naming him) a true copy thereof, and that the defendant had been engaged in business in the city of St. Paul for six months then last past, and was absent from this state. The defendant appeared specially, and moved the court to set aside the judgment as void. The plaintiff then made a motion to amend his proof of service of the summons so as to show that the defendant was a nonresident of the state of Minnesota, and not therein, but had been for more than a year then last past actively engaged in carrying on business at the city of St. Paul, which was in charge of his agent and representative, upon whom service was made. The trial court allowed the proof of service to be so amended, and denied the defendant's motion to set aside the judgment as void. The defendant appealed from the order denying his motion. It evidently was the intention of the plaintiff to make service of the summons in this case pursuant to the provisions of Laws 1901, chap. 278, which are to the effect that, whenever a cause of action exists in favor of a resident of this state against any nonresident individual, association, or copartnership engaged in business in this state, by reason of such business, the summons may be served upon the manager, superintendent, foreman, agent, or representative of such individual, association, or copartnership while in charge of such business, with the same effect as if it were personally served. Section 2 of the act provides that the summons in such cases, in the absence from this state of the defendant, of which the sheriff's return shall be prima facie evidence, may be made by delivering a copy to the agent or representative of such nonresident defendant while he is in actual charge of the business out of which the cause of action arose. Waiving the objections of the defendant that the record does not show a compliance with the terms of the statute, we have for our decision the question whether the statute, in so far as it authorizes the service of summons on a nonresident and absent defendant with the same effect as if personally served on him within the state, is constitutional. Whether the statute is valid as applied to associations or copartnerships, which are quasi legal entities, to the extent of binding their property, but not that of the individuals of which they are composed, we do not consider or decide, for this is not such a case, but one against an individual. It is a case where the defendant was a nonresident and absent natural person, having property within this state, which the court did not seize, and upon whom the summons was never served, except by delivering a copy thereof to his agent, and yet a judgment *in personam* was rendered against him, good everywhere if the statute is valid. The state has plenary jurisdiction over all property, real or personal, within its limits, and may seize and subject it to the payment of the debts of the owners thereof, whether citizens of the state or not, upon such reasonable notice as the legislature may prescribe. But the power of the state to personally affect, by the judgments of its courts, citizens of another state, without personal service of process upon them within the state, is quite another matter. Prior to the decision in the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565, it was the law of this state, and in some other jurisdictions, that, if a nonresident defendant had property in this state, its courts had jurisdiction, without seizing it, to proceed by publication of the summons, and render a judgment *in personam*, valid within the state to the extent of any property of the defendant therein. *Stone* v. *Myers*, 9 Minn. 303, Gil. 287, 86 Am. Dec. 104; *Cleland* v. *Tavernier*, 11 Minn. 194, Gil. 126. Such, however, is not now the law, for a statute authorizing such a proceeding would not be due process of law. *Kenney* v. *Goergen*, 36 Minn. 190, 31 N. W. 210; *Lydiard* v. *Chute*, 45 Minn. 277, 47 N. W. 967; *Plummer* v. *Hatton*, 51 Minn. 181, 53 N. W. 460. *Pennoyer* v. *Neff* is the leading authority in support of the now well-settled proposition that, except as to proceedings affecting the personal status of the plaintiff, or *in rem*, or as to actions to enforce liens, or to quiet title, or to recover possession of property, or for the partition thereof, or to set aside fraudulent transfers thereof, or to obtain judgment enforceable against property seized by attachment or other process, no state can authorize its courts to compel a citizen of another state remaining therein to come before them and submit to their decision a mere claim upon him for a money demand, no matter what the prescribed mode of service of process against him may be. An attempt to do so is not due process of law. 2 Freeman, Judgm.

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§§ 564–567; *Hart* v. *Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; *Arndt* v. *Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *De la Montanya* v. *De la Montanya*, 112 Cal. 101, 32 L. R. A. 82, 44 Pac. 345, 53 Am. St. Rep. 165, and notes, 181. Now, unless the fact that a nonresident natural person does business in this state which is in charge of an agent creates an exception to this rule, the act here under consideration is unconstitutional as to such a party. Clearly, such a case is not an exception to the rule, for the mere fact that a natural person carries on business in this state by an agent cannot affect the question of the jurisdiction of our courts over him personally. The court may seize his property within the state by its process, and, upon such reasonable constructive notice to him as the legislature may direct, apply the property to the payment of his debts; but the legislature cannot declare that to be personal service on a citizen of another state, not actually found within the state, which is not so in fact. Such nonresident person, unlike a corporation, carries on business in this state, not by virtue of its consent, but by virtue of the Federal Constitution, which guarantees to the citizens of each state all privileges and immunities of citizens of the several states; hence, it cannot be implied from the fact that he does business within the state that he consents to submit himself to the jurisdiction of its courts in personal actions upon service of process on his agent. He submits his property which he sends into the state to the jurisdiction of its courts, but not his person. *Caldwell* v. *Armour & Co.* 1 Penn. (Del.) 545, 43 Atl. 517; *Brooks* v. *Dun*, 51 Fed. 138. In each of the cases cited it was held that a statute which authorized service of summons, in a personal action, on a nonresident natural person to be made on his agent in charge of his business within the state, was unconstitutional, because it was in violation of § 2, art. 4, of the Federal Constitution, and of § 1 of the 14th Amendment. See also *Ralya Market Co.* v. *Armour & Co.* 102 Fed. 530.

We are of the opinion, and so hold, that so much of Laws 1901, chap. 278, as provides for the service of the summons in a personal action against a natural person who is a citizen of another state, carrying on business in this state, without a seizure of his property by the process of the court, is unconstitutional. It follows that the defendant in this case was entitled to have the judgment against him set aside as void.

It is therefore ordered that the order appealed from be reversed, and the case remanded, with directions to the Municipal Court to grant the defendant's motion to set aside the judgment.

WISCONSIN SUPREME COURT.

ROGERS-RUGER COMPANY, *Appt.*,
v.
F. L. MURRAY, *Respt.*

(.....Wis.....)

A purchaser of property upon which a log lien is claimed is deprived of his property without due process of law by a statute making him personally liable for the full amount of the claim, if a petition for lien is duly filed, proceedings to enforce it are begun in time, and the property has been so changed that the lien cannot be enforced against it.

(September 23, 1902.)

APPEAL by plaintiff from a judgment of the Superior Court for Douglas County in favor of defendant in an action to render defendant liable for the amount of certain liens claimed against logs which he had purchased. *Affirmed.*

Statement by **Bardeen, J.**:

The complaint sets out that plaintiff is a corporation. Prior to April 10, 1899, plaintiff became the owner of certain time checks amounting to $5,079.02, issued by J. W. Howes Company to divers persons for work done by them for said firm during the logging season of 1898–99, in cutting logs and manufacturing the same into lumber. At

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NOTE.—*Personal liability of purchaser of personal property which is subject to a lien.*

I. *Scope of note*, 737.
II. *Purchasers of property subject to chattel mortgage*, 737.
III. *Liens created by state*, 738.

I. *Scope of note.*

The liability considered is that of a purchaser only, and from the fact of his purchase alone; and not that of one who, by some act of absorption or disposal, renders the satisfaction of the lien impossible. Such a liability can only exist, if at all, by force of a statute creating it.

II. *Purchasers of property subject to chattel mortgage.*

In those jurisdictions where a chattel mortgage is regarded as an absolute sale, subject to be defeated by the performance of mentioned conditions, the interest, before the forfeiture thereof, of the mortgagor in the property is held to be a proper subject of sale and purchase; and a purchaser in good faith of such interest cannot be made liable for the value of the property or the amount of the mortgage lien, so long as there is no act on his part whereby the latter is endangered. And he may dispose of what he so purchases without incurring liability to the mortgagee, provided he does nothing to render the lien ineffectual.

The cases under this division are given, and are useful, only for the purpose of illustrating and enforcing the proposition that a purchaser of personal property upon which there is a lien by way of chattel mortgage can never be made personally liable to the holder of the mortgage from the simple fact of such purchase, but only when he does some act interfering with, or de-

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the same time such persons assigned their claims for a lien upon the logs and timber to plaintiff. On May 16, 1899, plaintiff duly filed a lien for said several time checks, and within four months commenced an action to enforce the same. After the commencement of the work represented by the time checks, said J. W. Howes Company sold 72,000 feet of the lumber cut from the logs to the defendant, said lumber being of the value of $15 per 1,000 feet. Prior to the commencement of this action plaintiff made a demand on defendant for the value of said lumber, which was refused. Judgment was demanded for $5,079.02 and interest. A demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action was sustained. The plaintiff appeals from the order sustaining the demurrer.

Mr. **H. V. Gard,** for appellant:

In enacting Rev. Stat. § 3336, it was the intent of the legislature to raise a personal liability up to, but not exceeding, the value of the property transported or intermingled.

The original act (Laws of 1891, chap. 139, § 6), was held to be penal in its nature.

Lohman v. *Peterson,* 87 Wis. 227, 58 N. W. 407.

The revisers rewrote that section into § 3336, with the evident purpose of obviating the penalty and transforming it into a contractual liability.

A change of phraseology, or omission of a material word, in the revision of a statute does not change the law, unless the intent to change is clear.

23 Am. & Eng. Enc. Law, p. 372.

When a statute is susceptible of two con-

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stroying, the lien, *i. e.,* some act which may be said to amount to a conversion.

And further, that he may, previous to the forfeiture of the condition of the mortgage, or a demand from the holder thereof, in good faith transfer such property.

And so, it has been held that an officer is not liable for levying upon and selling property covered by a chattel mortgage before the forfeiture of its conditions, on an execution against the mortgagor; whether he assumes to sell the property absolutely, ignoring the mortgagee, or only the mortgagor's interest therein. Hull v. Carnley, 11 N. Y. 501, 17 N. Y. 202. The court said that the effect of the sale on execution against the mortgagor would be the same as a voluntary transfer of the mortgaged articles by the mortgagor to a third person; and that such a disposition of them would not oust the mortgagee, whether his interest was repudiated or was recognized; as such sales, whether judicial or private, pass such title as the vendor, or party against whom the authority to sell exists, had to part with, and no other.

To the same effect, see Goulet v. Asseler, 22 N. Y. 225; Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Manning v. Monaghan, 23 N. Y. 539, 28 N. Y. 585.

The deduction from the foregoing is clear, that, if such a purchaser should sell the property within the period during which the mortgagor was, by the conditions of the mortgage, entitled to the possession of it, he would not be liable to an action by the mortgagee.

And it is equally clear that, while the mortgagors retain possession, they can sell and deliver the mortgaged property, and the purchaser will take all the interest the mortgagors had thereto, and hold it subject to the mortgage, whether he is aware of its existence or not; and, there being no default in the payment, and no possession taken by the mortgagee, such purchaser has the right to dispose of it to another, who will take it subject to the mortgage; and the remedy of the mortgagee is to follow it and recover it from his possession. And, if the mortgaged property is an animal, and the mortgagee suffers it to remain in the possession of the person to whom the purchaser from the mortgagor sold it, until it dies of a disease which it had when the mortgage was executed, a demand upon the purchaser from the mortgagor will not authorize the mortgagee to support an action against him. Hathaway v. Brayman, 42 N Y. 322, 1 Am. Rep. 524.

And this would seem to be precisely what was held in Martin v. Lewinski, 54 App. Div. 573, 66 N. Y. Supp. 995, in which case it was decided that, where the defendant had purchased the property from the mortgagor, and there had been no default in the payment of the note, to secure which the chattel mortgage was executed, and no demand of possession in behalf of the mortgagee before the sale and delivery of the property to a third person by the defendant, the mortgagee was not in a position to recover damages of the defendant.

And an execution creditor who purchases at the sale of an execution debtor property subject to a mortgage, where the constable, putting up the property with the consent of such execution creditor and in his presence and hearing, announces to the bidders that the property will be sold subject to the mortgage, and that the purchaser will have to comply with the conditions and demands of the mortgage, who, after purchasing the property, sells the interest of the execution debtor for a sum more than sufficient to pay the amount of the mortgage, and receives the money therefor, and refuses on demand to pay to the mortgagee the amount of his mortgage after it becomes due,—is not liable to the mortgagee therefor. Hamill v. Gillespie, 48 N. Y. 556.

And in those jurisdictions where it is claimed that such a mortgage is a security, and that the title to the property does not pass from the mortgagor until foreclosure, until that event occurs the interest of the mortgagor may likewise be sold and purchased, and the purchaser thereof will not incur liability, either for the value of the property, or for the amount of the lien, provided he commits no act by which the latter is endangered. Randall v. Higbee, 37 Mich. 40; Carpenter v. Graham, 42 Mich. 191, 3 N. W. 974, 46 Mich. 531, 9 N. W. 841; Warner v. Beebe, 47 Mich. 435, 11 N. W. 258; Flood v. Butzbach, 114 Mich. 613, 72 N. W. 603.

Analogous to the foregoing, it has been held that a purchaser of cotton from a tenant with notice of the landlord's lien thereon is not liable to the landlord, if it does not appear that he has ever converted or removed the cotton or its proceeds; but that it is held by him subject to the remedy of the landlord. Ehrman v. Oats, 101 Ala. 604, 14 So. 361.

III. *Liens created by statute.*

The reasons given in ROGERS-RUGER CO. v. MURRAY for deciding that the statute there considered deprived the purchaser of his property without due process of law were that it rendered him liable for the entire debt due the lien claimant; in that it imposed upon the purchaser a penalty if he purchased during the pendency of the lien claim, thereby thrusting upon such purchaser an obligation having no relation to the value of the property

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structions, one constitutional and the other not, the former should be adopted, even though the latter may be the more natural interpretation of the language used.

Palms v. *Shawano County*, 61 Wis. 211, 21 N. W. 77; *Bigelow* v. *West Wisconsin R. Co.* 27 Wis. 478; 23 Am. & Eng. Enc. Law, pp. 349, 352; Cooley, Const. Lim. 72, 177, 184; *Camp* v. *Rogers*, 44 Conn. 291.

Even if the statute by its terms raises a liability beyond the value of the property, there would seem to be no objection to sustaining it up to the amount of the value of the property, and holding it void beyond that limit, for statutes may be good in part, and void in part.

Cooley, Const. Lim. 177.

Mr. **A. B. Ross** also for appellant.

Messrs. **Catlin, Butler, & Lyons,** for respondent:

The lien is a creature of the statute, and is assignable only by the grace of the statute. Unless the assignment is in strict compliance with the terms of the statute, only the naked claim would pass, without the lien or right to enforce it.

Caldwell v. *Lawrence*, 10 Wis. 331; *Tewksbury* v. *Bronson*, 48 Wis. 581, 4 N. W. 749; *Bernhardt* v. *Rice*, 98 Wis. 578, 74 N. W. 370; *Shearer* v. *Browne*, 102 Wis. 585, 78 N. W. 744; *Dirimple* v. *Dells Lumber Co.* 101 Wis. 509, 78 N. W. 182; *Scott* v. *Christianson*, 110 Wis. 164, 85 N. W. 658.

The notice mentioned in § 3316 authorizes the assignment of part of a claim which would not otherwise be assignable so as to carry the right of lien.

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he received or the loss which the lien claimant sustained; and that this extreme liability was not made to rest upon the fact that a lien had been adjudged and determined, as the lien claimant had only to file his lien and commence a suit, and then the liability of the purchaser became absolute.

A statute of Tennessee provided that a landlord's lien for rent might "be enforced (1) by original attachment issued on affidavit that the rent is due and unpaid, or, before due, on affidavit that the defendant is about to remove or sell the crop; (2) or by judgment at law against the tenant, and execution to be levied on the crop in whosesoever hands it may be." Code, § 3541. And by § 3542 it was further provided: "And the person entitled to the rent may recover from the purchaser of the crop or any part of it, with notice of the lien, the value of the property so that it does not exceed the amount of the rent and damages." Phillips v. Maxwell, 1 Baxt. 25, 29, 30.

In the above case, the judge who delivered the opinion of the court, to the effect that the lien related back to the date of the contract, added this *dictum:* "By § 3542, if the landlord elects to proceed against the purchaser for the value of the property, and not for the property itself, he cannot recover if the purchaser had no notice of the lien."

In Armstrong v. Walker, 9 Lea, 156, it was decided that a firm of cotton factors was not liable as such purchasers, where they only received cotton from a tenant, which was subject to a landlord's lien, and sold it for the tenant to a third party; the latter being the purchaser from the tenant through his agents, the factors.

In 1879 the section in regard to the liability of a purchaser was amended by eliminating therefrom the words "with notice of the lien," leaving the section as it now is in the Code of 1896, § 5302.

Thereafter, in an action by a lessee against defendants, who had purchased cotton from a subtenant upon which plaintiff had a landlord's lien, it was decided that a demand was unnecessary previous to bringing the action, because, if the suit was maintainable at all, it was upon the ground that defendants had purchased cotton of the producer, upon which the statute gave the landlord a lien and right of action against the purchaser. And that it was not necessary that the rent should be due before bringing the suit against the defendants as purchasers; nor that a judgment should be first had against the subtenant. The court said that the cause of action against the purchaser is, that property, on which a person entitled to rent has a lien, has been purchased of the debtor, and the right of the creditor thus interfered with, and the person so entitled is given an action to recover its value because the property has been purchased by another. That, to support the action, the plaintiff must show that he is entitled to the rents, and that defendant is the purchaser of the crop, or part of it, and the value of the property so purchased; and then he may recover the value of the property not to exceed the amount of rent and damages. And that plaintiff must prove his claim for rent, just as he would be required to do if he had brought suit against the tenant. Richardson v. Blakemore, 11 Lea, 290.

In Davis v. Wilson, 86 Tenn. 519, 8 S. W. 151, it was held that this statute gives the landlord a right of action which is not limited by the duration of the lien against the crop a right of action against the purchaser personally, and without reference to the existence or nonexistence of the lien, when suit may be brought against him. The court, after affirming the doctrine laid down in Richardson v. Blakemore, 11 Lea, 290, *supra,* that the purchase of the crop while subject to the lien is actionable for the reason that it is an interference with the landlord's rights, further decided that the action contemplated was one of debt as upon an implied contract, or promise, on the part of the purchaser, and was not barred by limitation until six years after the cause of action accrued, notwithstanding the period provided for the enforcement of the lien had expired before the commencement of the action against the purchaser.

And in Biggs v. Piper, 86 Tenn. 589, 8 S. W. 851, it was stated that, from the decision in Richardson v. Blakemore, 11 Lea, 290, *supra,* to the effect that a suit by the landlord may be maintained against the purchaser before any judgment against the tenant, or before the rent is due; and from that in Davis v. Wilson, 86 Tenn. 519, 8 S. W. 151, *supra,* to the effect that the landlord may sue the purchaser for the value of the property after the expiration of three months from the maturity of the debt for rent (the time limited for the enforcement of the lien), where the sale was made within the three months,—it is clear that the right of action against the purchaser is not dependent upon the lien, but is an independent and substantive cause of action, given by statute, against the purchaser of crops from a tenant who has not paid his rent; and that this extraordinary remedy is not confined to the landlord alone, but is transferable to his assigns.

It will be noticed that the Tennessee statute is not obnoxious to the objection made by the

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Skobis v. *Ferge*, 102 Wis. 122, 78 N. W. 426.

The statute in question is in conflict with the 14th Amendment to the Constitution of the United States, and § 9 of article 1 of the state Constitution, for the reason that it purports to make one person pay the debt of another, and deprives him of his property without due process of law.

Davidson v. *New Orleans*, 96 U. S. 107, 24 L. ed. 620; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 33, 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *John Spry Lumber Co.* v. *Sault Sav. Bank, Loan & T. Co.* 77 Mich. 199, 6 L. R. A. 204, 43 N. W. 778; *King* v. *Hayes*, 80 Me. 206, 13 Atl. 882; *Lindsay & P. Co.* v. *Mullen*, 176 U. S. 127, 44 L. ed. 400, 20 Sup. Ct. Rep. 325; *Parsons* v. *Russell*, 11 Mich. 113, 83 Am. Dec. 728; *Flint River S. B. Co.* v. *Roberts*, 2 Fla. 102, 48 Am. Dec. 178; *Oregon R. & Nav. Co.* v. *Smalley*, 1 Wash. 210, 23 Pac. 1008; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Wallace* v. *Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579; *Garvin* v. *Daussman*, 114 Ind. 429, 16 N. E. 826; *Schroeder* v. *Galland*, 134 Pa. 277, 7 L. R. A. 711, 19 Atl. 632; *Jones* v. *Great Southern Fireproof Hotel Co.* 79 Fed. 477; *Selma Sash, Door, & Blind Factory* v. *Stoddard*, 116 Ala. 251, 22 So. 555; *Cook* v. *South Park*, 61 Ill. 115; *Dorman* v. *State*, 34 Ala. 216; *Moore* v. *State*, 43 N. J. L. 203, 39 Am. Rep. 558.

Words should not be read into or out of a plain statute.

Duluth, S. S. & A. R. Co. v. *Douglas County*, 103 Wis. 89, 79 N. W. 34; *Milwaukee Electric R. & Light Co.* v. *Milwaukee*, 95 Wis. 42, 69 N. W. 796; *Everett* v. *Wells*, 2 Scott N. R. 525; *Hanson* v. *Eichstaedt*, 69 Wis. 538, 35 N. W. 30; *Gilbert* v. *Dutruit*, 91 Wis. 661, 65 N. W. 511.

Bardeen, J., delivered the opinion of the court:

This action involves the validity of Rev. Stat. 1898, § 3336. Such section is as follows: "If any property upon which a lien is claimed under the foregoing provisions shall, during the pendency of the claim therefor, be transported out of this state, secreted, destroyed, sold, encumbered, or so changed in character by intermingling it with other property as to prevent the property upon which the lien is claimed from being subjected to the satisfaction of the lien, the owner of such property, and every purchaser thereof or person acquiring any interest therein during the pendency of such claim, shall be liable to the lien claimant for the amount which may be adjudged to be due him, which amount may be recovered against any such person in a personal action: Provided, the petition for a lien is filed in accordance with law, and an action to foreclose the same is begun within the time limited therefor." It will be observed from the complaint that the plaintiff has complied with the requirements of this statute, and is seeking to recover from defendant the entire

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court in ROGERS-RUGER CO. v. MURRAY, to the Wisconsin statute, *viz.*, that it seeks to make the purchaser liable for the entire debt of the lien claimant regardless of the value of the property purchased; the Tennessee statute providing that the purchaser shall only be liable for "the value of the property so that it does not exceed the amount of the rent and damages."

The objection mentioned was the principal, if not the only, real reason given for holding that the Wisconsin statute deprived the purchaser of his property without due process of law; and yet another cause for assailing that law was found in the circumstance that the extreme liability sought to be imposed on the purchaser was not made to rest upon the fact that a lien had been adjudged and determined.

But the Tennessee statute does virtually the same thing, as has been seen by the several decisions of the supreme court of that state herein given; and it does not appear that that objection has ever been raised to it.

From the foregoing, the deduction would seem to be fair that, if the Tennessee statute is not obnoxious to the constitutional provision against the deprivation of property without due process of law, the Wisconsin statute is only so, because it seeks to make the purchaser liable for the entire debt of the lien claimant regardless of the value of the property. On the other hand, it is equally true that, if the purchaser is deprived of his property without process of law, not alone for the reason just stated, but also for the other, *viz.*, that the liability sought to be imposed on the purchaser is not made to rest upon the fact that a lien has been adjudged and determined;—then the Tennessee statute—the validity of which seems not to have been questioned—would be liable to the same objection.

By a statute of Wyoming it is provided that "no lien upon personal property shall be valid as against an innocent and bona fide purchaser, unless the person having the right of such lien shall notify said purchaser, before he makes payment for such property, of the existence of such lien; in which case, the purchaser shall be responsible to the person having such lien claim against said property, for the full amount of his claim, and all legitimate costs and expenses; and payment made on such lien claim shall apply on payment for such personal property." Wyo. Rev. Stat. div. 2, title 2, § 2859; Rev. Stat. 1887, § 1485.

No case can be found in the reports of that state in which the question of the construction of this statute has been raised. But it is difficult to see why the provision that a purchaser with notice before payment shall be responsible to the person having the lien, "for the full amount of his claim," does not come under the ban of the judgment in ROGERS-RUGER CO. v. MURRAY.

And if it shall be urged, in defense of the validity of the statute, that the lawmaking power meant that such a purchaser should be liable to the extent of the value of the property purchased, it may be stated that this is precisely what was claimed by the counsel for the plaintiff in that case to sustain the validity of the statute which was there under consideration; and the answer is that of the court there, *viz.*: "That no canon of construction . . . sanctions this contention," and that "words should not be read into or read out of a plain statute." P. H. V.

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amount of time checks it has purchased. According to the literal reading of the statute, any person who buys an interest in property upon which a log lien is claimed, and uses or so disposes of the property that the lien cannot be enforced, renders himself liable for the entire debt due the lien claimant. It is also to be observed that this extreme liability is not made to rest upon the fact that a lien has been adjudged and determined, but may be declared in any case where a lien is claimed, a petition filed, and action commenced. The good faith or diligence of the person purchasing the property is no protection to him. The lumber may be sold in open market, it may pass through many different hands, it may go into the possession of innocent purchasers, and yet the original owner, and every person acquiring any interest therein "during the pendency of such claim," is liable to the lien claimant for the full amount his due, regardless of the value of the property which may have come to his hands. The value of the property received by the purchaser may be infinitesimal when compared with the amount due the claimant. In this case it was about one fifth. For the simple act of purchasing personal property the statute makes the purchaser liable with the real debtor to the extent stated. The lien claimant need not exhaust his remedy against the real debtor. He need not have the amount his due determined in the suit brought against the party primarily liable. He has only to file his lien, and commence a suit, and then the liability of the other becomes absolute. Is this a valid enactment? Does it do violence to that provision of the Federal Constitution which provides that "no state shall. . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws?" Amend. 14, § 1. That it imposes upon the purchaser of any of the commodities upon which the statute gives a lien a penalty if he purchases during the pendency of such claim is perfectly obvious. It thrusts upon such purchaser an obligation having no relation to the value of the property he receives or the loss which the lien claimant sustains. It may be a just and proper thing for the legislature to protect the lien claimant against acts that tend to defeat his lien. Indeed, it may go farther, and pass statutes which shall be read into the contracts of the parties when made, and date the inception of the lien from the commencement of the operations which give rise to the lien. Such legislation was sustained in the cases of *Lampson* v. *Bowen*, 41 Wis. 484; *Vilas* v. *McDonough Mfg. Co.* 91 Wis. 607, 30 L. R. A. 778, 65 N. W. 488; *J. B. Alfree Mfg. Co.* v. *Henry*, 96 Wis. 327, 71 N. W. 370; and *Fitzgerald* v. *Walsh*, 107 Wis. 92, 82 N. W. 717. This principle was carried to its limit in *Mallory* v. *La Crosse Abattoir Co.* 80 Wis. 170, 49 N. W. 1071, which sustained the subcontractor's lien under Laws 1889, chap. 333, on the theory that such law made the owner a surety for the original contractor for the payment of work which resulted in the improvement of his property. This statute was to be read into the contract of the original parties, and could be sustained, because it gave the property owner a remedy over in case he was compelled to pay more than the amount called for in his contract. The statute under consideration contains no such provision. It gives the purchaser no remedy, while it imposes a burden beyond the contemplation of the parties. It is the imposition of the penalty mentioned that makes the law vicious. Because it is arbitrary, unjust, and oppressive, because it creates a liability having no just relation to the loss sustained by the lien claimant or benefits received by the purchaser, it comes fairly within the condemnation of the Federal Constitution. Much judicial thought has been expended in interpreting the meaning of the section of the 14th Amendment mentioned, and many cases have arisen in which the learning of the judges has been displayed. All agree that the legislature cannot take the property of one and give it to another. It cannot create or enforce penalties, except in the exercise of the police power, or for the general welfare of the people. Legislation that is so partial and arbitrary as to result in the spoliation of property has always been condemned. In fact, the range of decision has been so wide, and the cases so numerous, that an attempt at citation of authorities would result in confusion. Counsel for the appellant, while not admitting the invalidity of the statute, argue that it can be sustained by holding that it was only intended to make the purchaser liable for the actual value of the property received, and that the statute may be so construed. No canon of construction of which we are aware sanctions this contention. In words as plain as any that could have been selected, the legislature has manifested its intention. The language is that the party "shall be liable to the lien claimant for the amount which may be adjudged to be due him." The construction contended for would make the statute read "shall be liable to the lien claimant for the value of the property received by him." This court can only construe. It cannot legislate. Words should not be read into or read out of a plain statute. To adopt the construction asked would be to make a new statute. This we cannot do. It must be left as written by the legislature, and its terms, being in violation of the organic law, must be held invalid. Plaintiff having no basis for its alleged cause of action, the demurrer was properly sustained.

Order affirmed.

Cassoday, Ch. J., concurring:

I concur in the decision in this case, but in doing so I do not wish to be regarded as approving the decision of this court in *Mallory* v. *La Crosse Abattoir Co.* 80 Wis. 170, 49 N. W. 1071, or *Vilas* v. *McDonough Mfg. Co.* 91 Wis. 607, 30 L. R. A. 778, 65 N. W. 488, cited in the opinion of my Brother **Bardeen.**

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MISSISSIPPI SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*,
v.
Joseph HARRIS.

(.....Miss.....)

1. **One purchasing a round-trip railroad ticket good only on the day of purchase** may recover damages in case he is ejected from the only train passing his station on the return trip on that day, for the reason that the ticket is not good on that train because the train is not scheduled to stop at that station.
2. **A statement by the agent, when selling a round-trip railroad ticket** good only on the day of sale, that, in case the only train returning that day is late, the purchaser may have difficulty in getting it to stop to let him off, has no effect upon his rights under the contract.
3. **The right of the holder of a round-trip railroad ticket** good only on the day of sale, to return upon the only train passing his station that day, is not affected by the statement of a flagman, when he attempts to board the train, that it does not stop at his destination, and his agreement to leave the train at the last stop before his destination.

(December 8, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Hinds County in favor of plaintiff in an action brought to recover damages for illegal ejection from defendant's train. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Mayes & Harris** for appellant.

Messrs. **Alexander & Alexander,** for appellee:

Inasmuch as the ticket is the evidence of the contract of carriage, and the ticket in this case specified a return carriage of its holder to Ridgeland before midnight, plaintiff certainly had a right to return on this train, which the evidence shows was commonly known as the local passenger, in distinction to the subsequent north-bound limited, which passed later in the night.

Alabama & V. R. Co. v. *Bell* (Miss.) 29 So. 818.

Where the company allows its authorized agent to keep for sale, and sell, return tickets for return on a train known as the local passenger, and which is not scheduled to pass the point of destination of the ticket without stopping; and, further, makes no way whereby one making inquiry can ascertain that it will not stop,—then it is most certainly liable if the passenger purchasing the ticket, and boarding the train, is carried past the point.

Atkinson v. *Southern R. Co.* 114 Ga. 146, 55 L. R. A. 223, 39 S. E. 888; *Head* v. *Georgia P. R. Co.* 79 Ga. 358, 7 S. E. 217; *Boehm* v. *Duluth, S. S. & A. R. Co.* 91 Wis. 592, 65 N. W. 506; *St. Louis, A. & T. R. Co.* v. *Mackie*, 71 Tex. 491, 1 L. R. A. 667, 9 S. W. 451; *Howard* v. *Chicago, St. L. & N. O. R. Co.* 61 Miss. 198.

The face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between passenger and carrier.

Poulin v. *Canadian P. R. Co.* 17 L. R. A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 197.

A corporation is bound by the ticket agent's statements.

Burnham v. *Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220; *Northern P. R. Co.* v. *Pauson*, 30 L. R. A. 730, 17 C. C. A. 287, 44 U. S. App. 178, 70 Fed. 585; *Scott* v. *Cleveland, C. C. & St. L. R. Co.* 144 Ind. 125, 32 L. R. A. 154, 43 N. E. 133.

A passenger's ticket is the acknowledgment of the receipt of the passenger's fare and the obligation to carry him for the purpose and upon the terms specified.

Richmond, F. & P. R. Co. v. *Ashby*, 79 Va. 130, 52 Am. Rep. 623; *Sears* v. *Eastern R. Co.* 14 Allen, 433, 92 Am. Dec. 780; 2 Wood, Railway Law, p. 1126; *Wells* v. *Alabama G. S. R. Co.* 67 Miss. 24, 7 So. 737; *Humphries* v. *Illinois C. R. Co.* 70 Miss. 453, 12 So. 155.

Terral, J., delivered the opinion of the court:

Appellee on Sunday evening, the 3d day of March, 1901, bought of the agent of appellant at Ridgeland an excursion ticket to Jackson and return, good for that day only. Late at night on the same day he boarded train No. 26, which was the only train upon which he could return; and after passing Tugaloo, and before reaching Ridgeland, he was, according to the evidence made on his side of the case, ejected from the train with insult and violence. He sued the company, recovered judgment for $75, and the company appeals.

The trial court instructed the jury that, if train No. 26 was the only train upon which appellee could return to Ridgeland that day, his expulsion therefrom was wrongful. The company insists that the instruction was error, and cites *Yazoo & M. Valley R. Co.* v. *Rodgers*, 80 Miss. 200, 31 So. 581, as being opposed to this view of the law. But in that case Rodgers returned home the next day on his excursion ticket, and could have returned by one or more trains on the day he was refused passage on No. 6,—a fast train, not stopping at Egremont,—if he had desired to do so; yet, declining to return on trains that would have placed him at home that day, he complained that a fast train, not scheduled for Egremont, excluded him from passage on it. In reply to repeated offers to bribe him, Conductor Howard made a slighting or insulting remark to Rodgers, but that incident

NOTE.—As to right of passenger who has boarded a train relying on the assurance of the ticket agent that it will stop at the station at which he desires to alight, to recover damages for ejection because the train does not stop at that station, see, in this series, Atkinson v. Southern R. Co. (Ga.) 55 L. R. A. 223.

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was not a factor in the case. Having had opportunity to return to Egremont on the very day that he was refused passage by Conductor Howard, and having yet two days more for a return to Egremont, he insisted on returning to Egremont by the only train that never stopped at that point. That case was quite different from the one before us. It was, however, shown here, for the railroad company, that train No. 26 was not scheduled to stop at Ridgeland, and that the agent at Ridgeland, when selling the round-trip ticket to Harris, told him that if No. 26 should be late, or behind its scheduled time, he would find difficulty in returning upon it, and that Harris replied he would take the chance. It showed, also, that Harris, upon boarding the train at Jackson, was warned by the flagman that the train did not stop at Ridgeland, and that he said he would get off at Tugaloo, or go on to Madison, and that the flagman permitted him to remain on the train upon that condition. It is evident that what passed between the flagman and Harris at Jackson was of no consequence, because the rights and duties of the parties were fixed by the ticket held by Harris. *Wells* v. *Alabama G. S. R. Co.* 67 Miss. 24, 6 So. 737. We further think the right of Harris to return on 26 was not affected by the statement of the agent at Ridgeland that, if the train was behind its scheduled time, he would experience difficulty in returning upon it; for he could not in that manner curtail or diminish the rights evidenced by the ticket which he was writing for the company. The uncontradicted proof was that No. 26 was on time, but, if it had not been on time, it would not have affected the merits of the controversy. Harris had a ticket for returning that day to Ridgeland, he entered the only train that could put him there on that day, and he was not a trespasser, but was rightfully thereon. *Head* v. *Georgia P. R. Co.* 79 Ga. 358, 7 S. E. 217. To sell Harris a coupon ticket to return on that day, and then to deny him the right to passage upon its only train that could return him to his destination, would have operated as a palpable fraud upon him. We think his ticket gave him a right of passage upon No. 26, and that his ejection was wrongful, and the instruction of the learned judge was not error.

The punitory damages imposed by the jury were not inflicted in consequence of the putting Harris off the train, but for insult and violence in so doing; and the question relating thereto was fairly submitted to the jury, and we do not understand counsel to challenge the instruction of the court or the finding of the jury in this respect.

The refusal of the court to grant to defendant its ninth and thirteenth requests for instruction to the jury is earnestly argued as matter of error; but, if the views expressed in the first part of this opinion are correct, their refusal was not error.

Affirmed.

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PEOPLE'S BUILDING & LOAN ASSOCIATION, *Appt.*

v.

Joseph McPHILLAMY.

SAME, *Appt.*,

v.

Mrs. L. HAWKS.

(.....Miss.....)

1. **Upon the voluntary dissolution of a building association** the principle of accounting with members is the same whether the association is solvent or insolvent.
2. **When an insolvent building and loan association goes into voluntary liquidation prematurely,** a borrowing member cannot be credited on his debt with the full amount of dues he has paid in on his stock, but his stock payments must share the losses and expenses of winding up, and the balance only be credited on the loan, when it can be ascertained.
3. **Whether the value of the shares of a borrowing member of a building and loan association** which is to be credited upon his loan in case of the premature voluntary liquidation of the association should be estimated and credited in advance of the settlement of the affairs of the association, or the credit made only at the settlement, must be determined by the court in its sound discretion.
4. **The form of the proceeding in which a settlement of the accounts** between a borrowing member and an insolvent building association is sought cannot affect the method of the accounting.

(November 24, 1902.)

APPEALS by defendant from decrees of the Chancery Court for Lauderdale County in favor of plaintiffs in suits brought to settle plaintiffs' accounts with the defendant association. *Reversed.*

The facts are stated in the opinion.

Messrs. **S. B. Watts, McWillie & Thompson,** and **Alexander & Alexander** for appellant.

Messrs. **S. A. Witherspoon** and **Amis & Dunn** for appellees.

Whitfield, Ch. J., delivered the opinion of the court:

These cases will be considered and determined together, as they are one, so far as the method of accounting is concerned. This is a true building and loan association, and it is a domestic building and loan association, and hence no question of usury is involved. It had been operating for some years, and, finding that its business ceased to be profitable, it went into voluntary liquidation in September, 1898. We are inclined to think that the association is insolvent,

NOTE.—As to rights of borrowing member of insolvent building and loan association, see cases in *note* to Southern Bldg. & L. Asso. v. Anniston Loan & T. Co. (Ala.) 29 L. R. A. 120; also Strauss v. Carolina Interstate Bldg. & L. Asso. (N. C.) 30 L. R. A. 693; Post v. Mechanics' Bldg. & L. Asso. (Tenn.) 34 L. R. A. 201; Hale v. Cairns (N. D.) 44 L. R. A. 261.

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but whether so or not is not material in considering the method of accounting. The equitable principle of accounting must be the same whether the association be solvent or insolvent. The question for consideration in these cases is, therefore, Where an insolvent association goes into voluntary liquidation prematurely, what is the proper method of accounting between the borrowing and nonborrowing members, respectively, on the one hand, and the asssociation, on the other? And the precise question here, more particularly, is, Should a borrowing member be credited on his debt with the amount of dues he has paid in on his stock? A borrowing member of a building and loan association occupies a dual relation to the association. In his capacity as borrower, he is a debtor. In his capacity as shareholder, he is a member of the corporation. What he pays as interest is paid in his character as debtor on his loan. What he pays as stock dues is paid in his character as stockholder. The two are separate and distinct, and must be so dealt with. *Hundermark* v. *New South Bldg. & Loan Asso.* (Miss.) 29 So. 528. When a building and loan association becomes insolvent, there is nothing to do but wind up its affairs. The shareholder who has been a member remains a member, liable to his just proportion of losses and expenses. He suffers a hardship, in this: that, instead of having his payments on his loan distributed in small instalments over many years, he is compelled by the necessity of the situation, and the nature of the building and loan association, to pay up his loan in one lump sum, with legal interest. This often involves great injustice to him, but it is nevertheless one of the risks which he assumed in becoming a member of this mutual association. There are instances where, because of peculiarly framed contract stipulations, a shareholder may cease to be a member upon insolvency or premature liquidation, but we speak of the ordinary membership, with the usual incidents in a building and loan association, such as we have before us in these cases. It is thoroughly settled by the authorities that when such insolvency ensues, or such premature liquidation occurs, the contract between the borrower and the association is abrogated; but there is diversity of opinion as to the point of time from which it is to be abrogated. Some of the earlier authorities held that, since the association cannot do for a borrower what it contracted to do, the contract is abrogated in such case *ab initio*, and the simple relation of debtor and creditor between the borrower and the association established from the beginning, and that all payments made by the borrower, under whatever name,—whether interest, premium, fines, stock dues, or what not,—shall be credited upon the loan, and only the balance, with legal interest, collected from the borrower. In other words, the nonborrower would in such case sustain the whole burden of the loss incurred up to the time of such insolvency. This ignores the fact that the borrower was a member of the association up to the time of insolvency; had proceeded all along upon that basis, bearing his proportionate part of expenses and losses up to the time of such insolvency,—bearing them as his part of losses and expenses, under that name. Close analysis makes it plain that this is not just to the nonborrower, for, under this method, the borrowing member would get back, entire, all his stock dues, without abatement of a single cent, whereas the nonborrower would only get back such portion of his stock dues paid in as would result from the winding up of the affairs of the association,—less than the whole in every case of insolvency. The true doctrine undoubtedly is that the contracts are to be abrogated for the future,—that is to say, so far as they are executory,—but that prior to insolvency they shall stand. In other words, up to insolvency the payments must stand in the character they had when made,—for example, stock dues as payments made by the member in his capacity as member; but that, after insolvency, the borrower's obligation to pay stock dues, etc., shall cease, because the consideration for such payments fails from that time forward. Merely because the association becomes insolvent, what he has heretofore paid as his allotted part of expenses and losses has not by some occult process changed its character, and become interest or principal paid on the debt. He remains a member after insolvency, even, charged, just as the nonborrowing member, with the duties and obligations of a member, until the final settlement of the affairs of the association, which obligations consist, however, after insolvency, in simply paying his just *pro rata* of expenses and losses; expenses including, of course, such things as receiver's commissions, court costs, etc. He will be entitled, when such settlement is made, to have whatever his share of stock proves ultimately to be worth then credited on the loan. More than this, if there can be a reasonably certain estimate of what his shares are worth prior to the final settlement,—such an estimate as will surely not exceed their value,—the court may, in cases like these, credit such estimated value as payment on the debt. Whether such value of the shares shall be estimated and credited in advance of the settlement, or only at the settlement, must be determined by the chancery court in its sound discretion. The earlier cases to which we referred, holding that stock dues are to be credited on the debt, and that the contract is to be abrogated from the beginning, and the borrower treated as a mere debtor from the beginning, are as follows: *City Loan & Bldg. Asso.* v. *Goodrich*, 48 Ga. 445; *Waverly Mut. & Permanent Land, Loan & Bldg. Asso.* v. *Buck*, 64 Md. 338, 1 Atl. 561; *Cook* v. *Kent*, 105 Mass. 243; *Buist* v. *Bryan*, 44 S. C. 121, 29 L. R. A. 127, 21 S. E. 537, and various other authorities. See also 4 Am. & Eng. Enc. Law, 2d ed. p. 1081, and note; 7 Thomp. Corp. p. 7359, note 63. Add to this the late case of *Hale* v. *Barker*, 129 Cal. 419, 62 Pac. 168. See also *Carpenter* v. *Richardson*, 101 Tenn. 176, 46 S. W.

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452. We are inclined to think that the California case of *Hale* v. *Barker* is not in accord with later cases decided in that state, as pointed out by counsel for appellant. We refer to it, however, as the best-reasoned case on that side. We think a careful consideration of the recent and best-considered cases shows that this early doctrine is being departed from, as the nature of building and loan contracts becomes better understood, and the practical operation of such associations, under their contracts, more fully disclosed. The true doctrine must be that set forth by Judge Thompson in his work on Corporations (vol. 7, § 8796), as follows: "The effect upon the borrowing members of a premature dissolution, or what practically amounts to the same thing, requires some notice. In return for the undertakings of the borrower in the transaction of loan or advancement, as they have been pointed out, there is an implied undertaking on the part of the association that the borrower shall have the advantage of the building association scheme in the liquidation of the whole of his indebtedness; *i. e.*, that it shall be by means of gradual payment, and that he shall participate, and have the opportunity of reducing his liability by his participation, in the profits of a continuing business, to be carried on to a fixed end. Where, through bad management, financial misfortunes, loss of membership, or any other cause, the career of the association is brought to a premature close, the borrower is compellable forthwith to pay the balance due from him on his security, although, in terms only given for instalments. He is therefore deprived of some proportion of the advantages, the prospect of which induced him to assume the burden of his original obligation. There remains nothing to compensate him for his liability to make up the premium, to keep up stock payments, to pay fines, etc. The consideration of the liability failing, the liability itself must, in a proportionate degree, fail also. In other words, there remains on the one side a claim, on the other a liability to be measured simply by the amount of money actually advanced. In such case, therefore, all the borrower can be held for (on the theory of a rescission of at least part of his contract, and remitting the parties, as to the rest, to the position of the ordinary lender and borrower) is the amount received by him from the association, with legal interest. Upon this point nearly all the authorities agree. Some of them also declare the borrower to be entitled to a deduction from this amount of all periodical payments of dues and interest paid by him. In others it is declared that the borrower shall be required to pay back what he has actually received, with interest, and without deduction on account of any stock payments, and that he will then be entitled, after the debts of the association have been paid, to a *pro rata* dividend, alike with the nonborrowing stockholders, upon what he has paid into the association as dues. When it is remembered that the borrower still rests under the membership liability to contribute towards the losses and expenses of the association, it is clear that the former of these methods cannot be correct; for by it he will escape some part of his share of the losses. But, on the other hand, the hardship and increased expense of settlement which may result from requiring the borrower to pay back all that he has received, without any credit for the dues he had paid in, remitting him to final distribution for a return of the excess of his payment over what shall be found justly due from him, would seem to indicate the propriety of a third method, wherever practicable, *viz.*, to ascertain what the receipts, profits, and losses of the society have been, what its liabilities are, what available assets are on hand, and what, accordingly, is the present real value of every share, making allowance for the expenses of settlement; to credit the amount on the borrower's debt in respect to each share held by him, and, charging him with the sum actually advanced to him and interest, reduced by part payments of interest and premium, collect from him only the balance." See also Endlich, Bldg. Asso. § 477, and an elaborate note in 5 Am. & Eng. Dec. in Eq., to *Williams* v. *Maxwell*, at page 254, ¶ 2 [123 N. C. 586, 31 S. E. 821], where the same doctrine is very clearly and fully stated, with a full citation of authorities. The editor says: "Since the cessation of the business of a building association puts an end to the contract between it and its borrowing members, and makes their loans due and payable at once, it converts the relation between them into that of mere debtor and creditor, and consequently should entitle the borrower to have the dues paid credited upon the loan, if no equities supervene. Accordingly this rule is generally acknowledged to prevail in cases of a voluntary dissolution or cessation of business (*City Loan & Bldg. Asso.* v. *Goodrich*, 48 Ga. 445; *Waverly Mut. & Permanent Land, Loan & Bldg. Asso.* v. *Buck*, 64 Md. 338, 1 Atl. 561; *International Bldg. & L. Asso.* v. *Braden* [Tex. Civ. App.] 32 S. W. 704), and has in a few instances been held to apply to the winding up of an insolvent association, when the contract of loan was usurious. *Peters Bldg. Asso. No. 5* v. *Jaecksch*, 51 Md. 198; *Rochester Sav. Bank* v. *Whitmore*, 25 App. Div. 491, 49 N. Y. Supp. 862; *Strauss* v. *Carolina Interstate Bldg. & L. Asso.* 117 N. C. 308, 30 L. R. A. 693, 23 S. E. 450, 118 N. C. 556, 24 S. E. 116; *Buist* v. *Bryan*, 44 S. C. 121, 29 L. R. A. 127, 31 S. E. 537. But, inasmuch as this doctrine enables the borrower to evade his liability to share in the losses of the association, it can only be upheld on the theory that he is not a member thereof; and, whenever he is to be regarded as such, he cannot claim credit for dues paid, in case of the insolvency of the association, but must pay up the whole debt, and share in the assets *pro rata* with the other members (*Sullivan* v. *Stucky*, 86 Fed. 491; *Curtis* v. *Granite State Provident Asso.* 69 Conn. 6, 36 Atl. 1023; *Brown* v. *Archer*, 62 Mo. App. 277; *Weir* v. *Granite State Provident Asso.* 56 N. J. Eq. 234, 38

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Atl. 643; *Strohen* v. *Franklin Sav. Fund & L. Asso.* 115 Pa. 273, 8 Atl. 843; *State Sav. & L. Asso.* v. *Carroll*, 15 Pa. Co. Ct. 522; *Lepore* v. *Twin Cities Nat. Bldg. & L. Asso.* 5 Pa. Super. Ct. 276, Affirming 17 Pa. Co. Ct. 426; *Rogers* v. *Hargo*, 92 Tenn. 35, 20 S. W. 430), . . . unless the actual loss and expense of winding up are capable of calculation, in which case it is the preferable practice to permit him to pay the balance between the actual value of his stock and the loan, or, as it has been otherwise expressed, the difference between the dues paid in and the loan, plus his *pro rata* share of the defalcation of the association. *Reddick* v. *United States Bldg. & L. Asso.* 106 Ky. 94, 49 S. W. 1075."

We select two other opinions for their marked ability in setting forth this view. They are the opinions of Sherwin, J., in *Hale* v. *Kline*, 113 Iowa, 526, 85 N. W. 814, and the opinion of Brannon, J., in *Young* v. *Improvement Loan & Bldg. Asso.* 48 W. Va., at page 514, 38 S. E. 670; this last being the finest opinion we have seen on the subject. In the former, Justice Sherwin says: "The only question presented for our determination in this case is whether the defendants are entitled to credit for any part of the dues paid on the twelve shares of stock issued to A. D. Kline, and assigned by him as collateral security for the loan and premium in question. At the outset of the discussion of this question, we should say that the association was purely a mutual one, that every stockholder was a member thereof, and that every member thereof was a stockholder. Except as to the liability incurred by borrowing money of the association, every member assumed the same liabilities, and was entitled to a proportionate share of its earnings, from whatever source derived. With this mutuality of interest and liability in view, what are the rights of the defendants, and the rights of the other members and creditors, as represented by the plaintiff? There were two classes of members, which we may designate as 'borrowers' and 'nonborrowers.' To become a borrower, it was necessary to offer a premium of so much per share on the shares held by the applicant. The premium which these defendants contracted to pay was $600, represented by one half of the amount for which they gave their note. If the association had continued as a going concern until the monthly dues paid on the twelve shares of stock had matured the stock, then, by the terms of the note, itself, a surrender of the stock could have been made in full payment of the money actually received, and of the premium represented in the note; and in such case the defendants would, of course, receive indirectly the amount paid in dues. But the association became insolvent before the maturity of the stock, and it is obvious that the rights and equities of the members are thereby placed upon a different footing. This changed condition has been held by some courts to operate as a rescission of the entire contract, and to leave the members to an equitable adjustment of their rights and liabilities. It is conceded by all or by most of the courts, however, that the insolvency of such a mutual association releases the stockholders from further payment of dues on stock. It is the almost universal holding that, in the settlement of the affairs of an insolvent mutual association, a borrowing member whose stock has not matured shall be held for the amount of money actually received by him, with interest thereon, less the premium actually paid by him for the loan, and less the interest on the monthly payments of interest made by him. This rule applies to cases where the affairs of the association are not so far settled as to ascertain the value of the stock. When the value of the stock can be determined, the borrower would then be entitled to credit for its value in addition to the items heretofore mentioned. *Wilcoxen* v. *Smith*, 107 Iowa, 555, 78 N. W. 217; *Hale* v. *Cairns*, 8 N. D. 145, 44 L. R. A. 261, 77 N. W. 1010; *Phelps* v. *American Sav. & L. Asso.* 121 Mich. 343, 80 N. W. 120; *Leahy* v. *National Bldg. & L. Asso.* 100 Wis. 555, 76 N. W. 625; *Knutson* v. *Northwestern Loan & Bldg. Asso.* 67 Minn. 201, 69 N. W. 889; *Rogers* v. *Hargo*, 92 Tenn. 35, 20 S. W. 430; *Weir* v. *Granite State Provident Asso.* 56 N. J. Eq. 234, 38 Atl. 643; *Curtis* v. *Granite State Provident Asso.* 69 Conn. 6, 36 Atl. 1023. And see note to this case, page 24, 61 Am. St. Rep.; *People* v. *Lowe*, 117 N. Y. 175, 22 N. E. 1016. See also Endlich, Bldg. Asso. 2d ed. 477; 4 Am. & Eng. Enc. Law, 2d ed. p. 1080; *Post* v. *Mechanics' Bldg. & L. Asso.* 97 Tenn. 408, 34 L. R. A. 201, 37 S. W. 216; *Strohen* v. *Franklin Sav. Fund & L. Asso.* 115 Pa. 273, 8 Atl. 843." In the latter opinion, *supra*, Judge Brannon says: "Seeing that, upon insolvency of a building association, it must be wound up, and to that end that its borrowing members, though their debts are not yet payable, must pay up at once, the question is one of account between them and the association. How shall they be charged? I answer, with debt and interest. Endlich, Bldg. Asso. 528–531. With what shall they be credited? I answer, with payments made expressly on such indebtedness, and with fines and premiums, but not with periodical dues paid on stock. Endlich, Bldg. Asso. 477. . . . Counsel for the knitting companies say, as above stated, that when those companies made the contracts of loan, and assigned their stock for security for the debt, and the contract gave them the power to pay dues on stock up to a certain amount, and thereby cancel their indebtedness, they were not members in future, and cannot be held to be still paying dues on stock; that such payments are not to be credited on stock, as would be the case of nonborrowing members, but all payments of dues must go on their indebtedness. The proposition that they cease to be members is not sound in law. They still continued members of the association. 7 Thomp. Corp. §§ 8772, 8773, where it is stated that only Virginia and the District of Columbia have held that the relation of stockholders ceases under the cir-

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cumstances stated above. See same work, page 332, saying: 'The member, as a borrower, is still a member, with all his rights, except as pledged. He may vote, hold office, transfer his shares, subject to the lien, and do everything another shareholder may do.' *Lister* v. *Log Cabin Bldg. Asso.* 38 Md. 115, holds the same doctrine. So Endlich, Bldg. Asso. § 123. See 5 Am. & Eng. Dec. in Eq. 234. To sustain the proposition that when these borrowing members gave their bond for the advance of money, and assigned their stock as collateral, they ceased to be members, and were absolved from all obligation to sustain any share of losses, we are cited to Endlich, Bldg. Asso. § 81, reading thus: 'The liability to contribute to expenses ceases with the cessation of membership bona fide, and with the consent of the association. If, upon becoming a borrower, the member relinquish his membership, or if, being an investor merely, he avails himself of a provision in the rules or by-laws of the association, or of the statute supreme over it, to withdraw himself from it, he cannot subsequently be made liable for its debts and losses, and called upon by the society to contribute towards their payment.' Clearly so. If he relinquishes his membership or withdraws, he is no longer a member; but merely borrowing, giving bond and pledging stock as collateral, do not lose him the benefits or release him from the obligations of membership. . . . Being still a member after such borrowing, the party occupies the twofold character of debtor and stockholder, and his payments on debt are payments on debt, and his payments on stock are payments on stock,— so intended in both cases. When insolvency comes, he is still a member of this association, organized as well for his benefit as that of other members; and other members not borrowing are entitled to call upon him to still occupy the status of a member, and help bear the burden of disaster. He has no right to apply his stock payments on his indebtedness. When insolvency comes, the original plan of the association is defeated. Such operations as were contemplated by all members, borrowers and nonborrowers, are unavoidably frustrated. They cannot be accomplished. The association cannot demand further payments on stock, because, its business being stopped, it cannot apply such payments to effect the design for which they were stipulated to be made, and the consideration for their payment has ceased. Close up the affairs of the association is the only alternative. To do this, outstanding debts must be paid, chiefly from debts due from members, though not yet mature, because the association owns these debts as material assets, and indispensable to pay outstanding debts, and then to be divided among stockholders. The member who is a borrower, as such, occupies the position of a borrower. The relation between the association and him makes him its debtor for the money advanced to him, and he must pay it at once, to enable the association to do the only thing it can do,— wind up. Out of the assets, including this indebtedness of this stockholder, a division is made, after payments of debts, among the stockholders, including this borrowing stockholder. His stock is worth what his dues and other sources of revenue make it worth. What he paid in dues must go on his stock, to constitute the capital stock, as he contracted to pay such dues on his shares of stock, not on his debt. Here he is a stockholder, not a debtor. His contract of subscription is for stock, and his dues go on that by contract. Only in one event, by the contract, can those dues paid for stock go to pay the debt; that is, when, in case of success of the association, those dues, with dues from other members and other sources of income, bring the stock to par, and thus discharge the debt, by the letter of the contract. But, that being defeated by disaster, the set-off of stock against debts cannot be made. The member cannot be allowed to go on paying dues, in specific performance of the contract, for the company is incompetent to go on. The time has come when outside debts must be paid,— when members must suffer some loss. It is obvious, they ought to suffer this loss equally,— borrowing and nonborrowing stockholders. Now, if you credit A dues paid on his stock upon his debt, he gets the benefit of them in full, while B, who has no money borrowed from the association, but who paid the same amount of dues as A, gets no benefit from those dues. This, in justice, cannot be allowed. So the true rule is, in case of insolvency, to keep A in his twofold character, —debtor and stockholder. Make him pay back to the common treasury what he borrowed from it, and thus end his relation of debtor; and later, when the assets have been collected, and the divisible fund, after payment of debts, is found, give him his share in that fund, much or little. All shareholders will thus stand equal. There are some authorities *contra*, but the great current of authority, the latest and best considered, as building associations have increased, sustain this position. In the great case, *Strohen* v. *Franklin Sav. Fund & L. Asso.* 115 Pa. 273, 8 Atl. 843, the court stated the matter thus: 'The insolvency of the company puts an end to its operation as a building association. To a certain extent, it also ends the contracts between it and its members, and nothing remains but to wind it up in such manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not throw on either the borrowers or nonborrowers more than their respective share. That result may be reached by requiring the borrower to repay what he actually received, with interest. He would then be entitled, after the debts are paid, to a *pro rata* dividend with the nonborrower for what he has paid upon his stock. He will thus be obliged to bear his proper share of losses. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses, and throw them wholly upon the nonborrowers.

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In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner.' To the same effect, see 5 Am. & Eng. Dec. in Eq. 254; *Leahy* v. *National Bldg. & L. Asso.* 100 Wis. 555, 76 N. W. 625; *Price* v. *Kendall*, 14 Tex. Civ. App. 26, 36 S. W. 810; *Eversmann* v. *Schmitt*, 53 Ohio St. 174, 29 L. R. A. 184, 41 N. E. 139; *Weir* v. *Granite State Provident Asso.* 56 N. J. Eq. 234, 38 Atl. 643; *Wohlford* v. *Citizens' Bldg. Loan & Sav. Asso.* 140 Ind. 662, 29 L. R. A. 177, 40 N. E. 694; *Post* v. *Mechanics' Bldg. & L. Asso.* 97 Tenn. 408, 34 L. R. A. 201, 37 S. W. 216; Thompson, Bldg. Asso. 396."

It follows from these views that the accounting in these cases was had upon the wrong basis. It should be remarked that the law of building and loan associations is just now assuming definite shape, and the learned and accomplished chancellor below could hardly be expected to anticipate a doctrine as to accounting just now being for the first time firmly established.

There is only one other point that we will notice in these cases, and that is this: That these suits are not administration suits,—not being brought as such. We do not think, however, that the form in which the suit has been brought should dominate the method of accounting. What these borrowers are equitably entitled to, they should receive; but they should receive only that, whether the suits be administration suits or not. The equities by which the substantial rights are determined cannot be made more or less by the particular procedure resorted to. On the return of these cases into the chancery court, if there can be an estimate made of the value of the shares of these borrowers, such as will certainly not give them more than the shares will be worth on a final settlement, such ascertained value of the shares may be credited on the loan. If not, no stock dues should be credited on the loan, but the borrowers should be remitted to their right to receive whatever the value of these shares may be, when finally ascertained by the proper procedure.

Both cases reversed and remanded.

MISSOURI SUPREME COURT.

Josie JOHNSON *et al., Respts.,*
v.
John R. JOHNSON, *Appt.*

(.....Mo.....)

1. **A quitclaim deed will carry the grantor's interest in a covenant of seisin and warranty** in his title deed which runs to him and his assigns, so as to vest in the grantee a title acquired by the warrantor after the execution and delivery of his deed.
2. **Covenants of seisin and warranty in a conveyance of an undivided part of a certain tract of land** will not fail to carry to the grantee such interest, when subsequently acquired by the grantor, by the insertion in the deed of the further descriptive words, "being the interest I hold as heir," and that "acquired by purchase" from other heirs of a certain person deceased, such words being mere surplusage.
3. **A sale of an expectancy in lands of a living ancestor** may be enforced through the doctrine of estoppel springing from covenants in the deed.
4. **Solemn written instruments, which the parties thereto have allowed to stand unquestioned for years,** cannot be overturned and robbed of efficacy and force, as against innocent purchasers for value under them, by the unsupported testimony of one who asserts the overhearing of a conversation between the parties in which they expressed an intent and purpose different from that set down in the writing.
5. **A deed of an undivided interest in land will not be rendered ineffectual** by the fact that the grantee had, shortly before, purported to convey the same interest in the same land to the grantor at a time when the fee was in the latter, on the theory that the intent was merely to offset the effect of the former conveyance.
6. **Death intestate, unmarried, and without issue is not shown** by testimony of a person's sister that he had not been heard from in twenty years, and that at his last communication he was about eighteen years old and unmarried "so far as she knew."
7. **A petition for partition,** to which persons having an interest in the land are not made parties, cannot be maintained.

(June 18, 1902.)

APPEAL by defendant from a decree of the Circuit Court for Newton County partitioning certain real estate. *Reversed.*

The decree of partition was as follows:

"Now, on this day, this cause coming on to be heard, the plaintiffs, Josie Johnson, Lottie Leach, Elizabeth Kay, Lulu Felton, Bessie Setzer, A. B. Freeman, Hannah C. Johnson, George W. Johnson, and Oliver P. Johnson, appear by their attorneys, John T. Sturgis, Hugh Dabbs, and B. J. Morrow, and the defendant, John R. Johnson, appears in person and by his attorneys, Cravens & Cravens, and submit to the court the matters in controversy upon the pleadings and evidence adduced, and the court, being fully advised in the premises, doth find that the allegations of plaintiffs' petition herein are true. The court doth further find: That

NOTE.—For a case holding that a quitclaim deed does not, as a general rule, estop the grantor from asserting an after-acquired title, though it is said that the rule has its exceptions, see Haskett v. Maxey (Ind.) 19 L. R. A. 379.

As to effect of quitclaim deed as against secret encumbrances, see Robinson v. Clapp (Conn.) 29 L. R. A. 582.

As to effect of quitclaim by heirs of living person, see Defreese v. Lake (Mich.) 32 L. R. A. 744.

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plaintiffs and defendant are owners of and are seised as tenants in common of the following described tract of land, situate in the county of Newton and state of Missouri, to wit: Tract No. 1. The northwest quarter of the northeast quarter of section nine (9), in township twenty-six (26), and range thirty-three (33). That the estate from which said land descended to plaintiffs and defendant and their grantors was the estate of Pleasant Johnson, who died intestate on the ——— day of ———, 1873, leaving Nancy C. Johnson, his widow, who has since died on the ——— day of November, 1896, and the following children as his heirs at law, to wit: Plaintiffs Hannah C. Johnson, Oliver P. Johnson, and George W. Johnson; defendant, John R. Johnson; and also W. Clay Johnson, Millian Johnson, and Charles E. Johnson, now deceased. That Charles E. Johnson died on the ——— day of ———, 188—, never having been married or had any children, and leaving as his heirs his brothers and sisters, above mentioned, who then became entitled to his one-seventh interest in said land, thus entitling them each to one undivided sixth interest in said land. That afterwards, on the ——— day of ———, 189—, said W. Clay Johnson died, leaving as his heirs the plaintiffs, Josie Johnson, Lottie Leach, and Elizabeth Kay, who are each now the owner of and entitled to an undivided one-eighteenth interest in said land in fee. That John R. Johnson, defendant, on the 27th day of December, 1875, purchased from plaintiff George W. Johnson an undivided seventh of said land, leaving him (the said George W. Johnson) the owner of the one undivided forty-second interest in said land, which he now owns and to which he is entitled. That said John R. Johnson, defendant, is now the owner of and entitled to thirteen forty-seconds interest in said land. That Millian Johnson died on the ——— day of ———, 188—, leaving her children, Lulu Felton and Bessie Setzer, her heirs and entitled to her interest in said land, and who have since that time sold and conveyed one seventh of said land to plaintiff A. B. Freeman, who is now the owner of and entitled to one seventh of said land; and the said plaintiffs, Lulu Felton and Bessie Setzer are now each the owner of and entitled to one eighty-fourth of said land. That plaintiffs, Hannah C. Johnson and Oliver P. Johnson, are each the owner of and entitled to one sixth of said land in fee. The court further finds: That said plaintiffs, Josie Johnson, Lottie Leach, Elizabeth Kay, Lulu Felton, Bessie Setzer, Hannah C. Johnson, George W. Johnson, and Oliver P. Johnson, and the defendant, John R. Johnson, are the owners of and seised in fee as tenants in common of the following described land, in Newton county, Missouri, to wit: Tract No. 2. Lot one (1) and part of lot two (2) of the northeast quarter, and 10 acres off the north side of the northwest quarter of the southeast quarter, of section two (2), in township twenty-six (26), and range thirty-three (33), said tract being described by metes and bounds as follows: Beginning at a limestone 40 rods south of a limestone planted 40 rods west of the northeast corner of said section two (2), thence west 100 rods to a limestone, thence south 40 rods to a limestone, thence west 20 rods to a limestone, thence south 100 rods to a limestone, thence east 80 rods, thence north 20 rods, thence east 80 rods, thence north 78 rods, thence west 40 rods, thence north 40 rods to the place of beginning, containing 115 acres, more or less, and the courses and distances of which are more particularly described in a deed recorded in Book W, at page 542, of the Land Records of Newton county, Missouri. That the estate from which said land descended to said plaintiffs and defendant and their grantors was the estate of said Nancy C. Johnson, widow of Pleasant Johnson, who died on the ——— day of November, 1896, leaving as her heirs the same persons, or their descendants, as hereinbefore designated as the heirs of said Pleasant Johnson, except that Charles E. Johnson, who died without being married or having children, and W. Clay Johnson, the deceased ancestor of plaintiffs. Josie Johnson, Lottie Leach, and Elizabeth Kay, and Millian Johnson, the deceased ancestor of plaintiffs, Lulu Felton and Bessie Setzer, all died before their said mother, Nancy C. Johnson. The court further finds that the share of said last-described land to which each of the plaintiffs, Josie Johnson, Lottie Leach, and Elizabeth Kay, is entitled is one eighteenth; that the share of said land to which each of the plaintiffs, Lulu Felton and Bessie Setzer is entitled is one twelfth; that the share of said land to which the plaintiffs, Hannah C. Johnson, George W. Johnson, and Oliver P. Johnson, are entitled is one sixth; that the share of said land to which the defendant, John R. Johnson, is entitled is one sixth. Wherefore it is ordered, adjudged, and decreed by the court that partition of the lands herein described, both tract No. 1 and tract No. 2, be had and made among the parties plaintiff and defendant herein according to their interests herein ascertained and adjudged; and, it further appearing to the court, from the nature and amount of the property sought to be divided and the number thereof, that partition in kind of said estate cannot be made without great prejudice to the owners thereof, the court doth therefore order said property to be sold according to law to the highest bidder for cash in hand. And the court doth hereby appoint O. P. Hawkins as commissioner herein to make said sale and to report the same to this court, and directs that before entering upon the discharge of his duties as commissioner he shall execute and file with the clerk of this court his bond, payable to the state of Missouri, with two or more sureties to be approved by the court, in the sum of $3,000, conditioned that he shall faithfully discharge his duties as commissioner and account for and pay over, according to the order of the court, to the parties entitled thereto, all such sums of money as may come into his possession as such commissioner."

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Mr. **O. L. Cravens,** for appellant:

By the terms of the statute, under the covenants in the deed, the title subsequently acquired by George W. as heir was immediately vested in his grantee with the same force as if he had in fact been seised of the three sevenths at the time he made the deed; this, by way of estoppel running with the land.

Bogy v. *Shoab,* 13 Mo. 365; *Gibson* v. *Chouteau,* 39 Mo. 536; *Norfleet* v. *Russell,* 64 Mo. 176; *Altringer* v. *Capehcart,* 68 Mo. 441; *Irvine* v. *Irvine,* 9 Wall. 618, 19 L. ed. 800; Rawle, Covenants, §§ 248, 252, 254; Newell, Ejectment, p. 673; Jones, Real Prop. § 990.

After-acquired title of the grantor in the warranty deed was carried forward through the subsequent quitclaim deeds to the remote grantee.

Fordyce v. *Rapp,* 131 Mo. 354, 33 S. W. 57; *Powers* v. *Patten,* 71 Me. 583; *Foote* v. *Clark,* 102 Mo. 394, 11 L. R. A. 801, 14 S. W. 981.

The quitclaim deed from George W. Johnson to his mother was never delivered, and, even if he had a title, it never took effect as a deed.

Sneathen v. *Sneathen,* 104 Mo. 201, 16 S. W. 497.

If it was a mere taking back of the interest the parties supposed she had acquired by a former deed, it is a transaction to which defendant is not a party, and by which he is not bound.

Thompson v. *Wooldridge,* 102 Mo. 505, 15 S. W. 76; *Odle* v. *Odle,* 73 Mo. 289; *Lionberger* v. *Baker,* 88 Mo. 447.

Equity will not aid George W. Johnson or Nancy Johnson, for the reason that the transaction, viewed even from Hannah's standpoint, took place in the attempt to effect a fraud.

Rice v. *Bunce,* 49 Mo. 231, 8 Am. Rep. 129.

In the face of the express covenant in the warranty deed that defendant is seised of the estate of three sevenths conveyed, no notice or knowledge of him could overcome the written stipulations of the deed.

Whiteside v. *Magruder,* 75 Mo. App. 364; *Blanchard* v. *Haseltine,* 79 Mo. App. 248.

Messrs. **B. J. Morrow** and **John T. Sturgis,** for respondents:

Recording a deed raises a strong presumption of delivery.

McReynolds v. *Grubb,* 150 Mo. 352, 51 S. W. 822; *Burke* v. *Adams,* 80 Mo. 504, 50 Am. Rep. 510; *Kane* v. *McCown,* 55 Mo. 181; *Eau Claire Lumber Co.* v. *Anderson,* 13 Mo. App. 429.

Our statute, § 4591, is but declaratory of the common law. It is not alone the covenants of the deed, but rather the estate sought to be conveyed, that determines whether or not it operates on after-acquired title. The covenants may be insufficient for such purpose as in ordinary quitclaim deeds.

Brawford v. *Wolfe,* 103 Mo. 391, 15 S. W. 426; *Bogy* v. *Shoab,* 13 Mo. 365.

The estate conveyed may be so specified or limited as to take it out of the operation of the statute. The deed must undertake to convey "an indefeasible estate in fee simple absolute: not a deed merely transferring the grantor's interest, be it more or less, but a deed conveying the land itself."

Valle v. *Clemens,* 18 Mo. 486; *Gibson* v. *Chouteau,* 39 Mo. 536; *Butcher* v. *Rogers,* 60 Mo. 139; *Moore* v. *Harris,* 91 Mo. 616, 4 S. W. 439; *Gilbert* v. *James,* 86 N. C. 244; *Libby* v. *Thornton,* 64 Me. 479; *Comstock* v. *Smith,* 13 Pick. 119, 23 Am. Dec. 670; *Blanchard* v. *Brooks,* 12 Pick. 47.

An heir cannot, before the death of the ancestor, convey his expected inheritance.

Beard v. *Griggs,* 1 J. J. Marsh. 22; *Hall* v. *Chaffee,* 14 N. H. 215; *Hart* v. *Gregg,* 32 Ohio St. 511.

Sherwood, J., delivered the opinion of the court:

The subject-matter of this proceeding consists of two tracts of land numbered, respectively, tract No. 1 and tract No. 2, and described in the decree for partition, which will accompany this opinion. In such decree certain findings of facts were made, and the court ordered the tracts of land sold, and the proceeds divided among the parties to this suit according to their respective interests; and from this decree defendant has appealed. But, as will more fully appear later on, an arrangement was effected between the parties as to a sale of the land *non obstante* the appeal. Since this cause has reached this court, the respective interests of Bessie Setzer and Lulu Felton have been purchased by H. S. Price, and by order of this court entered November 19, 1900, he has been substituted in their room and stead. No dispute occurred between the parties litigant in the lower court as to the tract No. 1, so that no necessity exists for considering any of the facts relating thereto. In tract No. 2 defendant claimed an interest amounting to ten twenty-firsts of the whole, but the trial court awarded him only one sixth; and after the usual formalities below he has brought his appeal here.

The facts are: That in 1873 both tracts of land were owned in fee by Pleasant Johnson. At his death, in March of that year, there survived him his widow, Nancy Johnson, and six children,—George W., Oliver P., John R., Charles Edward, Millian, and Hannah C. Johnson. His other heirs were Josephine Johnson, Elizabeth Kay, and Lottie Leach, the children of his deceased son, W. C. Johnson. For some time prior to his death Pleasant Johnson had lived on the tract of ground over which this controversy arises, and by proper proceedings in the probate court of Newton county in 1878 the widow had it assigned to her as her homestead, and thereafter occupied it as such until her death, in 1896. On the 26th day of May, 1873, George W. Johnson conveyed by quitclaim deed to his mother, Nancy Johnson, an undivided one seventh of both parcels of ground, and this deed, some days afterwards, was put to record. On Novem-

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ber 19, 1875, Nancy Johnson reconveyed by quitclaim deed to George W. Johnson the same interest which he had previously conveyed to her in the several tracts aforesaid: that is to say, an undivided one seventh of all the real estate whereof Pleasant Johnson had died seised. The description in these deeds is identical, and there is no substantial difference between them except dates and the reversal of the names of grantor and grantee. On the 17th of February, 1874, the daughter Millian made a quitclaim deed to George W. Johnson for an undivided one seventh of the property over which the present dispute arises; and on December 27, 1875, John R. Johnson, defendant, made a quitclaim deed to George W. Johnson, conveying to him an undivided one seventh of the same property. Then, on February 27, 1877, George W. Johnson conveyed by warranty deed to William Jackson three undivided sevenths of the property referred to as tract No. 2, and using in this deed the words "grant, bargain, sell, convey, and confirm," and covenanted that he was seised of an indefeasible estate in fee in said premises, and had good right to convey the same, and that the same were free and clear of any encumbrance done or suffered by him or those under whom he claimed, and that he would warrant and defend the title against the lawful claims and demands of all persons. The grantee in this deed, William Jackson, afterwards, on November 27, 1878, conveyed by quitclaim deed to defendant three undivided sevenths of the same land, describing it in the same words, and mentioning it as "the interest I hold and acquired by purchase from George W. Johnson, heir at law," etc. It was shown in evidence that more than twenty years before the trial the son, Charles Edward, left home, and that nothing had been heard of or from him in that length of time. His sister, Hannah, testified that when last heard from he was about eighteen years of age, and was then located about three miles from Little Rock, Arkansas, and that, so far as she knew, he was unmarried. Further testifying, she stated that she and his other relatives had made frequent efforts to locate him since that time, but had been unable to learn anything of him. Neither Charles Edward nor his unknown heirs or devisees were made parties, and the trial court and the parties to this case proceeded to final judgment on the presumption that he had died intestate, and unmarried, and without issue, and in the order of distribution his share was divided among his brothers and sisters or their representatives in interest. Defendant, testifying in his own behalf, stated that he had paid to Jackson, in cash, the consideration named in the quitclaim deed of November 27, 1878, from Jackson to him, and that he had purchased the interest therein described at Jackson's solicitation, and in order to prevent threatened litigation between his mother and Jackson; and that he bought and Jackson sold to him three shares. "I was buying back my share, and also his share and another, which made the three specified." On cross-examination he testified that the other share which he was buying he thought was that which his sister Millian had previously conveyed to his brother George. In rebuttal plaintiffs put upon the stand Hannah Johnson, who testified, over the objection of defendant, to certain conversations between her mother and George W. Johnson about the time the quitclaim deed from her to him was executed. The tendency of these conversations, which were out of the presence of defendant, was to show that George W. Johnson was involved in a difficulty with his wife, and had "made over" his interest in his father's estate to his mother in fear of litigation with his wife, and that the quitclaim deed of November 19, 1875, from his mother to him, was merely intended as a reconveyance of that interest, and that the two deeds were executed in pursuance of a previous agreement between George W. Johnson and his mother that she would hold his interest for him until his domestic difficulties could be settled, and then reconvey to him. The immediate source of defendant's claim to ten twenty-firsts of tract No. 2 is the quitclaim deed to him from Jackson. It is his contention that upon the death of his father the title to the second tract, which was the homestead, vested in his mother in fee, although it was not formally assigned to her for some years later; that by her deed of November 19, 1875, his mother, being then the owner in fee of such tract, passed to George W. Johnson an undivided one seventh thereof; that neither the deed of Millian Johnson of February 17, 1874, nor his own deed of December 27, 1875, passed anything to George W. Johnson, because the fee-simple title to the property had previously vested in his mother, Nancy Johnson; and that, therefore, the warranty deed from George W. Johnson to William Jackson, although it purported to convey three sevenths of the tract in dispute, with appropriate covenants of seisin and warranty, in fact passed only the one seventh which George W. Johnson had previously acquired from his mother, and that by virtue of the covenants in the warranty deed the title which George W. Johnson acquired twenty years later upon the death of his mother inured to him (defendant) as the grantee of Jackson. On the other hand, plaintiff's position is that the deed of Nancy Johnson to her son, George W. Johnson, did not convey any real interest, because it was merely the reconveyance to him of the interest which he supposed he had in his father's estate, and which interest he had previously, to wit, on May 26, 1873, conveyed to her for the alleged reason that he was involved in difficulties with his wife, and feared the result of the threatened litigation with her. As hereinbefore indicated, after the cause had been heard and determined in the lower court, and after appeal taken, the parties filed this stipulation: "It is hereby agreed and stipulated by and between the parties plaintiff and defendant in the above-entitled cause that the appeal taken and allowed by

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defendant, John R. Johnson, shall not operate as a supersedeas herein as to the order of sale of the land sought to be partitioned as made at this term of court, but said land shall be sold by the special commissioner in partition according to and under and by virtue of the terms of said order of sale made herein and reported to this court at the next term thereof, the same as if no appeal was taken; but the proceeds of such sale shall be held and retained by said commissioner to abide the final judgment and decision in this cause either in the appellate court or this court, without payment of any costs that have accrued or may accrue, until the final disposition of the appeal and entry of such judgment as the circuit court may be required by the supreme court to enter." Accordingly, the property was sold, and the dispute of the parties is over the proper distribution of the proceeds.

The real controversy in this case is whether or not the after-acquired title of George W. Johnson inured to the benefit of the successor in interest of his grantee in the warranty deed of February 27, 1877. That conveyance recited that, for the consideration named, "the parties of the first part [George W. Johnson and his wife] do by these presents grant, bargain, and sell, convey, and confirm unto the said party of the second part [William Jackson], his heirs and assigns, the following described lots, tracts, or parcels of ground, lying, being, and situate in the county of Newton and state of Missouri, to wit: Three undivided sevenths in and to the following described land, being the real estate of Pleasant Johnson, deceased, late of Newton county, Missouri, being the interest I hold as heir at law of said deceased and the interest acquired by purchase of John R. Johnson and Millian Johnson, heirs at law of said deceased, which deeds of said interests are found in Record Book U, pages 268 and 270, Land Records of Newton county, to wit: Lot one (1), northeast quarter section two, township (26) twenty-six, range thirty-three (33), and south part of north half of northeast quarter of section two (2); all in township twenty-six, range thirty-three." The habendum clause of the deed reads thus: "To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances, and immunities thereto belonging or in any wise appertaining, unto the said party of the second part, and unto his heirs and assigns, forever." And then follow these covenants: "The said George W. Johnson hereby covenanting that he is lawfully seised of an indefeasible estate in fee in the premises hereby conveyed: that he has good right to convey the same: that the said premises are free and clear of any encumbrances done or suffered by him or those under whom he claims: and that he will warrant and defend the title to the said premises unto the said party of the second part, and unto his heirs and assigns, forever, against the lawful claims and demands of all persons whomsoever." The conveyance by which Jackson, the grantee in the above deed, transferred his interest to defendant, is not set out in full in the record, but it is there stated that it is dated November 27, 1878, recites a consideration of $350, is acknowledged in due form, and conveys "with apt words of quitclaim" the property mentioned in the warranty deed, describing it as follows: "Three undivided sevenths in and to the following described land, being the real estate of Pleasant Johnson, deceased, late of Newton county, Missouri, being the interest I hold and acquired by purchase from George W. Johnson, heir at law of said deceased, to wit: Lot one, northeast quarter of section two (2), township (26) twenty-six of range thirty-three (33); the south part of the north half of the northeast quarter of section two (2), and ten acres off the north end of the west half of the southeast quarter of section two (2),—all in township twenty-six (26), of range thirty-three (33), containing one hundred and eighteen acres, more or less." If the last-mentioned conveyance was the ordinary quitclaim deed, which seems the necessary inference from the record and the admissions of the parties, it operated to vest in defendant all the right, title, and interest of Jackson in and to the property described, together with all the rights, privileges, and appurtenances thereto pertaining. Now one of these rights and privileges was the benefit of George W. Johnson's covenants of seisin and warranty, and the quitclaim deed operated to substitute defendant for Jackson in respect of that benefit, so that it is not so much a question of the inurement running through a quitclaim deed as of an assignment of the covenant. Upon every consideration of reason and common sense it ought to be held that when a grantee, enjoying the benefit of a prior covenant, undertakes to convey all his interest in a tract of ground, with all the rights and privileges appurtenant thereto, his grantee will succeed to the enjoyment of the covenant, and especially is that true when the covenant, by its very terms, runs to him and his assigns, as is the case here. Immediately upon Jackson's quitclaim conveyance to defendant, the benefit of the covenant made to Jackson passed to his grantee, the defendant, who continues to enjoy it until he, in turn, conveys. In other words, the covenant runs with the land. In *Allen* v. *Kennedy*, 91 Mo. 324, 2 S. W. 142, we unequivocally held that a covenant of seisin is a covenant of indemnity, and runs with the land, and that a cause of action for damages for the breach of such covenant is assignable; and in *Langenberg* v. *Heer Dry Goods Co.* 74 Mo. App. 12, where the deed from the plaintiff's immediate grantor contained a restriction to acts done by, through, or under him, it was contended that for that reason there was no transfer to the plaintiff of the covenants of the original grantor. But the court said: "This position cannot be maintained. The restriction in question merely limited the obligation of the maker of the deed containing it, and in no wise the obligation of a maker of a prior deed

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containing covenants without any restriction." These cases are in accord, not only with the previous rulings in this state, but also with the weight of authority elsewhere. *Lockwood* v. *Sturdevant*, 6 Conn. 373; *Raymond* v. *Raymond*, 10 Cush. 134; *Smith* v. *Strong*, 14 Pick. 128; *Abbott* v. *Allen*, 14 Johns. 254; *Kincaid* v. *Brittain*, 5 Sneed, 123; *Garfield* v. *Williams*, 2 Vt. 328. So, in this case, the quitclaim of his grantee could not affect the measure of George W. Johnson's liability on his covenants; and, if his grantee has conveyed the property, and assigned the covenants which run with the land, to defendant, then the latter is entitled to all the benefits arising from them in the same manner as George W. Johnson's grantee would have been if he had not conveyed to defendant. It is not different because the deed to the latter is a quitclaim deed. Such an instrument was sufficient to invest the latter with all the rights of his grantor. In principle there would seem to be but little difference in this respect between a quitclaim deed and the deed of a special master under a decree of foreclosure and sale, which conveys only the right, title, and interest of the defendant mortgagor. Both conveyances pass the same estate in extent,—that is, whatever the grantor or mortgagor has, whether it be fee simple, life estate, or remainder; and in a case involving such a special master's deed we held that the right of inurement which a railroad company would have enjoyed passed to the grantee in the master's deed. *Fordyce* v. *Rapp*, 131 Mo. 354, 33 S. W. 57. In *Jenks* v. *Quinn*, 137 N. Y. 223, 33 N. E. 376, a covenant to pay an existing mortgage in a deed of conveyance was held to run with the land, and to pass to a subsequent grantee under an ordinary quitclaim deed; and a similar ruling was made in *Hunt* v. *Amidon*, 4 Hill, 345, 40 Am. Dec. 283, and also in *Beddoe* v. *Wadsworth*, 21 Wend. 120, upon the theory that a quitclaim deed is, in effect, an assignment of the covenants. A like conclusion was announced in *Saunders* v. *Flaniken*, 77 Tex. 662, 14 S. W. 236, and in *Powers* v. *Patten*, 71 Me. 583; the court there saying: "They [the covenants] were a part and parcel of his right, title, and interest in the land. He assigned and sold all his rights and interests. Such a description would certainly be as effectual as a mere deed of release would be, and covenants of warranty may descend, through the operation of deeds that are mere naked releases, indefinitely from party to party. *Wilson* v. *Widenham*, 51 Me. 566; *Brown* v. *Staples*, 28 Me. 497, 48 Am. Dec. 504." And accordingly it was ruled that the after-acquired title inured to the person holding under the first grantee, however remote from him in the line of title, and that the succession was not broken by an intervening deed, which conveyed only the grantor's right, title, and interest in the land.

But plaintiffs make contention that, because the general description in the warranty deed of George W. Johnson concluded with the words, "being the interest I hold as heir at law of said deceased, and the interest acquired by purchase of John R. Johnson and Millian Johnson, heirs at law of said deceased," etc., the particular estate intended to be conveyed is so specified and limited as to take the deed out of the operation of the statute, under the rule established in *Bogy* v. *Shoab*, 13 Mo. 365; *Valle* v. *Clemens*, 18 Mo. 486; *Gibson* v. *Chouteau*, 39 Mo. 536; and kindred cases. But an examination of these cases discloses that in each of them the conveyance was not of any particular interest, but only the whole interest of the grantor at the time of the conveyance, whatever it may have amounted to. From the wording of the granting clause above quoted it must be apparent that the deed purports to convey "three undivided sevenths in and to the following described land, to wit: . . . Lot one, northeast quarter section two," etc. It is not otherwise because between the word "land" and the word "lot" there is inserted parenthetically the phrase, "being the real estate of Pleasant Johnson, deceased, late of Newton county, Missouri, and being the interest I hold as heir at law of said deceased, and the interest acquired," etc. The case is exactly as if the deed read thus: "Three undivided sevenths of lot one, northeast quarter section two," etc., "being the real estate of Pleasant Johnson, deceased, and being the interest I hold as heir at law and the interest acquired," etc. The designation of the property conveyed as a part of the real estate formerly owned by Pleasant Johnson, and of the three sevenths as the portion which the grantor acquired by descent and by purchase, is surplusage, and cannot serve to restrict the grant any more so than would be the case were one to convey land with general covenants of warranty, and then refer to the tract conveyed as formerly owned by John Smith. The cases on which plaintiffs rely proceed upon the theory that by the particular words used it is apparent that the grantor intended to convey only that interest which he then had. It cannot be so in this case, because the grantor expressly conveys three sevenths, and the words designating the source from whom he acquired the three sevenths do not cut down the quantity conveyed. Suppose he had attempted to convey his own share and that formerly of his sister, and had said "two sevenths, being my share and that acquired by my brother," using the word "brother" instead of "sister," would the misuse of the words operate to cut down the fraction conveyed? Obviously not. So the mere attempt to designate the source from which he acquired the interest conveyed does not take the deed out of the statute. A different case might have been presented had the descriptive clause of the deed omitted mention of the fraction "three sevenths."

As a further argument against the contention of defendant, it is asserted that an heir cannot, before the death of his ancestor, convey his expectancy, and that the law ought not to enforce on him against his will what it would not let him do if he desired; but we

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cannot yield to that argument. The cases in which a sale of an expectancy in lands of a living ancestor has been enforced, even at law, through the doctrine of estoppel springing from the covenants in a deed, are numerous. *Steele* v. *Frierson*, 85 Tenn. 430, 3 S. W. 649; *Bohon* v. *Bohon*, 78 Ky. 408; *Somes* v. *Skinner*, 3 Pick. 52; *Robertson* v. *Wilson*, 38 N. H. 48; *House* v. *McCormick*, 57 N. Y. 310; *Habig* v. *Dodge*, 127 Ind. 31, 25 N. E. 182, Followed and Approved in *Jerauld* v. *Dodge*, 127 Ind. 600, 25 N. E. 186; *Fairbanks* v. *Williamson*, 7 Me. 96; *Stover* v. *Eyeleshimer*, 46 Barb. 84; *Rosenthal* v. *Mayhugh*, 33 Ohio St. 155; *Read* v. *Fogg*, 60 Me. 479. Upon full consideration of the question, it must be held that defendant, as assignee of the covenants contained in the warranty deed from George W. Johnson to William Jackson, is entitled to whatever interest Johnson subsequently acquired.

We are next concerned with the inquiry whether or not George W. Johnson acquired any interest by virtue of the quitclaim deed of his mother under date of November 19, 1875. That instrument, by its plain, unvarnished terms, purports to transfer to him an undivided one seventh of all her rights, title, and interest in and to the property over the respective interests in which this controversy arose. Within its whole length and breadth there is no word tending to support the contention of plaintiffs that it was merely the reconveyance to him of the supposed land he had theretofore transferred to her in fear of the result of his domestic difficulties. That supposition is derived solely from the existence of his prior deed to her, and the testimony of his sister as to conversations between him and their mother regarding the deed, all of which were without the hearing of defendant. This testimony, even if properly admitted, would be insufficient for the purpose of overturning the deed. It was not corroborated, and would not have been sufficient against George W. Johnson even if he were claiming under the deed; and there is no principle of law by which it would be any more effective against his grantee, especially when it is shown that the latter is a purchaser for value without notice. Solemn written instruments, which the parties thereto have allowed to stand unquestioned for years, cannot thus be overturned, and robbed of legal efficacy and force, by the unsupported testimony of one who asserts the overhearing of a conversation between those parties, in which they expressed an intent and purpose differing from that which they have thus set down in writing. To permit this would be to embark on a course fraught with the gravest dangers, and one likely to promote all manner of fraud and chicanery; and all the more is this true where the rights of third parties have intervened. George W. Johnson's prior quitclaim deed does not supply the lack of proof. Even when considered in connection with the testimony of Hannah Johnson, and aided by the presumption of delivery, it is ineffectual. It passed no interest to his mother, for the reason he had none to convey, and the assertion of reconveyance necessarily imports a prior conveyance of something. The parties may have had the intention contended for by plaintiffs, but in such circumstances the result must be determined by what they really did. Now, under our law as it stood when Pleasant Johnson's death occurred in 1873, his widow immediately took the same estate in the homestead which he himself had (*Gragg* v. *Gragg*, 65 Mo. 343; *Burgess* v. *Bowles*, 99 Mo. 543, 12 S. W. 341, 13 S. W. 99; *Skouten* v. *Wood*, 57 Mo. 380; *Albrecht* v. *Imbs*, 3 Mo. App. 587); and in Vermont (whence came the statute then in force) the decisions are of the same effect (*McClary* v. *Birby*, 36 Vt. 254, 84 Am. Dec. 684; *Day* v. *Adams*, 42 Vt. 510). That estate was a fee simple, and accordingly, in March, 1873, the title vested in Nancy Johnson. The quitclaim deed of her son, George, added nothing, but she, being seised of the fee, passed to him an undivided seventh by her conveyance of November 19, 1875, which he in turn conveyed to Jackson, and Jackson conveyed to defendant.

Next for determination is what interest George W. Johnson acquired by inheritance from his mother; for, in the light of what has already been said, that interest would, under our statute (Rev. Stat. 1889, § 8835; Rev. Stat. 1899, § 4591), pass to defendant as assignee of the covenants in the warranty deed to Jackson. Upon her death, in 1896, the property in dispute descended to her heirs. As before stated, she had seven children, including the absent Charles Edward. If, before her death, he died intestate, and without issue, the share of George W. Johnson and his five brothers and sisters would be one sixth each, but, if he died testate, then his devisees would take his share, leaving the other children each one seventh, and, if he died intestate, leaving issue, then such issue would take his seventh. *Barnum* v. *Barnum*, 119 Mo. 63, 24 S. W. 780. While the evidence at the trial might, perhaps, support a finding of Charles Edward's death by reason of his long-continued absence, with no tidngs from or of him, does it warrant the conclusion that he died intestate, unmarried, and without issue? The only evidence on the point was the testimony of his sister, Hannah, who said that he had not been heard from in twenty years, and that at the time of his last communication he was about eighteen years old, and unmarried, "so far as she knew." Her testimony does not positively prove his celibacy. It is negative in its character, and only amounts to a declaration of lack of positive knowledge on her part. It does not preclude either the possibility, or even the probability, of his having contracted marriage before the time of his last writing, or immediately or remotely afterwards. Marriages without the knowledge of relatives are by no means uncommon occurrences, nor were they ever such; and there may have been many reasons why he chose to leave them in ignorance. At best it can only be said that there is no presumption at all on

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the subject, although ordinarily a condition, whether it be one of insolvency, insanity of a chronic nature (*State* v. *Lowe*, 93 Mo. 547, 5 S. W. 889), or what not, once shown to exist, is presumed to continue until shown to have changed. But here was a young man last heard of at a time when he naturally would be unmarried, but approaching that period of life at which the greater number of men do marry, if at all, and no better reason is apparent for presuming a man unmarried until his death, merely because that was his condition in his early adolescence, than for the presumption that he spent his life in sin because, according to the creeds of some religious denominations, he was born under the cloud of original sin. Fish, J., speaking as the organ of the supreme court of Georgia, in *Bennett* v. *State*, 103 Ga. 67, 68, 29 S. E. 919, said: "There is no presumption of law or of fact that a man or woman is single, nor any presumption to the contrary. There is no presumption that a man is not a member of the church, or of the Masonic or any other order, simply because he was not a member in early life. Nor can it be inferred that a man is uneducated from the fact that such was his original condition. Yet there is as much reason for a presumption in such cases as there is for presuming that a man is unmarried because that must necessarily have been his first state. It may be that at a fixed age a majority of persons are single, and that at a more advanced age a majority are married, but it would be very uncertain and unreliable to presume that a particular individual of either age was single or that he was married. Moreover, why should a man in a civilized community, who is competent to marry, be presumed not to have entered into a contract of marriage, when no presumption arises that he has not entered into any other kind of a contract?" In *Vought* v. *Williams*, 120 N. Y. 253, 8 L. R. A. 591, 24 N. E. 195,—a case where the validity of a title to real estate depended upon the death of a party long absent,—the court refused to indulge the presumption of death intestate and without issue upon proof of absence of an heir for twenty-four years, who, at the time of his disappearance, was about twenty-three years old, unmarried, in feeble health, and of dissipated habits. The presumption as to the continuance of a condition once established and existing is applicable to a class of cases different in many respects from the case at bar. It is most frequently applied to questions of sanity, possession, insolvency, and the like; hardly to such circumstances as this record present. If it cannot be presumed that Charles Edward Johnson died intestate and without issue, then upon the death of the mother his brothers and sisters each took one seventh; and the remaining seventh was outstanding in the absent one, or his heirs or devisees, whoever they may be. The court below evidently proceeded on the theory that Charles Edward Johnson died intestate, and without issue, prior to his mother's death, and the parties on both sides measured their respective interests under the same theory, dividing up among themselves the interest to which he or his legal representatives would have been entitled.

At the close of the case defendant moved the court to continue the case, and require that Charles Edward or his unknown heirs be made parties, but the court denied the motion. Defendant excepted, and assigned error on the ruling in his motion for a new trial. Our statute (Rev. Stat. 1899, § 4376; Rev. Stat. 1889, § 7135) requires that every person having an interest be made a party, and in *Dameron* v. *Jameson*, 71 Mo. 97, we held that, where the evidence disclosed that a person not a party to the action had an interest in the land, no partition could be had unless that person were made a party, and properly brought into court; and reversed the judgment for that reason. Likewise, in *Estes* v. *Nell*, 108 Mo. 172, 18 S. W. 1006, it appeared at the trial below that one of the heirs of Henry Nell was not made a party. A decree denying partition was affirmed because of such defect of parties. It was there said: "The rule in partition suits, when conducted in chancery, was that, unless all persons whose 'interests in the subject-matter of the suit and the relief sought were bound up with that of others' were brought before the court, and made subject to its jurisdiction, the suit would not be entertained. 'It was, therefore, indispensable that all the cotenants not uniting in the petition be made defendants'. Freeman, Cotenancy & Partition, § 463; *Barney* v. *Baltimore*, 6 Wall. 284, 18 L. ed. 825; *Shields* v. *Barrow*, 17 How. 130, 15 L. ed. 158. This rule in equity is made to apply to our statutory proceedings for partition (§ 7135), providing that 'every person having any interest in such premises, whether in possession or otherwise, shall be made a party to such petition.' *Dameron* v. *Jameson*, 71 Mo. 97." Again, in *Lilly* v. *Menke*, 126 Mo. *loc. cit.* 216, 217, 28 S. W. 643, 994, Gantt, J., speaking for this court in banc, said: "The reasons are many and obvious why one seeking a compulsory partition should be required to bring into court all who have an interest in the property sought to be divided. The language of Judge Miller in *Barney* v. *Baltimore*, 6 Wall. 285, 18 L. ed. 825, is most appropriate here: 'If a decree is made, which is intended to bind them [the absent parties], it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But, as the decree cannot bind them, the court cannot, for that very reason, afford the relief asked to the other parties. If, for instance, the decree should partition the land, and state an account, the particular pieces of land allotted to the parties before the court would still be undivided as to these parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by the decree in this case.'" After showing the application of these remarks to the case then

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in hand, Judge Gantt proceeds thus: "We hold that a petition for partition that thus discloses the interests of persons not made parties to the suit does not state a good cause of action in partition, either under the statute or in equity; and that a decree rendered without bringing in such parties is erroneous on its face, and will be reversed in this court on appeal or writ of error, although no motion in arrest or exception was made in the trial court and preserved in the bill of exceptions." So, in a case where the point was made and urged at the trial and set up in the motion for a new trial, the result must be the same.

These considerations compel the reversal of the decree, and the remanding of the cause to the Circuit Court, with directions to set aside its interlocutory decree of partition and sale, as well as the sale thereunder made; to enter an order directing the special commissioner who made the same to refund to the purchaser the amount paid by him on his purchase; to permit plaintiffs to amend their petition by making Charles Edward Johnson, if alive, or his unknown heirs or devisees, if he be dead, parties to this cause, and to bring him or them within its jurisdiction; and thereupon to take such other steps as may be necessary, and not inconsistent with this opinion.

All concur.

A petition for rehearing having been filed, the following additional opinion was handed down October 27, 1902:

Upon the stipulation of the parties to this cause, the opinion and judgment herein are so far modified as to strike out both of the opinion and judgment the following portion thereof, to wit: "With directions to set aside its interlocutory decree of partition and sale, as well as the sale thereunder made; to enter an order directing the special commissioner who made the same to refund to the purchaser the amount paid by him on his purchase; to permit plaintiffs to amend their petition by making Charles Edward Johnson, if alive, or his unknown heirs or devisees, if he be dead, parties to this cause, and to bring him or them within its jurisdiction." This will be done, and the opinion, as modified, will stand, the judgment being reversed and the cause remanded, but, as stipulated, without further directions than that the cause shall proceed in accordance with the opinion.

STATE of Missouri, *Respt.*,
v.
E. Russell BARTLETT, *Appt.*

(.....Mo.....)

1. **One assaulted in a public street,** where he has a lawful right to be, is not bound to retreat before taking measures to defend himself.
2. **A person is justified in using a deadly weapon** to defend himself from a public whipping by one greatly his superior physically.
3. **The right to defend one's self from a public horse whipping** is not defeated by the circulation of slanders about relatives of the assailant.
4. **An objection that evidence offered is incompetent,** immaterial, and irrelevant is sufficient if the evidence is "no evidence at all."
5. **An information cannot be amended** by the prosecuting attorney of the county in which it originated, after it has been removed for trial to another county.

(December 16, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Lewis County convicting him of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. **Blair, Marchand, & Rouse,** for appellant:

Edwards was not, and could not have been, justified in his attack upon Bartlett on the day of the tragedy; and Bartlett, being pursued as he was, was clearly justified in firing upon Edwards as he did.

The office of Bartlett was as sacred to him as his castle or domicil.

Morgan v. *Durfee,* 69 Mo. 469, 33 Am. Rep. 508; *State* v. *Matthews,* 148 Mo. 185, 49 S. W. 1085.

It must be proved that provocations took place at the time of the assault, and that the assault would not have been made but for the provocations.

Collins v. *Todd,* 17 Mo. 537; *Murray* v. *Boyne,* 42 Mo. 472; *State* v. *Gamble,* 119 Mo. 427, 24 S. W. 1030; *State* v. *Hudspeth,* 150 Mo. 12, 51 S. W. 483; *State* v. *Higgerson,* 157 Mo. 395, 57 S. W. 1014; *Coxe* v. *Whitney,* 9 Mo. 527.

There can be no malice without a motive. No motive upon the part of Bartlett to injure or kill Edwards was shown; there could be no malice without insult, enmity, or wrong doing.

State v. *Partlow,* 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14; *State* v. *Rapp,* 142 Mo. 443, 44 S. W. 1131; *State* v. *Higgerson,* 157 Mo. 395, 57 S. W. 1014; *State* v. *Evans,* 158 Mo. 589, 59 S. W. 994.

The state, having failed to show that Bartlett brought on the conflict, or provoked the assault on March 8, that he might have an opportunity to wreak his revenge and malice upon Edwards by killing him, left Bartlett entitled to his full self-defense.

State v. *Partlow,* 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14; *State* v. *Rapp,* 142 Mo. 443, 44 S. W. 1131; *State* v. *Higgerson,* 157 Mo. 395, 57 S. W. 1014; *State* v. *Bowles,* 146 Mo. 6, 47 S. W. 892; *State* v. *Hollingsworth,* 156 Mo. 178, 56 S. W. 1087; *State* v. *Starr,* 38 Mo. 270; *State* v. *Eaton,* 75 Mo. 586; *Nichols* v. *Winfrey,* 79 Mo. 544; *State* v. *Harrod,* 102 Mo. 590, 15 S. W. 373; *State* v. *Hudspeth,* 150 Mo. 12, 51 S. W. 483; *State* v. *Evans,* 124 Mo. 397, 28 S. W. 8; *State* v.

NOTE.—As to extent of right of self-defense in case of assault by use of deadly weapon, see also, in this series, Drysdale v. State (Ga.) 6 L. R. A. 424; People v. Pearl (Mich.) 4 L. R. A. 709, and Gutzman v. Clancy (Wis.) 58 L. R. A. 744.

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Matthews, 148 Mo. 185, 49 S. W. 1085; *State* v. *Smith*, 114 Mo. 406, 21 S. W. 827; *State* v. *Sneed*, 91 Mo. 553, 4 S. W. 411.

When both parties are actually combating at the time the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun to fight, or, having begun, endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense.

4 Bl. Com. 184.

The defendant had the right, when attacked, to presume that the attack was to carry out the threats of Edwards.

State v. *Sloan*, 47 Mo. 604; *State* v. *Elkins*, 63 Mo. 159; *State* v. *Alexander*, 66 Mo. 148; 1 Bishop, New Crim. Law, § 872, p. 525.

Defendant may act more promptly when threats are made and communicated to him.

State v. *Evans*, 65 Mo. 575.

Where threats are communicated to defendant, and he is assaulted, his right of self-defense exists, though his assailant only intends to frighten him.

Ibid.

Messrs. **Edward C. Crow**, Attorney General, and **Sam B. Jeffries**, for respondent:

There can be no question but that the prosecuting attorney had a right to amend his information if he saw proper to do so.

Hughes, Crim. Law & Proc. § 2776; *Long* v. *People*, 135 Ill. 441, 10 L. R. A. 48, 25 N. E. 851; *Truitt* v. *People*, 88 Ill. 518; *State* v. *Hubbard*, 71 Vt. 405, 45 Atl. 751; *State* v. *Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; 1 Bishop, Crim. Proc. 2d ed. § 1215.

To obtain a verdict of acquittal, it should have appeared to the satisfaction of the jury that defendant apprehended a design on the part of Edwards to inflict death or great personal injury upon him.

State v. *Parker*, 106 Mo. 217, 17 S. W. 180; *State* v. *Bateswell*, 105 Mo. 609, 16 S. W. 953; *State* v. *Duncan*, 116 Mo. 296, 22 S. W. 699.

The apparent danger must be such that the defendant must believe, and have good reason to believe, that he cannot, without further hazard, deliver himself except by striking the fatal blow.

State v. *Wilson*, 98 Mo. 440, 11 S. W. 985.

The right to strike in self-defense does not arise until the person claiming it has done all things reasonable, in his power, to avoid it.

State v. *Kloss*, 117 Mo. 591, 23 S. W. 780; *State* v. *Lewis*, 118 Mo. 79, 23 S. W. 1082; *State* v. *Hickam*, 95 Mo. 323, 8 S. W. 252.

The fact that deceased was advancing upon defendant, with no reason on the part of the defendant to believe that it was with intent to kill or inflict great personal injury, did not justify the defendant in taking his life.

State v. *Brown*, 64 Mo. 367.

A deadly weapon cannot be used with intent to kill, in repelling a nonfelonious assault.

State v. *Sloan*, 47 Mo. 604; *State* v. *Stockton*, 61 Mo. 383; *State* v. *Gonce*, 87 Mo. 627; *State* v. *Ferguson*, 26 Mo. App. 8.

Sherwood, P. J., delivered the opinion of the court:

Prosecuted on information filed in the Scotland circuit court for the murder of Wm. D. Edwards, on change of venue to Lewis county defendant was found guilty of manslaughter in the fourth degree, and his punishment assessed at two years in the penitentiary. The amended information filed in Lewis county by the prosecuting attorney of Scotland county charged the crime to have been done by shooting Edwards to death with a revolver. The testimony in the bill of exceptions in this cause covers nearly 700 typewritten pages. Of course, there is no manner of necessity for covering such an immense acreage of space as this transcript covers. The whole meat of this case can, by proper condensation, find ample room in a transcript of 100 pages or less. The controlling facts in this cause are few and simple, but the controlling facts were not allowed to control in this instance, as will presently be seen.

E. Russell Bartlett, the defendant, is something past middle age, almost blind by reason of nearsightedness and chronic weakness of the eyes, very frequently afflicted with rheumatism, and so very badly ruptured that often he would be in a dangerous condition for hours together, and would have to have immediate medical attention and relief. His eyesight was so short in its range that the paper he would read, he would have to hold within 3 or 4 inches of his eyes, and friends and relatives whom he would meet in the street or at home he could not recognize, only at a short distance,—3 or 4 feet, and but little further, and then only when the light was back of the person seeking recognition. But he could recognize persons by their voices, and by addressing him as they met or passed him on the street was the usual and customary way his friends and acquaintances had of apprising him of their presence and identity. It crops out in several places in this record that defendant had enemies, who, it appears, were some of those, or else friendly to those, men, several of whom, for their misdeeds and forged deeds, defendant had assisted in prosecuting and in placing them in positions of absolute security in adjoining states to ours. Defendant had been swindled out of some $750 by reason of a forged mortgage, and after that seemed fully determined on giving to men who dealt in such wares a vigorous and incessant prosecution. Realizing how bitter his enemies were, and how helpless was his condition, both because of defective vision, as well as other more serious physical defects, already mentioned, he sent for his nephew, Bliss Glaze, a boy about eighteen years old, who lived a few miles from Memphis, to come and stay with him and his family at his house, and be "eyes" for him, so as to notify him of approaching danger, and also to assist in case of attack. This was some

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three weeks before the occurrence which gave origin to the present prosecution. Defendant's wife was also seemingly apprehensive or cognizant of danger threatening him, for she let her nephew have some money with which to purchase a revolver, which he wore as he accompanied his uncle around the town of Memphis, and wore it regularly after the assault made on his uncle by Wm. D. Edwards at the Reveille office on the 5th of March. At the foot of the stairway, on the street, Wm. D. Edwards, when he came down from the Reveille office, bawled out to defendant, who, having left that office, was then going up street, "G——d d—— you, Bartlett! I'll get you yet." To other persons, on the next day after the scene in the Reveille office, Wm. D. Edwards said Scotland county was not big enough for both him and defendant to live in. To another witness he said he was going to run a big bluff on defendant, etc. Other threats of various kinds had been made by Wm. D. Edwards against defendant, and of these he had been warned on several occasions. All of these threats were based on the failure of defendant to make retraction of a certain statement defendant had made of Jno. A. Edwards, a brother of Wm. D. Edwards, being in jail or in the penitentiary at Fairfield, Iowa. Sometimes these threats were to the effect that, if defendant did not retract the statement he had made about the brother of Wm. D. Edwards, the latter would "horsewhip him, just so as to disgrace him a little bit." Sometimes the threats were, "If he don't retract, I'll beat hell out of him." Sometimes the threat became murderous in its fierceness, to the effect "that, unless he takes it back, I'll take my knife and cut the son of a b—— to pieces." At other times Wm. D. Edwards made similar threats about using a revolver on defendant; stating he had one, and a knife. Sometimes Wm. D. Edwards, being told that it would be dangerous to crowd on defendant, a crippled and weakly man,—that he would shoot,—he replied, "The boys says he won't." Being told that he had better not assault defendant; that, in any event, he would be fined for doing so,—replied that "There's no danger of being fined in Memphis for beating Bartlett." This last remark shows very clearly that the current of public feeling in Memphis (or at least that Edwards thought so) was evidently flowing against defendant. This fact is further exemplified by the additional fact that when Wm. D. Edwards, with a revolver in his pocket, was lying in wait for defendant on the 6th or 7th of March, and telling witness what he would do, etc., after finding Bartlett did not pass by he gave his revolver to a companion and went away. Defendant, at the meeting in the Reveille office, had admitted to Wm. D. Edwards that his brother was at Wichita, and not in the penitentiary, but refused to sign the retraction tendered him, because, as he said at the time, it was not a fair statement. What were the contents of that paper is like locating the grave of Moses. Defendant also, after going to Wichita, where he saw Jno. A. Edwards, said some time in December or January, after his return, that Jno. A. Edwards was not the man. Some persons, it seems, who knew Jno. A. Edwards when he formerly lived in Scotland county, had told defendant that a photograph of Brown or Bouner, etc., was a picture of Jno. A. Edwards, and thus defendant was led into error by such misinformation. And defendant, complying with a request from Jno. A. Edwards to that effect, sent for the Hydes, who, it seems, were cousins of Jno. A. Edwards, frankly confessed his error, apologized for it, and requested them to inform Wm. D. Edwards of the apology; but whether this message was ever delivered, does not appear. To several other persons, defendant made similar statements, and requested them to tell his friends of what he had acknowledged. On or about 1:30 in the afternoon of March 8th, defendant, who had been suffering for two months with severe hemorrhage of the bowels, and almost in a state of nervous prostration, at the request of his wife, because it was raining a little, and he had recently suffered from rheumatism, took his daughter's umbrella, which she brought him (as she and a companion wished to use his), and started downtown, accompanied by his nephew, Glaze. This umbrella, which defendant carried in his hand, had a half-crooked handle, such as umbrellas usually have, and could readily be taken for a cane, were only the handle seen. On arriving downtown, as defendant and his nephew were approaching his office, or at least in the near vicinity of it (Wm. D. Edwards, accompanied by his faithful lieutenant, Bob Board), Edwards, with a rawhide whip, covered with cloth, loaded with iron at the butt, and weighing half a pound, and which, with lash, measured 5 feet, came up behind defendant, when Edwards, without a word to defendant, began striking defendant over the shoulders and on the back of the head with the lash of the whip with such force that the swish of the blows of the whip, according to one of the state's own witnesses, was so loud as to be heard by him clear across the square, a distance of some 500 feet. At the same moment, Board, who pretends he did not know Edwards "had a whip at the time," immediately sprang forward and caught defendant's nephew, Glaze, and held him fast. Asked what Glaze had done to make him seize him, he said nothing, and finally, being pressed for a reason, said, "I caught him to keep him from catching Edwards." One of Edwards' blows struck defendant in the back of the head, and the lash of the whip naturally flapped around, and, doing so, struck defendant in the ball of his right eye, giving him great pain, and causing momentary blindness in that eye, and in the other also, through sympathy. This caused defendant to throw up his arms to protect his face, and he turned and tried to look at Edwards, and then, maddened with pain, started on the run for his near-by office; Edwards following, and raining blows on his head and shoulders with the whip as he ran. While this was going on, and these

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parties were crossing the street towards defendant's office, two of the swift witnesses for the state, Bob Board and Lee T. Witty, were heard to exclaim: "Give it to him! Beat hell out of him!" Defendant outdistanced his pursuer a little, when he slackened his pace somewhat and endeavored to ascertain his bearings and turn his face towards his office. Having done this, he ran toward the office steps, drew his eyes open, when Edwards, having come up, began raining blows over defendant's shoulders and on his face, a number of the blows striking him on his face; Edwards apparently striking so as to hit defendant's face entirely. Defendant having reached his office steps, and the blows temporarily ceasing, he hung his umbrella on his arm, when just then the blows began again, and defendant told Edwards, "Stop or I'll hurt you;" but Edwards continued to strike him, when the idea occurred to defendant that, if he could get into his office and lock the door, he would be safe, so he sprang up the stairs rapidly; Edwards following and striking him all the way up. Having reached his office door, defendant seized the knob, tried to open it, and could not do it. It seemed to be locked. The blows from the whip were still descending, striking defendant on his head and hands, when defendant grabbed the door knob, tried again to open it, and, failing again, drew his revolver and said to Edwards, "Stop, or I'll kill you," when he said, "You son of a bitch! I'll kill you yet," when Edwards struck him again, and then defendant fired. Edwards still kept up his blows, apparently not having been hurt. When defendant again told him to stop, and the blows still continuing, defendant, after a few clumsy and nervous endeavors to fire the pistol, having caught the guard instead of the trigger, finally managed, by using his left hand, to reach the trigger, when the pistol fired, and Edwards sank down on the steps, and, being removed, died the next day. That defendant apparently attempted to open his office door is abundantly sustained by the state's and other witnesses. Their testimony is to the effect that he turned his face towards the door, seemed to be grabbing the door knob, and partly disappeared; but the evidence shows the door jambs are some 9 inches thick, and so defendant could partly disappear, and still not open the door, and so his testimony on the subject stands uncontradicted—indeed, supported—on this point. And it is also in evidence that the lock of the door in question was not infrequently "out of kilter," and would not work as it should, so that the door often seemed locked when it was not. Defendant, having fired the last shot, turned to his office door, took hold of the knob, and the door opened. He testified that his impression was at the time that some one inside unlocked the door, but that, at any rate, the door opened when he took hold of the knob. Defendant's umbrella was found on the stairway, but no cane was found on the premises. While Edwards was plying his whip on defendant, at the head of the stairs, and just before the first shot was fired, Mr. Lawrence testified to hearing some one in the crowd call out: "Hit him. He dassent shoot." Defendant freely admitted that at each time he fired he fired to kill; that he had heard of the threats that were made by Edwards about him; that he thought he saw Edwards make a motion for a gun, and, believing he would be killed unless he killed Edwards, he resolved to do the latter. Another thing well calculated to arouse apprehensions of serious danger in the mind of defendant consisted in the fact that, immediately as he was struck by Edwards, at the same moment Board seized and held his nephew, and prevented him from coming to defendant's assistance. This fact, coupled with what Board on the same day told some two or three witnesses,—that "it was my business to catch Glaze,"—shows concerted action, and that defendant had more enemies than one.

Defendant, when first assaulted and beaten by Edwards on the street, was not bound to retreat to his office. He had a right to be where he was, and the wrong of Edwards in assaulting and beating him there could not deprive him of that right; and so this court has, in effect, decided. *State* v. *Evans*, 124 Mo. 397, 28 S. W. 8. See also *State* v. *Hudspeth*, 150 Mo., *loc. cit.* 33, 51 S. W. 483, and cases cited. Because the right to go where one will, without let or hindrance, despite of threats made, necessarily implies the right to stay where one will, without let or hindrance. These remarks are controlled by the thought of a lawful right to be in the particular locality to which he goes or in which he stays. It is true, human life is sacred, but so is human liberty. One is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist, supposing for a moment such an anomaly to be possible. In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor. And this idea of the non-necessity of retreating from any locality where one has the right to be is growing in favor, as all doctrines based upon sound reason inevitably will, and has found voice and expression elsewhere. Thus, the supreme court of Indiana, discussing this subject, said: "A very brief examination of the American authorities makes it evident that the ancient doctrine as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, establishes the doctrine that

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when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." *Runyan* v. *State*, 57 Ind. 80, 26 Am. Rep. 52. This ruling was quoted approvingly by the Supreme Court of the United States in *Beard* v. *United States*, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 962. See also 3 Rice, Ev. § 360. In this case, however, defendant had brought himself strictly within the old rule of retreating to the wall, although he had done nothing to cause the assault made on him. Finding the door of his office would not open, he had a right, in the circumstances already related, to turn on his pursuing and persistent adversary and defend himself as best he could. *State* v. *Partlow*, 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14, and many subsequent cases.

We have carefully read this unusually long and uselessly long record, and, considering the circumstances detailed therein; the physical condition of defendant; his badly ruptured state; the poorness of his eyesight and his infirm health; the danger which must have attended a personal struggle with an adversary by far his physical superior; the fierce and deadly threats made against him by Edwards in case he failed to retract; the fact that Edwards suddenly attacked him from behind on the public street, without saying a word or asking a retraction; the fact that his only protector, his nephew, was seized from behind and held by Bob Board, one of those leagued against him, and prevented from going to his rescue the very moment Edwards struck him, showing concerted action against him; the fact that Edwards pursued him on the streets and up to his office door, still plying the whip; the fact that, though warned by defendant to stop and to go back, there was a repetition by Edwards at that moment of one of the deadly threats of which defendant had heard so frequently and so recently; and, finally, the movement, or apparent movement, of Edwards to draw a weapon,—made out a situation and posture of affairs, when taken all together, justifying defendant in what he did do, and authorized the lower court, on the coming in of all the testimony and evidence, to give the jury a peremptory instruction to bring in a verdict for defendant. See remarks of Gantt, P. J., in *State* v. *Talmage*, 107 Mo., *loc. cit.* 572, 17 S. W. 990, and *State* v. *Hagan*, 164 Mo. 654, 65 S. W. 249. In such peculiar circumstances as this record discloses, and the physically infirm condition of defendant, the grounds of and reasons for self-defense are necessarily and indubitably enlarged.

On the point of self-defense, it is aptly said by Wagner, J.: "When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterward turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at his peril of making that guilt, if appearances prove false, which would be innocence had they proved true." *State* v. *Sloan*, 47 Mo., *loc. cit.* 612.

But nothing above asserted is intended to convey the idea that one man, because he is the physical inferior of another, from whatever cause such inferiority may arise, is, because of such inferiority, bound to submit to a public horsewhipping. We hold it a necessary self-defense to resist, resent, and prevent such humiliating indignity,—such a violation of the sacredness of one's person,—and that, if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity. On this topic of the sacredness of a man's person, an eminent text-writer says with his accustomed accuracy and force: "But any injury whatsoever, be it ever so small, being actually done to the person of a man in an angry or revengeful or rude or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery, in the eye of the law. For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any—the slightest—manner." 3 Russell, Crimes (International ed.) 1896. To which may be added that human liberty is an inseparable attendant on the sacredness of a man's person, and will not last long if the latter can be ruthlessly invaded without peril and without punishment, save the mere imposition of a nominal fine, or the recovery of civil damages.

This case was tried on the truly phenomenal theory that defendant had been circulating slanders about Wm. D. Edwards's brother in order to provoke the latter to attack him. This view is embodied in the following instruction given at the instance of the state: "(16) Although the evidence shows that the deceased first assaulted the defendant, still, if you believe that defendant, with preconceived malice, and in order to have an excuse or pretext for killing William D. Edwards or for doing some great bodily harm, intentionally, by the utterance of false and degrading statements concerning the family of the deceased, provoked deceased to wrath for the purpose of inciting the deceased to attack him and make the first assault, then in such case the killing of William D. Edwards would be murder in the first degree, no matter how severe may have been the attack of William D. Edwards upon him." In the first place, there was no evidence to warrant such an instruction. In

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the second place, there was no law to warrant such an instruction. Provocation in such case must be personal, and even then would not authorize, as does the litigated instruction, the infliction of a horsewhipping. Besides, that instruction abrogates all right of self-defense. All evidence about such slanders should have been rigorously excluded by the trial court when offered by the state, and only admitted on behalf of defendant to show threats made by Wm. D. Edwards, and the basis and conditions of such threats. And though the objection to such supposed evidence, to wit, that it was "incompetent, immaterial, and irrelevant," Judge Ryland, away back in 21 Mo., said was "no objection at all;" and this court, every term of court since, still holds, as the evidence was no evidence at all, when offered by the state, such general "sheet lightning" objection was sufficient. *State* v. *Meyers*, 99 Mo. 107, 12 S. W. 516, and subsequent cases. It was thought necessary to note and notice the above point, lest, through inadvertent tolerance,

> "'Twill be recorded for a precedent;
> And many an error, by the same example,
> Will rush into the state."

The like considerations induce comment on the amended information filed in this cause in the circuit court of Lewis county by the prosecuting attorney of Scotland county. By the amendment to our Constitution adopted in 1900, it is provided that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies." Prior to the adoption of this amendment, as is well known, felony could only have been prosecuted by indictment. When this was the constitutional rule and limitation, it was decided by this court, in *Slater's Case*, 72 Mo. 102, followed by many subsequent cases, that, though authorized by statute, the grand jury of one county could not find an indictment for a crime committed in another county. Now the amendment declares that both these forms of procedure shall be "concurrent remedies:" if concurrent, then a prosecuting attorney of one county would have no greater power over an information which he could file in his own county than would a grand jury over an indictment they had found in their own county. As they could not find one for a crime done outside of their own county, neither could he file an information outside of his own county for a crime done in his own county, unless the Constitution so permitted. And the mere fact that the general statute commands a prosecuting attorney to follow to other counties indictments and informations originating in his county does not enlarge his powers as to amending an information, any more than it does amending an indictment. The only way to get a new indictment is to have new action taken by the grand jury of the original county, and the only way to have a new information is to have the amended or new information filed in the original county. This point was not raised in the motion in arrest, but being a matter of record, and a question of jurisdiction, we have thought best to notice it.

For the foregoing reasons, *we reverse the judgment* and discharge the defendant.

All concur.

William T. McGHEE *et al.*, *Respts.*,
v.
Samuel BELL, Impleaded, etc., *Appt.*

(.....Mo.....)

1. **Equity has jurisdiction of a bill** by one who by actual fraud has been induced to take a warranty deed for a tract of land containing only about three fourths of the quantity it was represented to contain, and give back a trust deed to secure a part of the purchase money, to cancel the trust deed, and adjust the compensation for the deficit.
2. **One who, by suppressing his title deed, and by fraudulent misrepresentations as to the quantity** of land in a tract, has induced an ignorant, old person to purchase it in the belief that it contained the quantity represented, cannot defeat a suit in equity to cancel the trust deed securing the purchase money and adjust the equities, on the ground that the purchaser was negligent in not utilizing the means at his command to ascertain the true quantity of the land.
3. **In adjusting the equities where a tract of land is sold for a lump sum** under a fraudulent representation as to the quantity it contains, compensation may be made for the deficiency at the rate per acre which would have been paid had the quantity been as represented, there being no evidence to show that one part of the tract is more valuable than another.
4. **One induced to purchase a tract of land** by misrepresentations as to the quantity contained is not bound to rescind *in toto* upon discovering the fraud, but may retain the tract and obtain an adjustment of equities as to the deficiency.

(*Burgess, Ch. J., dissents.*)

(November 12, 1902.)

APPEAL by defendant Bell from a decree of the Circuit Court for Benton County in favor of plaintiffs in a suit to enjoin the sale of plaintiffs' land under a deed of trust, and to cancel the same. *Affirmed.*

The facts are stated in the division opinion, which was delivered by GANTT, J., and was as follows:

This is a suit in equity to enjoin the sale of plaintiffs' lands under a certain deed of trust alleged to have been procured by fraud, and for the cancelation of the same, and for

NOTE.—For a case in this series holding that equity will not decree the rescission of an executed sale of land for breach of covenant as to title due to a mistake, in the absence of fraud, see Decker v. Schulze (Wash.) 27 L. R. A. 335.

As to necessity of returning consideration before bringing replevin for property obtained by fraudulent purchase, see *note* to Sisson v. Hill (R. I.) 21 L. R. A. 206.

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general relief. The petition, omitting the caption, is as follows:

"Plaintiffs, for their cause of action against defendants, state: That on the —— day of March, 1896, they purchased from defendant Samuel Bell a certain tract of land in Benton county, Missouri, described as follows, to wit: 'The south part of the northwest fractional quarter of section three (3), in township forty (40), of range twenty-three (23), lying in the following metes and bounds: Commencing at southeast corner of said quarter section, running on the half-mile line north to a point opposite the fence between James Neece and Adam J. Neece, and west with said fence to the slough, and down the slough to Grand river, and up Grand river to James Foster's land, and from thence east to place of beginning, containing 80 acres, more or less.' That at the time of said purchase and conveyance defendant Samuel Bell represented to plaintiffs that said tract contained not less than 80 acres of land. That defendant showed and pointed out the boundary lines of said tracts of land to plaintiffs, and stated to plaintiffs that a certain fence was on said land, and was the property of defendant. That the well on said premises afforded an abundance of water for house use. That plaintiffs had no knowledge of the number of acres contained in said tract, nor as to the area or boundaries thereof. That they were ignorant as to the capacity of said well to afford water for family use, but wholly and entirely relied on the statements and representations made at the time by defendant, and, so relying on the said representations of defendant that said tract did contain 80 or more acres, and that the well was as represented by defendant, plaintiffs were induced to, and did, purchase said tract of land at the sum and price of $600; $385 of which they paid at the time, and for the $215 balance of the purchase price of said land plaintiffs executed and delivered to defendant Samuel Bell their promissory note, and secured the same by making, executing, acknowledging, and delivering to defendants a deed of trust conveying to defendant James R. Jones, trustee, for the purpose aforesaid, which said deed of trust is dated the 16th of March, 1896, and recorded in the recorders' office of Benton county, at Deed Book 67, page 188. The plaintiffs say that the tract of land so sold and purchased contained only 50 acres of land; that the lines of boundary as pointed out by defendant includes lands owned by others, and not by defendant, and that said well has absolutely failed to furnish water as represented, and plaintiffs have been compelled to haul water for house use; and that the representations of defendant made to plaintiffs were false and fraudulent,—all of which was well known to defendant at the time, and were made for the purpose of deceiving and defrauding plaintiffs; that plaintiffs discovered the fraud some time after said purchase, and after they had greatly improved and added to the value of said property. Plaintiffs say that they are uneducated, and wholly incompetent to understand or comprehend a description of land by metes and bounds, and that defendant brought to them the deed, made, executed, and acknowledged, and told them that said deed contained a description of 80 or more acres of land, and that they accepted said deed and paid said sum of $385 and executed said note for $215 and the deed of trust on account of defendant's representations, and relied wholly thereon, and, but for said representations by defendant Samuel Bell, plaintiffs would not have purchased said tract. Wherefore plaintiffs say they have already paid full value for the land actually conveyed to them by defendant, and ask that defendant be required to bring said note and deed of trust into court, that the note be canceled, and held for naught, that the deed of trust be declared fully satisfied, and that defendants, or either of them, be forever enjoined from collecting said note by sale under said deed of trust or otherwise, and for such other relief as to the court may seem just and proper."

The answer of defendant Bell admits the execution of the deeds as alleged in the petition, and that the deed of trust and note were given to secure part of the purchase price of the land described in the petition, but denies all the other allegations in the petition. For further answer it alleges default in the payment of the note secured by the deed of trust, and an advertisement and sale by defendant Jones, the trustee therein, under the provisions of the deed of trust on July 3, 1897, at which defendant Bell became the purchaser for $250; and the execution of a trustee's deed to defendant Bell, and then concludes with a count in ejectment and prayer for possession. The reply admits the sale by the trustee, and that he made defendant Bell a deed as alleged in the answer, and denies all the other new matter set up in the answer. The cause was tried as a suit in equity, and the court found that defendant Bell represented the tract of land as containing at least 80 acres, and nearer 90 or 100; that his representations were false and fraudulent, and that plaintiffs were wholly ignorant of the number of acres in said tract; that plaintiffs paid $385 on the purchase price, and gave a deed of trust on the same land to secure the balance of $215; that the contract price was $600, or at the rate of $7.50 per acre; that in fact the tract only contained 61 acres, and plaintiffs were damaged to the amount of $142, or the price of 19 acres, at $7.50; that pending the action the trustee sold the whole tract under the deed of trust, and defendant Bell purchased the same, and received a trustee's deed therefor.

By its decree the court set aside the deed of trust and trustee's deed, and upon an accounting decreed that plaintiffs were indebted to defendant Bell in the sum of $72.50 as and for the balance of the purchase money, and decreed defendant a lien on said tract of land for that sum, and required plaintiffs to pay the same in ninety days, with 8 per cent interest from March 16, 1896, and upon his failure to do so awarded special execution

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against said lands to satisfy said judgment, and divided the unadjudged costs between the parties.

The decree is assailed on the ground that the bill states no equity; that on the facts stated plaintiffs' only remedy was an action at law for damages. The petition states a clear case of actual fraud, whereby plaintiffs, the purchasers, were induced to accept a deed from defendant to a tract of land represented by defendant to contain at least 80 acres, when it in fact only contained 61 acres, and to pay the larger part of the purchase money cash, and to execute a deed of trust on the same land for the balance of the purchase money; that the plaintiffs were ignorant and uneducated people, and wholly incompetent to understand or comprehend a description of land by metes and bounds; and that to cover up the fraud and allay any suspicion of plaintiffs the defendant caused the deed to be prepared, executed, and acknowledged, and brought to plaintiffs, and represented to them that the deed contained the description of 80 or more acres, and was the same as in his deed to said land; and that, being ignorant of the number of acres in said tract, they relied entirely upon defendant's representations, and paid their money and executed their note and deed of trust to secure the balance, when in fact the tract only contained 61 acres; that plaintiffs greatly improved the land, and added to the value thereof, and only discovered the fraud sometime thereafter. The court found all these allegations were true, and the evidence was ample to sustain that finding. The testimony disclosed that plaintiffs were very ignorant, the husband being barely able to write his name; that the defendant told them the land was irregular and fractional, and, while he would warrant them 80 acres, it contained nearer 90 or 100 acres. It further appeared that defendant pretended to show them the lines and fences, and falsely and fraudulently showed them land and fences as a part of said tract which belonged to other adjoining owners. It was further developed by the testimony of the justice of the peace who wrote the deed and took defendant's acknowledgment and of Mrs. Foster, and not denied by defendant, that defendant took the deed by which he acquired the land from Davis, his grantor, and which described the land as "50 acres, more or less," and directed the justice to write "80 acres," instead of "50 acres," in the description of the tract; and, when asked by Mr. Wheeler, the justice, why he wanted that description changed, he answered that he knew there were 80 acres in the tract. It also appeared that one of the plaintiffs—the husband—offered to go with defendant to the justice, but defendant told him it was not necessary; that he (defendant) would go and see first if the squire was at home. It further appears that plaintiffs went into possession after paying about two thirds of the purchase money and giving a deed of trust on the land to secure the balance, and cleared up about 4 acres, and put out an orchard of 175 trees, and never discovered the fraud until after they had put out their crop and the assessor came to assess the land the next year, when the assessor told them the tract contained about 50 acres only. After this a survey was made, by which it was shown that the tract contained 61 acres. It also appeared that defendant promised to bring the plaintiffs his old deed, but never did so. That plaintiff's family were all sick after this, and he waited to see defendant, who had moved into the adjoining county.

Few cases have ever been presented to this court in which the fraud alleged has been more fully sustained by the proofs. The plaintiffs told defendant that they would not buy less than 80 acres, and thereupon defendant, with his deed in his pocket, calling for only 50 acres, deliberately concealed that fact from plaintiffs, who were ignorant, uneducated people, and prevented plaintiffs from being present when the deed was drawn, lest, perchance, they should make some embarrassing inquiries of the justice as to the old deed, and thereby discover the falsity of his representations to them. Nor are plaintiffs chargeable with negligence in relying on the representations of defendant. The land was a fractional piece, lying on the brakes of Grand river, bounded partly by the river and a slough; and when defendant showed the plaintiffs the land he fraudulently represented to them the boundaries of the land, and told them certain fences belonged to it, which were on a neighbor's lands. Under such circumstances it ill becomes defendant to complain that these ignorant old people confided in his representations, instead of insisting upon a new survey. Such shrewdness and precaution are not to be expected from people in their station of life, after such positive representations. Having discovered the fraud, they found their whole tract covered by a deed of trust, procured as part of this fraudulent scheme, on the lands which they supposed they had bought, but which in fact fell short nearly a fourth of the number of acres for which they had bound themselves to pay, and liable to be foreclosed without an opportunity in a court of law to show the breach of the covenants as to the quantity they were to receive. Under such circumstances is an action at law for damages their only remedy? It is clear that upon equitable principles plaintiffs were not bound to rescind the whole contract, and take back their purchase money, and have their note and deed of trust canceled. In *Hill* v. *Buckley*, 17 Ves. Jr. 395, Sir William Grant, master of the rolls, stated the general rule to be: "Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation." In that case the contract of sale called for "217 acres, more or less, and 10 perches," whereas in fact it lacked 26 acres of being that much. In that case it was conceded by defendant's counsel that the words "more or less" would not cover

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the deficit of 26 acres, but they sought to defend on the ground that they were trustees of minors, and that the mistake was innocent, and without fraud a court of equity would not cancel the agreement; but the master of the rolls decreed an abatement of the purchase money *pro tanto*. In *Graham* v. *Oliver*, 3 Beav. 124, Lord Langdale, master of the rolls, stated the general rule to be that, "where a party has entered into a contract for the sale of more than he has, the purchaser, if he thinks fit to accept that which it is in the power of the vendor to give, is entitled to a performance to that extent." And such was the unanimous opinion of the supreme court of New York in *Waters* v. *Travis*, 9 Johns. 464; 2 Minor, Inst. 792, 793; 2 Lomax, Dig. 82, 83; *Triplett* v. *Allen*, 26 Gratt. 722, 21 Am. Rep. 320. And so the doctrine is laid down by Adams, Eq. 8th ed. *91, and Story, Eq. Jur. § 779. And in *Morss* v. *Elmendorf*, 11 Paige, 277, Chancellor Walworth went to the extent of saying that, where the vendor never had it in his power to perform at all, if the complainant had filed his bill in good faith, supposing at the time he instituted his suit in equity that a specific performance of the contract could be obtained under a decree of court, a court of equity might retain his suit, and award him compensation in damages; but it is unnecessary for us to go that far in this case. The general rule above laid down is fully and ably discussed and maintained both on principle and in the light of the authorities in England and in this country in *Erwin* v. *Myers*, 46 Pa. 96. Can it be said that in a court of conscience a vendee in possession under an executory contract to convey can insist upon a part performance, with an abatement of a part of the purchase money *pro tanto*, but that, if ignorant of the deficit in the quantity of the land sold, and relying upon the false representations of the vendor, he takes a warranty deed, and gives a deed of trust back to secure the purchase money, and before paying discovers the deficit and the fraud, he cannot, in a court of equity, have the same abatement, and retain that which the vendor could sell and convey to him? We hold that a court of equity, which looks at the substance, rather than the semblance, of things, will treat the vendee in each case on the same principles, and will adjust, on equitable grounds, in a proceeding analogous to a bill for specific performance, the compensation he is to receive for the deficit in quantity; and, while preserving the lien of the vendor for the balance, predicated on what he actually owned and sold, will enjoin him from enforcing a mortgage lien for that which in equity he has no right or title to. We hold that the positive and actual fraud by which plaintiffs were overreached and induced to make a deed of trust on their lands entitles them to the protection of a court of equity, and to a remedial decree, which a court of law could not give them under the circumstances, to adjust the equitable compensation for defects, and remove the cloud of the fraudulently acquired mortgage. We have no hesitancy in saying that the fraud of defendant and the entanglements of plaintiffs resulting therefrom fully justified the circuit court in retaining the bill and adjusting the equities between the parties. The fraud of defendant is one of the recognized heads of equity jurisdiction, and the specific redress to which plaintiffs are entitled by the setting aside of the deed of trust and adjusting the balance actually due defendant and removing the cloud of the fraudulent deed of trust was and is not attainable in a simple action at law for damages, since in a court of law a rescission *pro tanto* and equitable compensation are not recognized; and hence there is a prerogative jurisdiction in equity to relieve them, and a court of equity, having once acquired jurisdiction, will retain it to do complete justice. *Holland* v. *Anderson*, 38 Mo. 55; *Real Estate Sav. Inst.* v. *Collonious*, 63 Mo. 290, and cases cited.

As to the complaint that the court canceled the deed of trust while conceding that a part of the purchase money was still due, it is apparent no injury resulted from this part of the decree, because the court expressly decreed a vendor's lien on all of the land for the ascertained balance of the purchase money; thus fully securing and protecting every equitable and just claim of defendant.

The contention that plaintiffs cannot complain of the deceit practised upon them, and the wrongs resulting therefrom, because they had the means to ascertain the true quantity of the land, will not be countenanced in a court of conscience. As was said in *Starkweather* v. *Benjamin*, 32 Mich. 305: "It cannot be generally true that persons can judge of the contents of a parcel of land by the eye. . . When a positive assurance of the area of a parcel of land is made by the vendor to the vendee with the design of making the vendee believe it, that assurance is very material, and equivalent to an assurance of measurement." The defense rested mainly on the ground that "the purchaser saw the land, and was as able to judge of its size as Starkweather." It was held in that case that the doctrine invoked did not apply to the facts of the case. And so we say here. Having, by fraud and suppression of the old deed, deceived these ignorant plaintiffs, and induced them to rely upon his fraudulent statements, defendant is in no position to invoke his own fraudulent conduct as a defense to the just claim of the plaintiffs resulting from that fraud. The parties did not stand on an equal footing. *Caldwell* v. *Henry*, 76 Mo. 260; *Raley* v. *Williams*, 73 Mo. 310. Neither can his positive statements as to the number of acres be treated as mere opinions. They were representations of facts as of his own knowledge, and were false, and constituted fraud. *Coon* v. *Atwell*, 46 N. H. 510; *Langdon* v. *Green*, 49 Mo. 363; *Dunn* v. *White*, 63 Mo. 181. There was ample evidence of actual fraud in showing the boundaries, and in suppressing the title deed, and that plain-

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tiffs relied upon the false representations of defendant.

Finally, it is urged that the court adopted a wrong standard of damages; that in compensating plaintiffs for their loss of the 19 acres of land for which they gave their notes and deed of trust, and which, owing to the fraudulent representations of defendant, they did not get by his deed to them, the court erroneously fixed the compensation at the amount per acre for which the whole tract sold; that he should have awarded them the difference between the value of the land as it was represented and its value as it actually was at the time of the sale. There was no evidence tending to show that one part of the land was more valuable than another. It was represented at 80 acres, and the circuit court took the view most favorable to defendant under these circumstances, and estimated the land as represented to be 80 acres, and the whole price at $600, and reached the conclusion that the plaintiffs had agreed to purchase at a price of $7.50 per acre, and, as the deficit was 19 acres, he allowed plaintiffs in the proportion of 19 to 80, or $142.50. In so ruling the court was not without precedent. In *Gass* v. *Sanger* (Tex. Civ. App.) 30 S. W. 502, it was ruled in an action to recover for land lost because of conflict of boundaries, in the absence of any proof to the contrary, the measure of recovery was held to be such a portion of the entire price as the amount lost is to the entire tract. And to the same effect is *Skinner* v. *Walker*, 98 Ky. 729, 34 S. W. 233. In *Logan* v. *Bryant*, 19 Ky. L. Rep. 1774, 44 S. W. 435, the vendor represented the boundary as containing 40 acres, when in fact it only contained 17 acres, and it was ruled by the court of appeals that the purchaser was entitled to a credit on the price for the deficiency, estimated at the contract price. Now, under the evidence in this case, it is plain that plaintiffs stipulated for 80 acres, and the defendant positively represented the quantity as 80 acres, and it is clear that, in the absence of any proof to the contrary, it was favorable to the defendant to estimate the deficit at $7.50 an acre, that being the value according to the contract price; because, though the land was neither bought nor sold professedly by the acre, the presumption is that in fixing the price regard was had on both sides to the quantity which both supposed the estate consists of. *Hill* v. *Buckley*, 17 Ves. Jr. 401. There is no evidence as to what the land would have been worth had it contained 80 acres, as it was represented, and we see no ground for reversal because the court adopted this measure of compensation.

The contention that plaintiffs were bound to rescind *in toto* does not apply to a case like this. When this same proposition was urged in *Waters* v. *Travis*, 9 Johns. 459, Chancellor Kent answered: "The doctrine that a contract enforced specifically must be so in its entirety appears to me solid; but where the right of the one party is sustained, and the other can only shelter himself by the allegation that part of the property sought is not in his power, and so placed by his own act, from a complete compliance with it, the rule of equity as to the entirety must be strangely applied if it could possibly prevent the party injured by the alienation from saying: 'True it is, I am entitled to the whole, but under all the circumstances I am content to accept what is in the power of the defendant to give, and relinquish my right to the remainder.'" And on appeal in the same case Judge Spencer said: "It is against all my notions of justice to allow the appellant to excuse himself from performing so much of the contract as he can yet perform because he has seen fit wrongfully to abridge himself of the power of performing the whole. And I again recur to the observation that the converse of this proposition would not be just or true. The respondent might insist on having all the land or none, or he may elect to consider the acts of the appellant as his, and thus make valid what was wrongful. . . . Where a vendee seeks a specific execution of an agreement, there is, says Mr. Sugden (Sugden, Vendors, 193), much greater reason for affording the aid of the court at the suit of the purchaser when he is desirous of taking the part to which a title can be made." *Atty. Gen.* v. *Day*, 1 Ves. Sr. 218; [*Mortlock* v. *Buller*], 10 Ves. Jr. 315.

In my opinion, the bill stated a case for equitable interposition, and the evidence abundantly supported it, and the decree should be affirmed.

Mr. **Henry P. Lay**, for appellant:

Plaintiffs' petition attempts to force on the defendant a new contract, to which he never assented.

Norton v. *Bohart*, 105 Mo. 631, 16 S. W. 598; *Fruin* v. *Crystal R. Co.* 89 Mo. 405, 14 S. W. 557.

It attempts to retain the benefits derived from a contract, and to avoid the obligations arising from it.

Smith v. *Busby*, 15 Mo. 393, 57 Am. Dec. 207; *Woodward* v. *Van Hoy*, 45 Mo. 300; *Beatie* v. *Rocky Branch Coal Co.* 56 Mo. App. 221; *Norton* v. *Bohart*, 105 Mo. 631, 16 S. W. 598; *Estes* v. *Reynolds*, 75 Mo. 563; *Fruin* v. *Crystal R. Co.* 89 Mo. 405, 14 S. W. 557.

A vendee, who claims to have been induced to purchase land by fraudulent misrepresentations made by the vendor, cannot retain possession of the land purchased, and avoid the payment of any part of the purchase money because of fraud.

21 Am. & Eng. Enc. Law, pp. 84, 91; *Estes* v. *Reynolds*, 75 Mo. 563; *Lapp* v. *Ryan*, 23 Mo. App. 436.

While the prayer of the petition is for the cancelation of a deed of trust on the ground that the debt secured has been paid, yet the other allegations of the petition show that no part of the debt has really been paid, and that the real object of the petition is to rescind a part of the contract of sale, while affirming the remainder, which cannot be done.

Lewis v. *Brookdale Land Co.* 124 Mo. 672,

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28 S. W. 324; *Estes* v. *Reynolds*, 75 Mo. 563; *Crumb* v. *Wright*, 97 Mo. 18, 10 S. W. 74; *Robinson* v. *Siple*, 129 Mo. 208, 31 S. W. 788; *Bogart* v. *Bogart*, 138 Mo. 429, 40 S. W. 91.

A mere statement of opinion as to quantity by a vendor, even though mistaken, does not entitle the vendee to relief,—especially where, as in this case, the vendee has ample opportunity to investigate and judge for himself.

14 Am. & Eng. Enc. Law, 2d ed. p. 34; *Anderson* v. *McPike*, 86 Mo. 293; *Nauman* v. *Oberle*, 90 Mo. 666, 3 S. W. 380; *Union Nat. Bank* v. *Hunt*, 76 Mo. 439; *Dalrymple* v. *Craig*, 149 Mo. 345, 50 S. W. 884; *Lewis* v. *Brookdale Land Co.* 124 Mo. 687, 28 S. W. 324.

On discovering the fraud, the vendee of lands must proceed to rescind the contract of sale promptly, and *in toto*, and place the other party to the contract *in statu quo*. A failure so to do leaves him only his legal action for damages for the deceit.

Lewis v. *Brookdale Land Co.* 124 Mo. 672, 28 S. W. 324; *Lapp* v. *Ryan*, 23 Mo. App. 436; *Robinson* v. *Siple*, 129 Mo. 222, 31 S. W. 788; *Taylor* v. *Short*, 107 Mo. 384, 17 S. W. 970; *Dougherty* v. *Stamps*, 43 Mo. 247; *Estes* v. *Reynolds*, 75 Mo. 563; *Kirk* v. *Seeley*, 63 Mo. App. 266; *Crumb* v. *Wright*, 97 Mo. 18, 10 S. W. 74.

Courts of equity will not grant damages for deceit, except as an incident to other and purely equitable relief, and will not take jurisdiction of an action where such damages are the only question involved.

2 Story, Eq. Redfield's ed. 6, § 798; 14 Am. & Eng. Enc. Law, 2d ed. pp. 162 (*f*), 172.

As the plaintiff had the means at hand to readily ascertain the truth or falsity of defendant's alleged representations as to quantity, and neglected to avail himself of them, he cannot recover even legal damages for the deceit, if practised.

Slaughter v. *Gerson*, 13 Wall. 379, 20 L. ed. 627; *Gordon* v. *Parmelee*, 2 Allen, 212; *Mires* v. *Summerville*, 85 Mo. App. 183.

Mr. **W. L. P. Burney**, for respondents:

A party defrauded in a contract may stand by it, even after he discovers the fraud, and recover damages resulting from the fraud; or he may rescind the contract, and recover back what he has paid or sold.

Parker v. *Marquis*, 64 Mo. 28; *Nauman* v. *Oberle*, 90 Mo. 666, 3 S. W. 380; *Brownlow* v. *Wollard*, 61 Mo. App. 124; 14 Am. & Eng. Enc. Law, p. 168; *Hall* v. *Clark*, 21 Mo. 415; *Shultz* v. *Christman*, 6 Mo. App. 338; *Cahn* v. *Reid*, 18 Mo. App. 115.

When a person, who has been drawn into a purchase or other contract by fraud, does not seek to rescind the same, but merely seeks to recover the damages sustained by reason of the fraud, he is not required to return, or offer to return, what he has received under the contract. He may retain the same and recover his damages.

14 Am. & Eng. Enc. Law, p. 168; *Shinnabarger* v. *Shelton*, 41 Mo. App. 147; *Hitchcock* v. *Baughan*, 36 Mo. App. 216; *Brockhaus* v. *Schilling*, 52 Mo. App. 73; *Heed* v. *Pierce*, 8 Mo. App. 569, Appx.; *Pryor* v. *Foster*, 130 N. Y. 171, 29 N. E. 123.

Where a court of equity has once obtained jurisdiction of a cause, it will not relinquish the same until it has done full and complete justice between the parties.

11 Am. & Eng. Enc. Law, 2d ed. p. 201; *McDaniel* v. *Lee*, 37 Mo. 204; *Boynton* v. *Miller*, 63 Mo. 209; *Holland* v. *Anderson*, 38 Mo. 55.

Equity has ancient and original jurisdiction in matters of fraud and deceit.

Nelson v. *Betts*, 21 Mo. App. 232; *Biddle* v. *Ramsey*, 52 Mo. 153; *St. Louis* v. *St. Louis Gaslight Co.* 70 Mo. 105; *Bales* v. *Gilbert*, 84 Mo. App. 679; *Rogers* v. *First Nat. Bank*, 82 Mo. App. 377; *Black* v. *Rogers*, 75 Mo. 441.

The measure of damages for false representations on a sale is the difference between the value as represented and as it actually is, and not the difference between the market value and the price paid.

Davenport v. *Anderson* (Tex. Civ. App.) 28 S. W. 922; *Farmer* v. *Randel* (Tex. Civ. App.) 28 S. W. 384; *Bank of Atchison County* v. *Byers*, 139 Mo. 627, 41 S. W. 325; *Anslyn* v. *Frank*, 8 Mo. App. 242; *Cahn* v. *Reid*, 18 Mo. App. 116; *McBeth* v. *Craddock*, 28 Mo. App. 380; *Clark* v. *Hannibal & St. J. R. Co.* 36 Mo. 216; *Shinnabarger* v. *Shelton*, 41 Mo. App. 147.

Per Curiam:

The foregoing opinion of **Gantt**, J., in division No. 2, after a rehearing in banc, is adopted as the opinion of the court.

Sherwood, Robinson, Valliant, Marshall, and **Brace**, JJ., concur therein.

Burgess, Ch. J., dissenting:

This is an action for damages for fraud in the sale by defendant Bell of a tract of land to plaintiffs, containing a less number of acres than Bell represented it to contain, and to enjoin the sale of the land conveyed under a deed of trust executed by plaintiffs to defendant Jones, as trustee for the benefit of Bell, to secure the payment of $215, being the balance of the purchase money, $385 having been paid in cash at the time of the sale, upon the ground that the damages sustained amounted to more than the balance due on the property. The petition alleges: That in March, 1896, plaintiffs purchased from defendant Bell the following land in Benton county, Missouri: "The south part of the northwest fractional quarter of section three, in township forty, of range twenty-three, lying in the following metes and bounds: Commencing at the southeast corner of said quarter section, and running on the half-mile line north to a point opposite the fence between James Neece and Adam J. Neece, and west with said fence to the slough, and down the slough to Grand river, and up Grand river to James Foster's land, and thence east to the place of beginning;

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containing 80 acres, more or less." That at time of purchase said defendant represented to plaintiffs that said tract contained not less than 80 acres. That plaintiffs were ignorant of the facts, and, relying wholly on said representations, purchased said land for $600, paid $385 down, and gave a deed of trust on said land to defendant Jones, as trustee, to secure a note to Bell for the remaining $215, which deed of trust is dated March 16, 1896, and recorded at Deed Record 67, page 188. That said tract of land in fact contained only 50 acres. That Bell's representations as to such fact were false and fraudulent, and made for the purpose of deceiving plaintiffs. "Wherefore plaintiffs say they have paid full value for the land actually conveyed." The prayer is that the note secured by the deed of trust be canceled, that the deed of trust be declared fully satisfied, and that defendants be enjoined from attempting to collect said note by sale under said deed of trust or otherwise. The answer of defendant Bell admits the execution of the deed to the land as alleged in the petition, alleges that the deed of trust and note were given to secure part of the purchase price of the land described in petition, but denies every other allegation in the petition. For further answer and counterclaim the answer alleges default in payment of the note secured by the deed of trust, advertisement and sale by defendant Jones under the provisions thereof on July 3, 1897, at which sale defendant Bell became the purchaser for $250, and that a deed was executed to him by the trustee. The answer concludes with the usual allegations of a petition in ejectment, and prays for the possession of said land. The reply admits the trustee's sale and execution of deed as alleged in the answer, but denies all other allegations of new matter. The judgment and finding by the court of the sale of the land was as alleged in the petition and admitted in the answer,—that plaintiffs were wholly ignorant of the number of acres contained in said tract, but relied on defendant's representations that said tract contained 80 acres; that said representations were false and fraudulent, and that said tract contained only 61 acres. The court also finds the amount of cash payment to be $385, and the execution of deed of trust securing $215, as alleged and admitted; that the contract price was at the rate of $7.50 per acre, and that plaintiffs have sustained damage in sum of $142.50, the price of 19 acres of land at such rate; that a sale was made under said deed of trust by the trustee, Jones, as alleged and admitted. "It decreed that said deed of trust and trustee's deed be set aside, and for naught held, and that defendant recover of plaintiffs $72.50 of the unpaid purchase money of said land, with 8 per cent interest from March 16, 1896, and that the same be a lien on said land, and that each party pay the costs made by himself, and not heretofore adjudged." Motions for new trial and in arrest, containing the usual grounds of objection, were filed timely, and overruled, and appeal perfected to this court by defendant Bell.

The following admissions were made in the pleadings or by the parties during the trial: "(1) The defendant Bell, on March 16, 1896, conveyed by warranty deed in usual form the land described in the petition to plaintiff W. T. McGhee, and in said deed described said land as containing '80 acres, more or less.' (2) That in the deed conveying said land to Bell, and in several deeds prior thereto, said land is described as containing 50 acres, more or less; metes and bounds being the same as in deed from Bell to McGhee. (3) That said land in fact contained 61 acres according to survey made by county surveyor. (4) Execution of deed of trust to secure balance of purchase money, default in payment, advertisement and sale, and execution of deed by Jones, as trustee, to Bell. (5) That plaintiffs went into possession of land under deed from Bell, and were in possession at institution of this suit, and to the date of trial. (6) That plaintiffs discovered the deficiency in the land about June, 1896, before any material improvements had been made; that thereafter they remained in possession, improved the land, but made no complaint to Bell until pushed on the note for the remainder of purchase money." Defendant knew the number of acres named in the deed, under which he held title and possession of said land. The plaintiff William T. McGhee was an illiterate man, and could neither write nor read the writing of others. Defendant learned that he desired to purchase a tract of land containing not less than 80 acres, and, in order to sell his land to plaintiffs, and, as a special inducement thereto, the defendant represented to and told plaintiffs that his farm contained not less than 80 acres, and contained nearer 90 or 100 acres, and pointed out to them the boundary lines of said tract, and told them that certain fences were on said land, and were the property of defendant. Plaintiffs had no knowledge of the number of acres contained in said tract, nor did they know the area or boundaries thereof, except as the same were pointed out to them by defendant; and relied wholly on the statements and representations of defendant as to the number of acres in said tract, and the boundary lines thereof; and relying upon said statements, and believing the same to be true, and being deceived thereby, were induced to purchase and did purchase of defendant the said land for the price and sum of $600, as and for a tract of 80 acres, paying $385 cash, and giving their note for $215, the balance of the purchase price, and secured the same by a deed of trust on said land, making defendant James R. Jones trustee therein. Plaintiffs afterwards, and before the institution of this suit, learned that they had received a deed to a tract much less than 80 acres in area, and aver that they relied wholly on defendant's representations, and but for said representations they would not have purchased said land.

About March, 1897, the interest on the un-

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paid purchase price falling due, defendant Jones, as trustee, advertised said land for sale under said deed of trust, whereupon plaintiffs brought this suit to have set off damages for the fraud and deceit practised by defendant in the sale of said land, and allege that they have already paid full value for the land actually conveyed, and ask that defendant, who was still possessor of said note, be required to bring said note and deed of trust into court, that the note be canceled and for naught held, that the deed of trust be declared satisfied, and that defendants be enjoined from collecting said note by a sale under said deed of trust or otherwise, and for such other relief as to the court might seem just and proper. Afterwards, during the pendency of said suit, said land was advertised and sold by the defendant Jones herein, trustee in said deed of trust. Plaintiffs' attorney appeared, and gave public notice of the pendency of this action (having first filed notice *lis pendens*), and at said sale said defendant Bell purchased said land. Defendant filed his answer, denying each and every allegation in plaintiff's petition, and setting up his purchase at trustee's sale, and his deed thereunder, and for judgment in ejectment.

It is said in the majority opinion that "it is clear that upon equitable principles plaintiffs were not bound to rescind the whole contract, and take back their purchase money, and have their note and deed of trust canceled," and *Hill* v. *Buckley*, 17 Ves. Jr. 395, is relied upon as sustaining that contention. But in that case the defendant sold to the plaintiff a tract of land containing 217 acres and 10 perches, when in fact there was not that quantity by about 26 acres. The bill was for specific performance of the contract by the vendee, in so far as it was in defendant's power to convey, with an abatement out of the purchase money in respect of a deficiency in quantity. "Held, that, where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation." *Graham* v. *Oliver*, 3 Beav. 124, is another authority relied upon. That was also an action by the vendee for the specific performance of the sale of a tract of land, who was willing to take a less quantity than he purchased, and it was held "that, where a party has entered into a contract for the sale of more than he has, the purchaser, if he thinks fit to accept that which it is in the power of the vendor to give, is entitled to a performance to that extent." The same doctrine is announced in *Waters* v. *Travis*, 9 Johns. 464; Adams, Eq. 8th ed. p. 91; Story, Eq. Jur. § 779; *Morse* v. *Elmendorf*, 11 Paige. 277; and *Erwin* v. *Myers*, 46 Pa. 96. To the same effect is *Townsend* v. *Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258. These authorities announce a familiar principle, which no one disputes, and which every lawyer concedes. But they are not in point in this case, for the reason that this is not an action for specific performance of part of a contract for the sale of land, but is somewhat in the nature of an equitable set-off upon the ground of the false and fraudulent representations of Bell in regard to the quantity of the land, by reason of which plaintiffs claim they were damaged in excess of the contract price of the land already conveyed to them by Bell, and ask that defendant be required to bring said note and deed of trust into court, that the note be canceled, and held for naught, that the deed of trust be declared fully satisfied, and that defendants be forever enjoined from collecting said note by sale under said deed of trust or otherwise, and for such other relief as to the court may seem just and proper. There is not one word said in the petition with respect to specific performance of the contract, nor could such an action be maintained, for the obvious reason that plaintiffs had received from defendant Bell a good and sufficient deed for all the land which the tract that he sold to them contained, and, although a less quantity than he contracted to sell them, plaintiffs retained said deed with full knowledge of that fact, and had it in their possession at the time of the institution of this suit. There was, therefore, nothing upon the part of Bell to perform. It would be absurd to say that plaintiffs could accept and retain a deed which they knew was for a greater number of acres than was in the tract which they purchased, and then sue the grantor for the specific performance of a contract to convey land which he had theretofore conveyed to them. In Waterman, Spec. Perf. § 516, it is said: "As a rule, when the plaintiff knew at the time of bringing his suit that the contract could not be specifically performed or decreed, the bill will not be sustained for compensation in damages. It is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is matter strictly of legal, and not of equitable, jurisdiction." 2 Beach, Modern Law of Contracts, § 881. In the case of *Kempshall* v. *Stone*, 5 Johns. Ch. 193, the defendant, who had entered into articles of agreement with the plaintiff for the sale and conveyance of a lot of land, after the time of performance had elapsed sold and conveyed the land to a third person for a valuable consideration, without notice of the agreement, and before the filing of a bill by the plaintiff for a specific performance of it. Held, that a specific performance could not be decreed, and that the plaintiff must seek his remedy at law for a compensation in damages for the breach of the agreement. The court said: "When the defendant had disabled himself before the filing the bill, and the plaintiff knew of that fact before he commenced his suit (and I consider such knowledge a material circumstance in the case), it is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal, and not of equitable, jurisdiction. The remedy is clear and perfect at law by an action upon

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the covenant; and, if this court is to sustain such a bill, I do not see why it might not equally sustain one in every other case sounding in damages and cognizable at law." *Hatch* v. *Cobb*, 4 Johns. Ch. 559. The same rule is announced in 2 Story, Eq. Jur. 3d ed. § 799. In the case of *McQueen* v. *Chouteau*, 20 Mo. 222, 64 Am. Dec. 178, Judge Scott, in speaking for the court, said: "It was admitted on the hearing of this cause that before this suit was brought the defendants conveyed away the land in controversy. They had offered previously to convey to McQueen on his compliance with the terms of the contract. This he failed to do. In cases similar to this, courts of equity have refused to decree a specific performance of the contract, and have refused to entertain the bill for the purpose of compensating the complainant for damages, but have left him to his action at law on the agreement. In the case of *Hatch* v. *Cobb*, 4 Johns. Ch. 559, it is said that it is doubtful how far the court has jurisdiction to assess damages merely in such a case, in which the plaintiff was aware, when he filed his bill, that the contract could not be specifically performed or decreed, as it was a matter of legal cognizance; that, although equity, in very special cases, may possibly sustain a bill for damages on a breach of contract, it is clearly not the ordinary jurisdiction of the court. This doctrine is confirmed in the subsequent case of *Kempshall* v. *Stone*, 5 Johns. Ch. 193, in which it was held that a defendant, who had entered into an agreement with the plaintiff for the sale of a lot, and who, after the time of performance had elapsed, sold and conveyed the land to a third person for a valuable consideration, without notice of the agreement, and before the filing of a bill by the complainant for a specific performance of it, would not be compelled to a specific performance, but that the plaintiff's remedy was at law for a compensation in damages for the breach of the agreement." In *Bonner* v. *Little*, 38 Ark. 397, it is said: "Where there is a sale of lands, and a contract to convey the legal title, which, as to part, is impossible, the vendee may, if there be nothing else in the case to defeat his equity, elect to have performance so far as the vendor may be able, and may apply to a court of equity to compel it; and the court taking jurisdiction for this purpose will retain the cause for the incidental purpose of awarding compensation for the deficiency. This is given, however, more for the purpose of adjusting the equities between the parties with regard to the subject-matter, already properly before the court, than as actual damages for nonperformance. With regard to the latter, they are more properly within the jurisdiction of courts of law, and courts of equity will not assume jurisdiction for the sole purpose of awarding damages for a breach of contract to convey, where it was known to the complainant, when the suit was brought, that a performance was impossible." The same doctrine is announced in Willard, Eq. Jur. 290, and, in fact, by all of the authorities.

While it is true that, where the vendor has contracted to convey a tract of land, the title to part of which fails, the vendee may enforce specific performance of the residue of the land, with compensation in damages for the part the vendor is unable to convey, yet where he conveys to the vendee all of the land sold to which he has title, as in this case, though less than the quantity sold, and the deed thereto is accepted by him, the vendee cannot file a bill in equity for the mere purpose of obtaining compensation in damages for fraud practised upon him by the vendor in the sale of the land, but he must resort to his remedy at law for that purpose, where the case may be tried before a jury if either party so desires, of which right defendants are deprived if this judgment be permitted to stand; and in no authority cited in the opinion is it ruled otherwise.

There is no pretense that the note for the balance of the purchase money, or the deed of trust given by plaintiffs upon the land described in the deed from Bell to plaintiffs to secure its payment, were obtained by fraud, or that Bell is insolvent, or that plaintiffs did not have an adequate remedy at law against him for damages, or that they desired to have the contract rescinded, nor do they offer to pay the balance of the purchase money should any part of it be found to be due to defendant; but all of these essential averments are taken for granted. They do not aver that the note and deed of trust were obtained from them by fraud, or that they did not know that they were signing such instruments, but aver that they have paid defendant, Bell, more than the value of the land, and for that reason alone ask that he be required to bring them into court, and that they be canceled, etc. While there is no rule of law better established than that, where a court of equity once acquires jurisdiction of a cause, it will retain it, to do full and complete justice between the parties (*Holland* v. *Anderson*, 38 Mo. 55; *McDaniel* v. *Lee*, 37 Mo. 204), there are no allegations in the petition in the case at bar which entitle plaintiffs to equitable relief of any kind. The only thing complained of in the petition is the fraudulent conduct of Bell, by which plaintiffs claim they were induced to buy the land. But, notwithstanding these facts, the court found that plaintiffs were indebted to defendant, Bell, in the sum of $72.50, balance due upon the land, and, without anything in the pleading which authorized it, set aside and canceled the deed of trust, and rendered judgment in Bell's favor against plaintiffs therefor, and made it a lien upon the land. Where the purchaser of land receives and retains a deed thereto from his vendor for a less number of acres than he contracted for, with knowledge of that fact,—as did the plaintiffs in this case,—he cannot resort to a court of equity for the sole purpose of recovering damages for fraudulent representations upon which he relied, made by the vendor, with respect to the number of acres the tract contained, and was thereby induced to purchase the land; but must resort to a

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court of law. He has, upon discovery of the fraud, the right to stand by the contract, and sue his vendor for damages for the fraud practised upon him, or to rescind the contract; but, as a general rule, the right to disaffirm a contract for fraud must be exercised promptly, and the disaffirmance must be *in toto*. "A party cannot affirm a contract in part and repudiate it in part. He cannot accept its benefits on the one hand, while he shirks its disadvantages on the other. He cannot play fast and loose in the matter. Nor is he permitted to select his own time, consult his own convenience, and watch the rise and fall of the market, before exercising the right of rescission. If he elects to disaffirm the contract in consequence of deception practised upon him, such election, in order to avail him, must have the chief and essential element of promptitude, and he must put the other party in the same situation as he was before the contract was made. All the authorities speak this language. *Jarrett* v. *Morton*, 44 Mo. 275; *Hart* v. *Handlin*, 43 Mo. 171, and cases cited;" *Estes* v. *Reynolds*, 75 Mo. 563; *Lewis* v. *Brookdale Land Co.* 124 Mo. 672, 28 S. W. 324; *Robinson* v. *Siple*, 129 Mo. 208, 31 S. W. 788. There seems to be an exception to the general rule, however, in case the property received by party seeking to rescind has been changed in such a manner that it is impossible to have it restored. Then a court of equity will afford relief anyway. *Holland* v. *Anderson*, 38 Mo. 55. But that decision is placed on the express ground that the property had so changed that the parties could not be put *in statu quo*, and, as a court of equity had taken jurisdiction of the action, it was held that it would retain the cause, and determine the whole matter in controversy. *Nelson* v. *Betts*, 21 Mo. App. 220. In the case at bar there was nothing in the way to the placing by plaintiffs of defendant, Bell, *in statu quo* before or at the time of the institution of this suit, which was a condition precedent to a rescission of the contract. But they do not seek to have the contract rescinded, but affirm it, and at the same time claim damages from Bell on account of the fraud practised upon them, which they seek to recover and have deducted from the balance due by them on the purchase money by way of recoupment, without offering to do equity on their part, or offering to perform the contract on their part. *Springfield Engine & Thresher Co.* v. *Donovan*, 147 Mo. 622, 49 S. W. 500, was an action in ejectment, in which plaintiff was entitled to no relief if not the possession of the land sued for; but the court rendered judgment in its favor against the defendant Dorice Donovan for $1,073.50, and decreed that the deed of trust given by him on the land to plaintiff to secure said indebtedness be foreclosed, and that Donovan's right, title, and interest in the land be sold for the payment of the debt. The court said: "If there is anything in the record upon which to predicate this judgment, or any theory upon which it can be permitted to stand, we are at a loss to know where it is, or what it is. It is a judgment for which plaintiff does not ask or want, unauthorized by the pleadings in the case, and manifestly erroneous." So, in the case at bar, defendant did not ask or want a money judgment against plaintiffs, nor was such a judgment authorized by his answer. It is axiomatic that no judgment can be maintained which is not authorized by the pleadings, and such is this case.

Defendant also contends that whatever representations, if any, Bell made with respect to the number of acres in the tract of land, and its boundaries, were mere expression of opinion, and ought not to have been relied upon by plaintiffs; but the great weight of authority is that statements as to such matters, if made by a person positively as of his own knowledge, are statements of fact, and constitute fraud. *Hitchcock* v. *Baughan*, 44 Mo. App. 42; *Foster* v. *Kennedy*, 38 Ala. 359, 81 Am. Dec. 56; *Beardsley* v. *Duntley*, 69 N. Y. 577; *Coon* v. *Atwell*, 46 N. H. 510; *Hill* v. *Brower*, 76 N. C. 124; *Griswold* v. *Gebbie*, 126 Pa. 353, 17 Atl. 673; *Clark* v. *Baird*, 9 N. Y. 183. And such affirmations are not to be regarded as mere expressions of opinion, in which it was folly to confide; nor as representations, the truth of which the vendee might, with common prudence, ascertain. *Coon* v. *Atwell*, 46 N. H. 510. In *Starkweather* v. *Benjamin*, 32 Mich. 305, it is held that "it is no defense to an action of fraud in misrepresenting the quantity of land in a parcel the defendant was then selling the plaintiffs by the acre, that the latter saw the land, and was as able to judge of its size as the defendant. A positive assurance of the area of a parcel of land, made under such circumstances, is very material, and is equivalent to an assurance of measurement; and, if it be false, and the vendee is deceived by it, he has a clear right of action for the fraud." So that it is clear, if Bell made the statements to plaintiffs with respect to the location and quantity of the land which they claim he did, and that they were induced by reason thereof to buy it, they were fraudulent, and for which they can maintain an action at law against him.

For these considerations I dissent from the opinion, and think the judgment should be reversed.

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MONTANA SUPREME COURT.

Fred BEINHORN, *Respt.*,
v.
L. S. GRISWOLD, *Appt.*

(.....Mont.....)

A statute and custom depriving the owner of unfenced land of the right to recover for injuries caused by trespassing animals do not require him to keep the property safe for such animals, so as to charge him with the loss in case he leaves poisonous liquids used in his business exposed where, without his knowledge, the animals drink it and perish.

(July 14, 1902.)

APPEAL by defendant from a judgment of the District Court for Lewis and Clarke County in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's cattle, which were alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Edward C. Russell** and **Lewis Penwell**, for appellant:

Under the common law, every unwarrantable entry of a man, or of his cattle, upon the premises of another, inclosed or uninclosed, was a trespass, and the trespasser was liable in damages.

3 Bl. Com. 209, 211.

Our state has adopted laws barring the remedy for such damages, unless the lands are inclosed by a fence of stated construction.

A statute is not presumed to work any changes in the rules of the common law beyond what is expressed in its provisions, or fairly implied in them, in order to give them full operation.

Forrester v. *Boston & M. Consol. Copper & S. Min. Co.* 21 Mont. 556, 55 Pac. 229, 353; *Arthur* v. *Bokenham*, 11 Mod. 150; *Wilbur* v. *Crane*, 13 Pick. 284; *Hollman* v. *Bennett*, 44 Miss. 323; Endlich, Interpretation of Statutes, § 127; *Monroe* v. *Cannon*, 24 Mont. 316, 61 Pac. 863; *Bileu* v. *Paisley*, 18 Or. 47, 4 L. R. A. 840, 21 Pac. 934; *Stewart* v. *Bonninger*, 138 Pa. 441, 21 Atl. 159; *May* v. *Poindexter*, 98 Va. 143, 47 L. R. A. 588, 34 S. E. 971; *Addington* v. *Canfield* (Okla.) 66 Pac. 355.

Cattle lawfully running at large are therefore trespassing when they enter upon the uninclosed lands of a legal occupant.

Egan v. *Montana C. R. Co.* 24 Mont. 572, 63 Pac. 831; *Knight* v. *Abert*, 6 Pa. 472, 47 Am. Dec. 478; *Lazarus* v. *Phelps*, 152 U. S. 81, 38 L. ed. 363, 14 Sup. Ct. Rep. 477; *St. Louis Cattle Co.* v. *Vaught*, 1 Tex. Civ. App. 388, 20 S. W. 855; *Herold* v. *Meyers*, 20 Iowa, 378; *McNeer* v. *Boone*, 52 Ill. App. 181; *Norton* v. *Young*, 6 Colo. App. 187, 40 Pac. 156; *Union P. R. Co.* v. *Rollins*, 5 Kan. 167.

A trespasser cannot recover for injuries not wantonly or wilfully inflicted.

Egan v. *Montana C. R. Co.* 24 Mont. 572, 63 Pac. 831; *O'Leary* v. *Brooks Elevator Co.* 7 N. D. 554, 41 L. R. A. 677, 75 N. W. 919; *Indianapolis* v. *Emmelman*, 108 Ind. 530, 9 N. E. 155; *Akers* v. *Chicago, St. P. M. & O. R. Co.* 58 Minn. 544, 60 N. W. 669; *Sweeny* v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Stendal* v. *Boyd*, 73 Minn. 53, 42 L. R. A. 288, 75 N. W. 735; *Frost* v. *Eastern R. Co.* 64 N. H. 220, 9 Atl. 790; *Daniels* v. *New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248, 28 N. E. 283; *Buch* v. *Amory Mfg. Co.* 69 N. H. 257, 44 Atl. 809; *Evansville & T. H. R. Co.* v. *Griffin*, 100 Ind. 221, 50 Am. Rep. 783; Thomp. Neg. p. 1183 *n*; *Redigan* v. *Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276, 28 N. E. 1133; 2 Am. L. Reg. N. S. 196.

A mere passive acquiescence on the part of the owner or occupant, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use.

Shearm. & Redf. Neg. § 705; *Vanderbeck* v. *Hendry*, 34 N. J. L. 467; *Egan* v. *Montana C. R. Co.* 24 Mont. 572, 63 Pac. 831; *Reardon* v. *Thompson*, 149 Mass. 267, 21 N. E. 369; *Woodruff* v. *Bowen*, 136 Ind. 441, 22 L. R. A. 198, 34 N. E. 1113; *Helms* v. *Bell*, 155 Ind. 502, 58 N. E. 707; *Delaware, L. & W. R. Co.* v. *Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682; *Fitzpatrick* v. *Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675; *Ryan* v. *Towar*, 128 Mich. 463, 55 L. R. A. 310, 87 N. W. 644; *Felton* v. *Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350; *Thomas* v. *Chicago, M. & St. P. R. Co.* 103 Iowa, 649, 39 L. R. A. 399, 72 N. W. 783; *Brague* v. *Northern C. R. Co.* 192 Pa. 242, 43 Atl. 987; *Ritz* v. *Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993; *Baltimore & O. S. W. R. Co.* v. *Bradford*, 20 Ind. App. 348, 49 N. E. 390; *Alabama G. S. R. Co.* v. *Moorer*, 116 Ala. 642, 22 So. 900; *Louisville & N. R. Co.* v. *Vittitoe*, 19 Ky. L. Rep. 612, 41 S. W. 269; *Shea* v. *Concord & M. R. Co.* 69 N. H. 361, 41 Atl. 774.

If cattle stray upon uninclosed land, and injure themselves by eating deleterious matter which has been left there by the landowner without any malicious intent, the latter is not liable to the owner of the cattle.

Thomp. Neg. p. 298; *Bush* v. *Brainard*, 1 Cow. 78, 13 Am. Dec. 513; *Hess* v. *Lupton*, 7 Ohio, pt. 1, p. 216; *Durham* v. *Musselman*, 2 Blackf. 96, 18 Am. Dec. 133; *Tonawanda R. Co.* v. *Munger*, 5 Denio, 255, 49 Am. Dec.

NOTE.—As to negligence in enticing cattle to their destruction by the use of salt on railroad switches, see, in this series, Kirk v. Norfolk & W. R. Co. (W. Va.) 32 L. R. A. 416.

As to liability for permitting salt water to run through pens provided by carrier of live stock, when the animals are injured by drinking it, see Harman & Crockett v. Norfolk & W. R. Co. (Va.) 44 L. R. A. 289.

As to landowner's liability for injury to cattle by barbed-wire fence, see Loveland v Gardner (Cal.) 4 L. R. A. 395.

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239; *Illinois C. R. Co.* v. *Carraher*, 47 Ill. 333; *McGill* v. *Compton*, 66 Ill. 327.

A person having a poisonous tree on his land is not liable for injury to trespassing cattle.

Illinois C. R. Co. v. *Carraher*, 47 Ill. 333; *Ponting* v. *Noakes*, 10 Reports, 265 [1894] 2 Q. B. 281; *McNeer* v. *Boone*, 52 Ill. App. 181; *Headen* v. *Rust*, 39 Ill. 186; *Hughes* v. *Hannibal & St. J. R. Co.* 66 Mo. 325; *Turner* v. *Thomas*, 71 Mo. 596; *Kerwhacker* v. *Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Herold* v. *Meyers*, 20 Iowa, 378; *Ferguson* v. *Miami Powder Co.* 9 Ohio C. C. 445; *Union P. R. Co.* v. *Rollins*, 5 Kan. 167.

A landowner is not liable for failure to keep his premises safe for trespassing animals.

Knight v. *Abert*, 6 Pa. 472, 47 Am. Dec. 478; *Bush* v. *Brainard*, 1 Cow. 78, 13 Am. Dec. 513; *Hess* v. *Lupton*, 7 Ohio, pt. 1, p. 216; *Durham* v. *Musselman*, 2 Blackf. 96, 18 Am. Dec. 133; *Tonawanda R. Co.* v. *Munger*, 5 Denio, 255, 49 Am. Dec. 239; *Illinois C. R. Co.* v. *Carraher*, 47 Ill. 333; *McGill* v. *Compton*, 66 Ill. 327; *Ponting* v. *Noakes*, 10 Reports, 265 [1894] 2 Q. B. 281; *Morrison* v. *Cornelius*, 63 N. C. 346; *Ferguson* v. *Miami Powder Co.* 9 Ohio C. C. 445; *Walker* v. *Herron*, 22 Tex. 55; *Caulkins* v. *Mathews*, 5 Kan. 191; *Union P. R. Co.* v. *Rollins*, 5 Kan. 167; *Herold* v. *Meyers*, 20 Iowa, 378.

As against the trespasser, the landowner need only refrain from active injury; if the trespasser is *sui juris* and negligent, he cannot recover for passive injury.

Delaware, L. & W. R. Co. v. *Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682; *Twist* v. *Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 402; *Walsh* v. *Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Daniels* v. *New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248, 28 N. E. 283.

Messrs. **Stranahan & Stranahan,** for respondent:

Cattle at large in this state are not trespassing when they stray upon the uninclosed lands of another. And owners have a right to permit them to run at large.

Smith v. *Williams*, 2 Mont. 195; *Fant* v. *Lyman*, 9 Mont. 61, 22 Pac. 120; *McMaster* v. *Montana Union R. Co.* 12 Mont. 163, 29 Pac. 539, 30 Pac. 268; *Monroe* v. *Cannon*, 24 Mont. 316, 61 Pac. 863.

The old common-law rule relative to cattle running at large is not, nor was it ever, in force in this state.

Kerwhacker v. *Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Young* v. *Harvey*, 16 Ind. 314; *New Orleans, J. & G. N. R. Co.* v. *Field*, 46 Miss. 573; *Jones* v. *Nichols*, 46 Ark. 207, 55 Am. Rep. 575; *Haughey* v. *Hart*, 62 Iowa, 96, 49 Am. Rep. 138, 17 N. W. 189; *Caulkins* v. *Mathews*, 5 Kan. 191; *Buford* v. *Houtz*, 133 U. S. 321, 33 L. ed. 618, 10 Sup. Ct. Rep. 305; *Fennell* v. *Seguin Street R. Co.* 70 Tex. 670, 8 S. W. 486; 2 Am. & Eng. Enc. Law, 2d ed. p. 356; 16 Am. & Eng. Enc. Law, pp. 478, 494; 2 Shearm. & Redf. Neg. 2d ed. §§ 419, 957; Thomp. Neg. 238.

Defendant, by leaving his land uninclosed, granted plaintiff an "implied license" for his cattle to stray or roam upon such uninclosed land.

2 Shearm. & Redf. Neg. new ed. 419; Ray, Neg. 592; *Haughey* v. *Hart*, 62 Iowa, 96, 49 Am. Rep. 138, 17 N. W. 189; *New Orleans, J. & G. N. R. Co.* v. *Field*, 46 Miss. 573; *Morris* v. *Fraker*, 5 Colo. 425.

If plaintiff's cattle were technical trespassers, yet the judgment should be affirmed.

Lowe v. *Salt Lake City*, 13 Utah, 91, 44 Pac. 1050; 1 Shearm. & Redf. Neg. ¶ 97; *Saxton* v. *Bacon*, 31 Vt. 540; *White* v. *McNett*, 33 N. Y. 371; *Henly* v. *Neal*, 2 Humph. 551; *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 275; *Powell* v. *Salisbury*, 2 Younge & J. 391; *Colvin* v. *Sutherland*, 32 Mo. App. 77; *Crowhurst* v. *Amersham Burial Board, L. R.* 4 Exch. Div. 5, 27 Week. Rep. 95; *Firth* v. *Bowling Iron Co.* L. R. 3 C. P. Div. 254; 2 Shearm. & Redf. Neg. ¶ 662.

The owner of land is bound to take notice of the natural propensities of domestic animals.

Ray, Neg. 598; *Sisk* v. *Crump*, 112 Ind. 504, 14 N. E. 381.

Even if the common law were applied to our conditions, the owner of cattle at large would be entitled to recover for injuries done if resulting from the negligent use of property by the owner.

16 Am. & Eng. Enc. Law, p. 419; Ray, Neg. 597; *Colvin* v. *Sutherland*, 32 Mo. App. 77.

The owner of cattle lawfully running at large takes only the risks incident to their loss or injury from unavoidable accident.

Jones v. *Nichols*, 46 Ark. 207, 55 Am. Rep. 575; *Raiford* v. *Mississippi C. R. Co.* 43 Miss. 233; *Kerwhacker* v. *Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *New Orleans, J. & G. N. R. Co.* v. *Field*, 46 Miss. 573.

The owner of land, who places thereon something that attracts the animals of another, whereby they are injured, is liable for their loss or injury.

Jones v. *Nichols*, 46 Ark. 207, 55 Am. Rep. 575; *Burger* v. *St. Louis, K. & N. W. R. Co.* 52 Mo. App. 129; *Brown* v. *Hannibal & St. J. R. Co.* 27 Mo. App. 394; *Schooling* v. *St. Louis, K. C. & N. R. Co.* 75 Mo. 518; *Townsend* v. *Wathem*, 9 East, 277; *McNamara* v. *MacDonough*, 102 Cal. 575, 36 Pac. 941; *Kennedy-Shaw Lumber Co.* v. *Price*, 113 Cal. 291, 45 Pac. 336; *Robinson* v. *Mills*, 25 Mont. 391, 65 Pac. 114; *Young* v. *Harvey*, 16 Ind. 314; *Haughey* v. *Hart*, 62 Iowa, 96, 49 Am. Rep. 138, 17 N. W. 189; *Caulkins* v. *Mathews*, 5 Kan. 191; *Sisk* v. *Crump*, 112 Ind. 504, 14 N. E. 381; *Noblesville Gas & Improv. Co.* v. *Teter*, 1 Ind. App. 322; *Durham* v. *Musselman*, 2 Blackf. 96, 18 Am. Dec. 133.

Pigott, J., delivered the opinion of the court:

Action to recover damages for injuries alleged to have been caused by the negligence of the defendant. The complaint states that the defendant negligently left ex-

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posed a vat containing poisonous liquid; that, by reason of such negligence, certain cattle of plaintiff and of one Holm drank from the vat some of the liquid, and died from the effects of the poison; and that Holm assigned his demand for damages to the plaintiff. The answer puts in issue the allegation of negligence, and avers that the death of the cattle was caused by the carelessness of the plaintiff and Holm. The plaintiff secured a judgment, and the defendant moved for a new trial on several grounds; one being the insufficiency of the evidence to prove negligence on the part of the defendant. From the order denying a new trial the defendant has appealed.

The facts upon which the plaintiff bases his allegations of negligence are substantially these: During the year 1898 the defendant was the lessee in possession of the Non-Such gold mine and mill site. The property was not inclosed by a legal fence. For the proper conduct of his mining operations, he employed the cyanide process, using large quantities of poisonous chemicals, consisting principally of cyanide of potassium, which he diluted with water, and kept in suitable receptacles on the surface of the mining property, but not sufficiently covered to prevent easy access to the poisonous solution. In appearance it resembled water. Cattle of the plaintiff and of Holm, while ranging on the public domain, wandered over to and upon the defendant's mine and mill site, and there drank the poisonous liquid contained in the vats or tubs. The defendant knew that the cattle were in the habit of straying upon his uninclosed property, and he had driven them away whenever he saw them there. The plaintiff insists there is but one question involved, which he states thus: Is a "landowner who negligently leaves exposed upon his uninclosed premises, where he knows stock are wont to stray, dangerous places or substances, whereby another's cattle, straying thereon, are injured, liable for such injury?" He argues that, as the defendant's mining property was not inclosed by a legal fence, the cattle were not trespassing upon his property, but were rightfully thereon, and that, therefore, he owed to the plaintiff the duty so to use his property and conduct his business as not to injure the plaintiff's cattle; that, in failing to cover the poisonous solution so as to prevent the cattle from drinking of it, he violated this alleged duty, and, as such negligence resulted in the death of the cattle, and consequent loss to the plaintiff, the defendant is liable in damages. In support of his contention the plaintiff cites *Monroe* v. *Cannon*, 24 Mont. 316, 61 Pac. 863, where the owner of pasture land was held entitled to recover the value of grass consumed by bands of sheep deliberately and intentionally driven on it by the herder in charge of them; the opinion containing the following language: "If in the case now under consideration the damage sustained by respondent had resulted from trespasses committed by cattle or sheep, or other animals named in the statute, lawfully at large, and not under the direction and control of their owner, then appellant's position would be sound." Neither this language, nor anything said in the opinion, lends countenance to the contention of the plaintiff in the case at bar. The decision does not declare or define any duty owing by the landowner to the owner of straying cattle. These observations apply also to § 3258 of the Political Code, which reads: "If any cattle, horse, mule, ass, hog, sheep, or other domestic animal break into any inclosure, the fence being legal, as hereinbefore provided, the owner of such animal is liable for all damages to the owner or occupant of the inclosure which may be sustained thereby. This section must not be construed so as to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law." Even if it be conceded that the cattle of the plaintiff were not wrongfully upon defendant's property, no liability would be incurred from the fact that they were injured while there, unless it was the defendant's duty to protect from injury all cattle on his property whose trespass was not of such a nature as to render their owners liable for the trespass. Counsel for the plaintiff urge that, if these cattle were not wrongfully on the defendant's property, they must have been rightfully there; asserting that, if there was no remedy by action, there could not be a trespass. To this we cannot yield assent. The owner is entitled to the exclusive possession of his land, whether fenced or not; and it is beyond the power of the legislature to prescribe, or of custom to create, a right in another to occupy the land or enjoy its fruits. Either written law or custom may withhold from the owner who does not fence his land a remedy for loss suffered by reason of casual trespasses by cattle which stray upon it, and may give a remedy for such trespasses to those only who inclose their land. By custom, as well as by statute, the common law of England has been so modified in Montana. This is undoubtedly a legitimate exercise of the police power. It falls far short, however, of conferring a legal right to dispossess the nonfencing owner. He may at pleasure lawfully drive the intruding cattle from his land, and keep them away from it. This is his right, for the cattle are trespassing. The owners of domestic animals hold no servitude upon, or interest, temporary or permanent, in, the open land of another, merely because it is open. If the landowner fails to "fence out" cattle lawfully at large, he may not successfully complain of loss caused by such live stock straying upon his uninclosed land. For, under these circumstances, the trespass is condoned or excused,— the law refuses to award damages. While the landowner, by omitting to fence, disables himself from invoking the remedy which is given to those who inclose their property with a legal fence, and while the cattle owner is thereby relieved from liability for casual trespasses, it is nevertheless true that the cattle owner has no right

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to pasture his cattle on the land of another, and that cattle thus wandering over such lands are not rightfully there. They are there merely by the forbearance, sufferance, or tolerance of the nonfencing landowner; there they may remain only by his tolerance. The cattle-owning plaintiff did not owe to the land-owning defendant the duty to fence his cattle in. The latter did not owe to the former the duty to fence them out. Neither of them was under obligation to the other in that regard. The defendant is not liable in this action unless he was negligent. There cannot be negligence without breach of duty. Hence, manifestly, the defendant was not guilty of negligence in omitting to prevent the plaintiff's cattle from going upon his unfenced land.

As has just been said, the straying of the plaintiff's cattle upon the defendant's land did not involve the violation of any legal duty upon the part of the defendant. There would therefore seem to be no basis for the plaintiff's charge of negligence on the part of the defendant, unless it consists in the defendant's alleged failure to protect the cattle from injury while on his land. The damage resulted from a permissive, not an active, cause of injury. We are asked to hold that the law imposed upon the defendant, in addition to the duty of refraining from intentional or wanton injury to the cattle, the duty so to use his property and so to conduct his mining operations thereon as to avoid all dangers to which these trespassing beasts might expose themselves. Counsel invoke the provisions of § 2296 of the Civil Code, which is declaratory of the common law: "Every one is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property. . . ." Giving to the principle thus expressed full recognition, and measuring the rights of the parties by the test of negligence thus furnished, we are unable to find in the record evidence of acts or omissions by the defendant constituting negligence in the management of his property. But the plaintiff contends that, irrespective of § 2296, the defendant has been guilty of negligence in so using his property as to imperil, and in this case actually injure, the property of another. We think the principles which he invokes have no application to the facts disclosed by the record. To a naked trespasser or mere licensee by sufferance (if the expression may correctly be used) the landowner owes the duty to refrain from any wilful or wanton act causing injury to his person or chattels, and, after discovering that the trespasser is in imminent danger or immediate peril, to use reasonable care to avoid an active cause of injury. *Egan* v. *Montana C. R. Co.* 24 Mont. 569, 63 Pac. 831. The rule is different in respect of those who go upon property because of the owner's invitation, either express or implied. As to such persons he is bound, at his peril, to use reasonable care and diligence in keeping his property in safe condition. To a mere licensee or naked trespasser the landowner does not owe the active duty of being diligent or using care in providing against the danger of accident. The distinction is well expressed in *Sweeny* v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644: "All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be encumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus, a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safe-guards for wrongdoers. So, a licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter, or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon. . . . The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." The methods pursued by the defendant in the management and use of his property involved no danger to the plaintiff or his cattle, nor exposed either to risk, so long as he and they remained within the limits of the plaintiff's rights. The contention of the plaintiff rests upon the erroneous theory, heretofore considered, that the cattle owners

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hold a personal servitude upon, or the right of commons or profit in, all unfenced land, by virtue of which they are supposed to be entitled, as of right, to use for grazing and pasture all of the uninclosed lands of other persons. Such burden upon or easement in gross in open lands has not been granted, and does not exist. We have already decided that such use, while it does not constitute an actionable wrong, is not the exercise of a legal right; and as the cattle owner possessed no right to have his live stock upon the defendant's land, and the latter was clothed with the unquestioned right to drive them away because they were not rightfully there, clearly the defendant had no active duty in respect of them while there. He was, of course, bound to refrain from intentional or wanton injury. If he stood by and knowingly permitted them to drink of the poisonous solution, without making an effort to prevent them from doing so, he might, perhaps, be liable. But neither of these conditions is in the case at bar.

We think there is no proof in the record which justifies the application of the doctrine of invitation, enticement, allurement, or attraction. *Deane* v. *Clayton*, 7 Taunt. 489, 531, 533; *Jordin* v. *Crump*, 8 Mees. & W. 782; *Ponting* v. *Noakes* [1894] 2 Q. B. 281; *Stendal* v. *Boyd*, 67 Minn. 279, 69 N. W. 899; *Twist* v. *Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 402. The soundness of the principles upon which the so-called turntable and similar cases are supported is not presented for decision.

We have read the opinions which are opposed to the conclusions here announced. They need not be referred to or discussed. We are entirely satisfied that our conclusions are based upon correct fundamental principles.

The order refusing a new trial is reversed, with costs to the appellant, and the cause is remanded.

Brantly, Ch. J., concurs.

Milburn, J., concurring:

Considering only the facts appearing in this case, I concur in the reversal of the order denying a new trial. I do not concur in all that is said in the opinion with reference to absence of duty owing by one person to another who is trespassing upon the premises of the former, or to the owner of live stock which wander upon such premises.

OHIO SUPREME COURT.

City of CLEVELAND, *Plff. in Err.*,
v.
CLEMENTS BROTHERS CONSTRUCTION COMPANY.

(.....Ohio.....)

***1. The act of April 16, 1900** (94 Ohio Laws, p. 357), entitled, "An Act to Provide for Limiting the Hours of Daily Service of Laborers, Workmen, and Mechanics Employed upon Public Work, or of Work Done for the State of Ohio, or Any Political Subdivision Thereof, Providing for the Insertion of Certain Stipulations in Contracts of Public Works; Imposing Penalties for Violations of the Provisions of This Act, and Providing for the Enforcement Thereof,"—is in conflict with §§ 1 and 19 of article 1 of the Constitution of Ohio, because it violates and abridges the right of parties to contract as to the number of hours' labor that shall constitute a day's work, and invades and violates the right, both of liberty and property, in that it denies to municipalities and to contractors and subcontractors the right to agree with their employees upon the terms and conditions of their contracts. Said act is therefore unconstitutional and void.

2. Said act is not a valid exercise of the police power, it not appearing that the services and labor to be performed were unlawful or against public policy, or that they were of such character that such limitation and restriction as to the number of hours' labor that should constitute a day's work was necessary to the public welfare.

3. Said act being unconstitutional, in an action brought by a contractor against the city to recover an amount due him for labor performed for said city under a contract containing a stipulation, as required by said act, that said contractor should not require or permit any of his employees to labor more than eight hours in any one day, and providing as penalty for a violation of such stipulation the forfeiture of $10 for each employee who should be so required or permitted to work more than eight hours in any one calendar day, where, by way of answer, and as and for its only defense, such city relies upon and pleads its right to withhold and retain from such contractor by way of forfeiture, and as penalty for his breach of such stipulation, an amount equal to the amount claimed by said contractor to be due him on said contract, such answer does not state a sufficient defense, and is bad on general demurrer.

4. Where a statute peremptorily requires certain stipulations or agree-

*Headnotes by the COURT.

NOTE.—As to constitutionality of eight-hour law as affecting municipal corporations, see, in this series, *Re* Dalton (Kan.) 47 L. R. A. 380, and People *ex rel.* Rodgers v. Coler (N. Y.) 52 L. R. A. 814.

As to statutory limitation of hours of labor generally, see *note* to State v. Loomis (Mo.) 21 L. R. A. 796; People v. Phyfe (N. Y.) 19 L. R. A. 141, and *note;* Low v. Rees Printing Co. (Neb.) 24 L. R. A. 702; Ritchie v. People (Ill.) 29 L. R. A. 79; State v. McNally (La.) 36 L. R. A. 533; Holden v. Hardy (Utah) 37 L. R. A. 103 (Affirmed in 42 L. ed. U. S. 780); State v. Holden (Utah) 37 L. R. A. 108; Short v. Bullion, B. & C. Min. Co. (Utah) 45 L. R. A. 603; *Re* Morgan (Colo.) 47 L. R. A. 52; and Wenham v. State (Neb.) 58 L. R. A. 825.

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ments to be inserted in a contract, and the same are, by force of such statute, and because of its provisions, inserted by the contracting parties in their contract, the obligatory and binding force of such stipulations and agreements so inserted depends upon the validity of the statute requiring their insertion: and where such statute is itself unconstitutional such stipulations and agreements, although incorporated in the contract, are in law without any obligatory or binding force upon the parties to said contract.

(December 2, 1902.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment reversing a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover the unpaid balance of the contract price for the construction of a sewer. *Affirmed.*

Statement by **Crew, J.:**

It was alleged by plaintiff in its petition that the city had, on July 31, 1900, entered into a contract with the plaintiff for the construction of a sewer in Wellington avenue, in said city, and promised to pay the plaintiff for the material furnished and work and labor done by it in the construction of said sewer as specified in the contract; that the chief engineer of said city was directed to, and did, make an approximate estimate of the work done and materials furnished under said contract, which estimate amounted to $9,808.72; that said estimate was duly approved by the director of public works, and filed with the city auditor; that all of said amount was paid by said city to the plaintiff, except the sum of $320; that said city, without valid reason, and contrary to the terms of the contract, retained said sum, and refused to pay the same to the plaintiff; wherefore the plaintiff prayed judgment for said sum of $320, with interest thereon from December 15, 1900. The city's answer to the petition admitted the contract, the estimate, that said estimate was duly approved by the director of public works and filed with the city auditor, the payment of all of the amount of said estimate except $320, the retention by it of that sum, the plaintiff's demand, and its refusal to pay. It, however, denied that such retention and refusal were contrary to the terms of the contract, and without lawful or valid reason, as alleged in the petition; and averred that it refused to pay the plaintiff said amount by authority of an act passed by the general assembly of the state of Ohio April 16, 1900, entitled "An Act to Provide for Limiting the Hours of Daily Service of Laborers, Workmen, and Mechanics Employed upon Public Works, or Work Done for the State of Ohio, or Any Political Subdivision Thereof," etc. 94 Ohio Laws, p. 357. Defendant, in its answer, further averred that, in accordance with the provisions of § 2 of said act, a certain stipulation attached to the answer, and made a part thereof, and marked "Exhibit A," was made a part of the contract between the plaintiff and defendant, and that, in violation of the stipulation and of the law, the plaintiff required or permitted laborers, workmen, and mechanics to work more than eight hours in one calendar day upon the work mentioned in the contract, and that the work so done was not done by reason of any emergency, or upon any work mentioned in the act and exempted from its operation; that said act and stipulation provided that a penalty of $10 for each day in which any laborer, mechanic, or workman labored more than eight hours should be paid by plaintiff and withheld by defendant; that the plaintiff did require 32 laborers to work more than eight hours on one certain day; that in accordance with the provisions of said act defendant retained $10 per day for each violation of the act, amounting to $320; wherefore it prayed to be dismissed. To this answer the plaintiff demurred, alleging as grounds of demurrer: (1) That said answer is insufficient in law on its face; (2) that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action; (3) that the statute referred to in said answer is unconstitutional. This demurrer was overruled by the court of common pleas, and judgment given for the defendant. The case was taken to the circuit court on error, which court reversed the judgment of the common pleas for error in overruling said demurrer. The circuit court sustained the demurrer to the answer, and, defendant not desiring to plead further, rendered judgment against the city of Cleveland for the amount prayed for. This proceeding is prosecuted to reverse the judgment of the circuit court and to affirm that of the common pleas.

Messrs. **M. W. Beacom and Baker, Payer, Gage, & Carey,** for plaintiff in error:

Municipal corporations can exist only by the authority of the state, whether that authority be expressed in a charter, or in special or general acts under which such corporations are organized.

Beach, Pub. Corp. §§ 31, 60; Dill. Mun. Corp. §§ 54, 57; *Ravenna* v. *Pennsylvania R. Co.* 45 Ohio St. 118, 12 N. E. 445.

They derive their powers entirely from the state through the acts of its legislature. Their powers are only such as the legislature may confer.

15 Am. & Eng. Enc. Law, p. 1039; *Bloom* v. *Xenia*, 32 Ohio St. 461.

The legislative will is supreme, and it may enlarge, abridge, or entirely withdraw, at its pleasure, the powers which it has granted.

Beach, Pub. Corp. §§ 538, 539; *Jones* v. *Lake View*, 151 Ill. 663, 38 N. E. 688.

It can impose such restrictions as it deems proper.

Beach, Pub. Corp. § 542; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Frederick* v. *Groshon*, 30 Md. 436, 96 Am. Dec. 591; *Groff* v. *Frederick City*, 44 Md. 67; *Jersey City* v. *Jersey City & B. R. Co.* 20 N. J. Eq. 360; *State ex rel.*

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Cleveland v. *Jersey City Bd. of Finance & Taxation*, 38 N. J. L. 259.

Individuals may make any contract not prohibited by the terms or the policy of the law; but, unlike them, municipal corporations can only contract within the limits of expressly granted or necessarily implied powers, and then only in the manner, and under the restrictions, the legislature has prescribed.

15 Am. & Eng. Enc. Law, pp. 1080, 1106.

The contracting party was not compelled to bid. It did so voluntarily, with full knowledge, and, when awarded the contract, executed it voluntarily. Even if the provisions of the statute were not actually inserted therein, they would be read into the contract as a part of the law of the state.

People v. *Warren*, 77 Hun, 120, 28 N. Y. Supp. 303; *People ex rel. Warren* v. *Beck*, 10 Misc. 77, 30 N. Y. Supp. 473.

The legislature, in passing this act, did not transcend its powers; and the law in question is constitutional and valid.

People ex rel. Rodgers v. *Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716.

The state of Ohio, in its sovereign capacity, is not less free as a party to a contract than any individual in the state. That being true, the legislature has a right to provide that contracts made by any agent of the state shall include such provisions as the one imposed by the law in question.

People v. *Phyfe*, 136 N. Y. 554, 19 L. R. A. 141, 32 N. E. 978; *Re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336; *State* v. *Atkin*, 64 Kan. 174, 67 Pac. 519.

• *Messrs.* **Weed & Miller** and **Wilcox, Collister, Hogan, & Parmely,** for defendant in error:

This statute is unconstitutional because it impairs the right to contract, and therefore is in violation of § 1, art. 1, of the Constitution.

State v. *Lake Erie Iron Co.* 25 Ohio L. J. 101; *State* v. *Bateman*, 10 Ohio Dec. 68; *Marsh* v. *Poston*, 35 Ohio L. J. 327; *Low* v. *Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Godcharles* v. *Wigeman*, 113 Pa. 431, 6 Atl. 354; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Palmer* v. *Tingle*, 55 Ohio St. 442, 45 N. E. 313.

The statute is also unconstitutional in its provisions relating to the officers and agents of the state, and the political subdivisions thereof. It is administrative, and not legislative.

State ex rel. Broerman v. *Hamilton County*, 54 Ohio St. 333, 43 N. E. 587; *New Orleans, M. & C. R. Co.* v. *New Orleans*, 26 La. Ann. 478; *Normal School Dist. Bd. of Edu.* v. *Blodgett*, 155 Ill. 441, 31 L. R. A. 70, 40 N. E. 1025; *Atkins* v. *Randolph*, 31 Vt. 226; *People ex rel. Park Comrs.* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *Taylor* v. *Porter*, 4 Hill, 143, 40 Am. Dec. 274; *Hampshire* v. *Franklin*, 16 Mass. 83; *Western College of Homeopathic Medicine* v. *Cleveland*, 12 Ohio St. 375; *Cincinnati* v. *Cameron*, 33 Ohio St. 336.

This statute is invalid on the grounds under consideration in —

People ex rel. Rodgers v. *Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *State* v. *Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 51 N. E. 136; *Re Preston*, 45 Ohio L. J. 34; *Wheeling Bridge & T. R. Co.* v. *Gilmore*, 8 Ohio C. C. 665; *Diemer* v. *Hudson*, 18 Ohio C. C. 890; *Low* v. *Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362.

Crew, J., delivered the opinion of the court:

In this case the city of Cleveland, defendant in the court below, for answer to the claim made against it by plaintiff below, the Clements Brothers Construction Company, pleaded by way of justification, and as its only defense, the provisions of an act of the Ohio legislature passed April 16, 1900, and entitled "An Act to Provide for Limiting the Hours of Daily Service of Laborers, Workmen, and Mechanics Employed upon Public Works, or of Work Done for the State of Ohio, or Any Political Subdivision Thereof, Providing for the Insertion of Certain Stipulations in Contracts of Public Works; Imposing Penalties for Violations of the Provisions of This Act, and Providing for the Enforcement Thereof." 94 Ohio Laws, p. 357. The sufficiency of this answer as a defense was challenged by a demurrer filed thereto by plaintiff. Whether such answer was and is sufficient, and the matter so pleaded defensive, depends entirely upon whether said act of April 16, 1900, is a valid and constitutional enactment. The provisions of this law are as follows:

"Sec. 1. The service of all laborers, workmen, and mechanics employed upon any public works of or work done for the state of Ohio, or for any political subdivision thereof, whether said work is done by contract or otherwise, shall be and is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the state, or of any political division thereof, or any person acting for or on behalf thereof, or any contractor, or subcontractor for any part of any public works of or work done for such state, or political subdivision thereof, or any person, corporation, or association whose duty it shall be to employ or to direct and control the services of such laborers, workmen, or mechanics, or who has in fact the direction or control of the services of such laborers, workmen, or mechanics, to require or permit them, or any of them, to labor more than eight hours in any one calendar day, except in cases of extraordinary emergency, caused by fire, food [flood], or danger to life and property, and except to work upon public, military, or naval works or defenses in time of war, and except in cases of employment of labor in agricultural pursuits.

"Sec. 2. Each and every contract to which the state of Ohio, or any political subdivision thereof, is a party, and every contract made for or on behalf of the said state, or

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any subdivision thereof, which contract may involve the employment of laborers, workmen, or mechanics, shall contain a stipulation that no laborer, workman, or mechanic in the employ of the contractor, or any subcontractor doing or contracting to do any part of the work contemplated by the contract, shall be required or permitted to work more than eight hours in any one calendar day, except in cases of extraordinary emergency, caused by fire, flood, or danger to life or property, and except to work upon public, military, or naval work or defenses in time of war, and except in cases of employment of labor in agricultural pursuits, and each and every [such] contract shall stipulate a penalty for such violation of the stipulation directed by this act, of $10 for each laborer, workman, or mechanic, for each and every calendar day in which he shall labor more than eight hours, and the inspector or officer or person whose duty it shall be to see that the provisions of any such contract are complied with shall report to the proper officer of such state, or political subdivision thereof, all violations of the stipulation in this act provided for in each and every such contract, and the amount of the penalties stipulated in any such contract shall be withheld by the officer or person whose duty it shall be to pay the moneys due under such contract, whether the violations for which such penalties were imposed by contractor, his agents or employees, or any subcontractor, his agents or employees, no person on behalf of the state of Ohio, or any political subdivision thereof shall rebate or permit any penalty imposed under such [any] stipulation herein provided for, unless upon a finding which he shall make up and certify that such penalty was imposed by reason of an error of fact. Nothing in this act shall be construed to authorize the collection of said penalty from the state, or any political subdivision thereof.

"Sec. 3. Any officer of the state of Ohio, or of any political subdivision thereof, or any person acting for or on behalf thereof, who shall violate the provision of this act, shall be deemed guilty of a misdemeanor, and be subject to a fine or imprisonment or both, at the discretion of the court, the fine not to exceed $500, nor the imprisonment more than one year.

"Sec. 4. All acts and parts of acts inconsistent with this act, in so far as they are inconsistent, are hereby repealed.

"Sec. 5. This act shall take effect and be in force from and after its passage."

The court of common pleas held this law to be constitutional, and held that the answer of defendant, the city of Cleveland, constituted a good defense to the plaintiff's cause of action, and overruled the plaintiff's demurrer thereto, and gave judgment for said city of Cleveland. This ruling and judgment of the court of common pleas was reversed by the circuit court of Cuyahoga county on the sole ground that the court of common pleas erred in overruling the demurrer of plaintiff to said answer; and said circuit court, proceeding to render the judgment that the court of common pleas should have rendered, held said law to be unconstitutional, and sustained said demurrer to said answer; and, said defendant not desiring to plead further, said circuit court rendered judgment in favor of plaintiff, the Clements Brothers Construction Company, and against said city of Cleveland, for the full amount claimed by plaintiff. If the law under consideration is constitutional, then this judgment of the circuit court is erroneous, and should, in this proceeding, be reversed; but if, as found by the circuit court, such law is unconstitutional, then the judgment of said circuit court was right, and should be affirmed. Whether such law is constitutional is the sole question presented by the record in this case.

While the particular statute here in question has not, prior to this time, been before this court for review, nor has the precise question here presented heretofore been decided by this court, yet we are not without pertinent authority and direct adjudication by the courts of last resort in other states, upon the question here involved; and this court has more than once been called upon to consider and determine the constitutionality of statutes which were somewhat analogous to the statute under consideration, in that they had for their purpose, or did, in effect, limit and restrict the right of contract between employer and employee; and in every instance such statutes have been declared and held by this court to be unconstitutional. Counsel for plaintiff in error in this case apparently do not question the correctness of these decisions, and in argument they concede that it is beyond the power of the legislature to control by legislative enactment the contracts which shall be made between employer and employee when those persons are individuals or corporate persons and the subject-matter of their contracts is not necessary to be regulated for police reasons. And such clearly is the established law of this and other states. But they contend that the statute here in question is not an attempt by the legislature of Ohio to restrict or interfere with the right of liberty to contract, but is only in the nature of a direction by a principal to his agent, and therefore within the legislative authority, and matter of concern to the principal and agent only. They argue that the several municipal governments of the state are not in themselves independent and sovereign, but are subdivisions of the general government, created by it with enumerated powers, and with no powers except such as may be fairly drawn from their charters or creation. Hence they contend that, being mere subdivisions of the state, and deriving their powers from the state, such municipalities may be lawfully directed by the legislative will as to what contracts they may make, and what provisions and stipulations their contracts shall contain; and that, in the contract here in question the city of Cleveland being a mere agency and instrument of the state, the state had the right by and through its legis-

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lature to direct and require the city, as its agent and representative, to insert in this contract the stipulations and provisions therein found. The fallacy of this contention lies in the assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contracts shall contain, although such contracts may, as in this case, relate only to matters of purely local improvement. This is a misapprehension of the legislative authority, for no such right or power has been delegated to, or is possessed by, the general assembly. As said in *Taylor* v. *Porter*, 4 Hill, 144, 40 Am. Dec. 274: "Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void." Therefore, as "the security of life, liberty, and property lies at the foundation of the social compact, to say that this grant of 'legislative power' includes the right to attack private property is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established,"— this end being the protection of the absolute right to life, liberty, and property. Again, counsel for plaintiff in error are mistaken in the assumption that the statute here under consideration is, and should be regarded as, a mere direction by the sovereign authority, the state of Ohio, to one of its agents, the city of Cleveland, that contracts made by said city in certain cases and for a certain character of work, are to be made in a particular way. In the case of *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716, a statute distinguishable in no essential feature from the statute here under consideration was before the court of appeals of that state for review, its constitutionality having been challenged. O'Brien, J., in that case, in discussing the proposition we are now considering, speaking for the majority of the court, says: "Nor is it entirely true that the statute is a mere direction by the sovereign authority to one of its own agencies to contract in certain cases in a particular way. It is all that, no doubt, and very much more, since it affects personal and municipal rights in many directions that are of vastly more importance than the mere form of a contract to perform municipal work. It is true enough that a city is an agency of the state to discharge some of the functions of government, but these terms do not adequately describe its true relations to the state or the people. A municipal officer directing a local improvement is not the agent of the state. He is the agent of the city, and the city alone is responsible for his negligence or misconduct. If the authorities in charge of the streets of a city are agents of the state, the city ought not to be held liable for their acts or omissions. . . . The city is a corporation possessing all the powers of corporations generally, and cannot be deprived of its property without its consent or due process of law any more than a private corporation can; and, since its revenues must be used for municipal purposes, it is difficult to see how the legislature can make contracts for it which involve the expenditure of these revenues without its consent." And further in the same opinion it is said: "The right which is conceded to every private individual and every private corporation in the state to make their own contracts and their own bargains is [by this statute] denied to cities and to contractors for city work; and, moreover, if the latter attempt to assert such right, the money earned on the contract is declared to be forfeited to the city without the intervention of any legal process or judicial decree. . . . The contractor is a private individual, engaged in private business. When he enters into a fair and honest contract for some municipal improvement, that contract is property entitled to the same protection as any other property. It is not competent for the legislature to deprive him of the benefit of this contract by imposing burdensome conditions with respect to the means of performance, or to regulate the rate of wages which he shall pay to his workmen, or to withhold the contract price when such conditions are not complied with in the judgment of the city. When he is not left free to select his own workmen upon such terms as he and they can fairly agree upon, he is deprived of that liberty of action and right to accumulate property embraced within the guaranties of the Constitution, since his right to the free use of all his faculties in the pursuit of an honest vocation is so far abridged." "The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of which was the main purpose in view when the Constitution was enacted. If the legislature has power to deprive cities and their contractors of the right to agree with their workmen upon rates of compensation [or the number of hours that shall constitute a day's labor], why has it not the same power with respect to all private persons and private corporations? That question can be answered in the language which this court used when a case with features somewhat similar was under consideration: 'Such legislation may invade one class of rights to-day and another to-morrow, and, if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of arti-

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sans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.'" As suggested by counsel for defendant in error, the statute here under consideration absolutely ignores the fact that municipal corporations in their property rights, and their power to make contracts for local improvements for the benefit of their own citizens, are entitled to the same immunities and are protected by the same constitutional guaranties which shield the property of individuals or private corporations from legislative aggression. In considering the rights and powers of municipal corporations in the case of *New Orleans, M. & C. R. Co.* v. *New Orleans*, 26 La. Ann. 481, the supreme court of Louisiana says: A municipal corporation "possesses two classes of powers and two classes of rights,— public and private. In all that relates to one class, it is merely the agent of the state, and subject to its control. In the other it is the agent of the inhabitants of the place, the corporators; maintains the character and relations of individuals, and is not subject to the absolute control of the legislature, its creator."

In the case of *Atkins* v. *Randolph*, 31 Vt. 237, Judge Barrett, announcing the opinion of the supreme court of Vermont, states the proposition as follows: "It is true, as was urged in the argument by the learned counsel for the plaintiffs, that in some respects the legislature have a power in respect to municipal corporations that they have not in respect to private corporations, or individuals. They may alter or abolish municipal corporations at pleasure, but yet not so as to defeat the pecuniary rights of individuals as against such corporations, or as depending on their existence. The legislature have the same power in respect to private corporations when that power is reserved in the law creating them. So far as a municipal corporation is endowed by law with the power of contracting, and, as such, is made capable of acquiring, holding, and disposing of property, and subject to the liabilities incident to the exercise of such power and capacity, thus being invested with legal rights as to property in contracts [and improvements], and subject to legal liabilities in respect thereto, to be ascertained and enforced by suit in the ordinary judicial forums, upon the same principles and by the same means as in case of a private corporation, such municipal corporation must stand on the same ground of exemption from legislative control and interference as a private corporation. As to third persons who seek to enforce pecuniary liabilities against towns arising upon contract, such towns are merely private corporations or individuals, and in this respect they are not affected by the purely municipal public and political features that appertain to their corporate existence in virtue of and in reference to which alone they are subject to the absolute control of legislation." And to the same effect is the case of *People ex rel. Park Comrs.* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

This distinction as to the powers delegated to municipal corporations was clearly recognized and commented upon by this court in the case of *Western College of Homeopathic Medicine* v. *Cleveland*, 12 Ohio St. 375. In that case Judge Gholson, announcing the opinion of the court, at page 377, says: "It is the duty of the state government to secure to the citizens of the state the peaceful enjoyment of their property, and its protection from wrongful and violent acts. For the proper discharge of this duty power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations, to be exercised for the benefit of the individuals of whom such corporations are composed; and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state, discharging duties incumbent on the state; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable." See also *Cincinnati* v. *Cameron*, 33 Ohio St. 366.

The liberal quotations, in this opinion, from the authorities above cited need no further apology upon our part than to say that, if the principles there announced and the conclusions there reached are correct,— and we believe they are, and adopt them,— they conclusively refute and answer the contention of plaintiff in error that the statute under consideration in this case does not restrict the right of liberty to contract, and is in the nature only of a direction by a principal to its agent.

Again, stripped of its provisions, except so far as they relate to contractors and subcontractors, the 1st section of the statute under consideration reads as follows: "It shall be unlawful for . . . any contractor, or subcontractor for any part of any public works of, or work done for such state, or political subdivision thereof, or any person, corporation, or association whose duty it shall be to employ or to direct and control the services of such laborers, workmen, or mechanics, or who has in fact the direction or control of the services of such laborers, workmen, or mechanics, to require or permit them, or any of them, to labor

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more than eight hours in any one calendar day." Thus, it is apparent that this statute, which is peremptory in terms, is more than a mere direction by a principal to an agent, and that its provisions apply, not only to officers and agents of the state of Ohio, but that they apply with equal force to all persons who would enter into contracts with the state or any of its political subdivisions, and undertakes to limit and restrict such persons in their right to contract by prohibiting the making of contracts for day's work of more than eight hours. What the terms and stipulations of a contract shall be is matter to be determined by the contracting parties, and the right has not been delegated to, nor is it within the power of, the general assembly by mandatory laws to prescribe the terms and provisions that shall be inserted in contracts that may be made between persons legally competent to contract. Doubtless the legislature might, in the absence of contract between the parties, prescribe the number of hours' labor that should constitute a day's work; but it is not in the power of the legislature, by the enactment of a positive law, to abridge the right of parties to fix by contract the number of hours that shall constitute a day's work, nor to deny effect to the stipulations and agreements of the parties themselves touching such matter, except only as the exercise of such power may be authorized for the common welfare; and the right to so exercise this power of restraint extends only to matters affecting the public welfare or the health, safety, and morals of the community. The number of hours' labor that shall be performed in a day is an important factor, and constitutes an essential part of every contract of service; and to deny effect to the stipulations or agreements between employer and employee touching the number of hours the employee shall labor each day is, in effect, either to impair the obligation of their contract, or to deny to them the right to stipulate or contract touching that matter. The latter is the right denied by the statute here in question. It is, we take it, axiomatic, that in service contracts the right to contract necessarily includes the right to fix by agreement the number of hours that shall constitute a day's work for the person employed; but by the terms and provisions of this statute the parties are not left free to negotiate respecting this matter between themselves, but the number of hours which shall constitute a legal day's work for the laborer employed on work done for the municipality is, by this statute, arbitrarily fixed and determined, and the statute further provides just what stipulations in this respect shall, by the contracting parties, be incorporated in their contract, and enacts that noncompliance with the provisions of said statute shall be deemed a misdemeanor punishable by fine or imprisonment, or both, at the discretion of the court. The privilege of making and entering into contracts is more than a mere license or liberty. It is a property right. It is an essential incident to the acquisition and protection of property, and is such right as the legislature may not arbitrarily and without sufficient cause either abridge or take away. In the case of *Palmer* v. *Tingle*, decided by this court, and reported in 55 Ohio St. 423, 45 N. E. 313, the second clause of the syllabus is as follows: "Liberty to acquire property by contract can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people; and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection, and benefit. The judgment of the general assembly in such cases is not conclusive."

There is one other claim of counsel for plaintiff in error upon which they seem to place some reliance that should perhaps be briefly noticed, and that is as to the matter of estoppel on the part of defendant in error. Counsel for plaintiff in error say in their brief: "It is plain that the municipality itself cannot complain, for, as has been shown above, it is merely an agency of a higher power, to wit, the state, and can only contract as it is authorized by that power to do; nor can the contractor be heard to complain, for the city, in pursuance of its granted powers, and under restrictions imposed by the act in question, in effect said to him and all others, when it invited bids for the performance of the work: 'The statute is one of the conditions which must be complied with, and an obligation which must be assumed by the contracting party.' The contracting party (the Clements Brothers Construction Company) was not compelled to bid. It did so voluntarily, with full knowledge, and, when awarded the contract, executed it voluntarily, knowing all of its provisions, and assumed the obligations and conditions imposed by the statute." It would, perhaps, be a sufficient answer to this claim of plaintiff in error to say that the stipulation referred to became a part of the contract, not because of any voluntary agreement between the parties that it should be inserted therein, but because the statute forcibly injected it. And that such is the fact we think sufficiently appears from the language of the contract which immediately follows such stipulation. That language is: "The foregoing stipulation is made by reason of and to conform to the requirements of an act of the general assembly of the state of Ohio, 'to Provide for Limiting the Hours of Daily Service of the Laborers, Workmen, and Mechanics Employed upon Public Works, or of Work Done for the State of Ohio, or for Any Political Subdivision Thereof, Providing for the Insertion of Certain Stipulations to Any Contracts of Public Works,' etc., passed April 16, 1900, to the extent that the provisions of said act are applicable in the performance of this contract." But, further, upon this proposition, as especially pertinent, we quote again from the opinion of Justice O'Brien in the case of *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716: He says: "The fact that certain provisions of

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the labor law were actually incorporated into the contract signed by the contractor cannot change or add anything to the strength of the position assumed by the city. The relator is not estopped by the agreement when there is no element of estoppel in the case, and the question is with respect to the validity of the statute, and not the construction or effect of the contract in that regard. If the law is valid, it governs the contract and the rights of the parties, whether actually incorporated into the writing or not, since all contracts are assumed to be made with a view to existing laws on the subject. If it is not valid, the contractor has not made it so by stipulating in writing to obey it, and prescribing the penalty for his own disobedience, which is the forfeiture of all rights under the agreement. It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates. . . . Courts in such cases are not bound by mere forms, but must look at the substance of things, and, so viewing this transaction, it would be idle to attempt to deceive ourselves with the idea that the question involved in this appeal arises out of the stipulations of the parties to the contract, or is governed by them, rather than the provisions of a statute. The contract is in the form that we find it, not because the parties so elected to contract, but for the reason that the statute would not permit them to contract in any other way."

As to the further claim of plaintiff in error that, "even if the provisions of the statute were not actually inserted therein, they would be read into the contract as a part of the law of the state," for answer we need only refer to the third paragraph of the syllabus of *Palmer* v. *Tingle*, 55 Ohio St. 436, 45 N. E. 313, which syllabus is as follows: "While a valid statute regulating contracts is, by its own force, read into and made a part of such contracts, it is otherwise as to invalid statutes." As bearing more or less directly upon the questions herein considered, in addition to the authorities above cited, the following cases will be found instructive: *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Godcharles* v. *Wigeman*, 113 Pa. 431, 6 Atl. 354; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Com.* v. *Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Low* v. *Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *People* v. *Gillson*, 109 N. Y. 389, 17 N. E. 343; *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431; *Re Eight-Hour Bill*, 21 Colo. 29, 39 Pac. 328; *State* v. *Lake Erie Iron Co.*, reported in 33 Ohio L. J. 6, and affirmed by this court in 51 Ohio St. 632; *Marsh* v. *Poston*, reported in 35 Ohio L. J. 327, affirmed by this court in 54 Ohio St. 681, 47 N. E. 1114; *Wheeling Bridge & T. R. Co.* v. *Gilmore*, 8 Ohio C. C. 658.

Our conclusion in this case is that the statute relied upon and pleaded by plaintiff in error as a defense to the claim of defendant in error is unconstitutional, because in conflict with §§ 1 and 19 of the Bill of Rights. And therefore such statute cannot avail the city as a defense to shield it from liability to defendant in error for the amount due said defendant in error under its contract.

The Circuit Court was right in sustaining the demurrer to the answer and in rendering judgment against the city, and that *judgment is therefore affirmed.*

Burket, Ch. J., and **Spear, Davis, Shauck**, and **Price**, JJ., concur.

OREGON SUPREME COURT.

Isaac H. ADAMS, *Appt.*,
v.
J. M. CHURCH *et al.*, *Respts.*

(.....Oct.....)

1. A decree requiring the owner of a timber-culture claim to public land to convey it to a partnership of which he is a member, in accordance with his agreement to do so, does not remove the claimant's interest in the property from the protection of the statute exempting such claims from liability to the satisfaction of debts contracted before the issuing of the final certificate therefor, even in favor of debts of the partnership.

2. A decree in a suit between a member of a partnership and the representative of a deceased member, adjudging that certain real estate is the property of the partnership, is not conclusive of the question whether or not it is within the provisions of a statute exempting timber-culture claims to public land from liability for debts contracted prior to the issuance of the final certificate therefor.

(December 22, 1902.)

APPEAL by complainant from a decree of the Circuit Court for Malheur County in favor of defendants in a suit to enjoin the sale of certain real estate for the debts of a partnership. *Reversed.*

The facts are stated in the opinion.

Messrs. **Lionel R. Webster** and **Will R. King**, for appellant:

Notwithstanding the fact that Adams conveyed the land involved to the partnership of "Steele & Adams," the plaintiff still re-

NOTE.—As to rights and position of creditors, purchasers, and other third parties in partnership real estate, see *note* to Goldthwaite v. Janney (Ala.) 28 L. R. A. 161.

As to when real estate will be considered partnership property, see *note* to Robinson Bank v. Miller (Ill.) 27 L. R. A. 449.

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mains, under and by virtue of said partnership, the owner of an undivided one-half interest therein. The attempt, therefore, to apply said land to the payment of the partnership debts is an attempt to apply Adams's interest, acquired under the timber-culture act, in payment of the debts contracted prior to the date of the final receipt. The debts of the partnership are the debts of each partner personally.

Andrews v. *Brown*, 21 Ala. 437, 56 Am. Dec. 252; Lindley, Partn. 200, 234, bottom p. 340; 1 Bates, Partn. 300; *Skinner* v. *Shannon*, 44 Mich. 86, 38 Am. Rep. 232, 6 N. W. 108; *Waite* v. *Mathews*, 50 Mich. 393, 15 N. W. 524; *McCoy* v. *Brennan*, 61 Mich. 362, 28 N. W. 129; *Stewart* v. *Brown*, 37 N. Y. 350, 93 Am. Dec. 578; *Evans* v. *Bryan*, 95 N. C. 174, 59 Am. Rep. 233; *Moyer* v. *Drummond*, 32 S. C. 165, 7 L. R. A. 747, 10 S. E. 952; *Ex parte Karish*, 32 S. C. 437, 11 S. E. 298; *Blanchard* v. *Paschal*, 68 Ga. 32, 45 Am. Rep. 474.

No lands acquired under an act of Congress regarding the making of a timber-culture entry shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor.

Nash v. *Farmers' & M. Bank*, 3 Kan. App. 697, 44 Pac. 907; *Miller* v. *Little*, 47 Cal. 350; 20 U. S. Stat. at L. 113, chap. 190; *Russell* v. *Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Wallowa Nat. Bank* v. *Riley*, 29 Or. 289, 45 Pac. 766; *Clark* v. *Bayley*, 5 Or. 343; *Gile* v. *Hallock*, 33 Wis. 523; *Baldwin* v. *Boyd*, 18 Neb. 444, 25 N. W. 580; *Brandhoefer* v. *Bain*, 45 Neb. 781, 64 N. W. 213; *Smith* v. *Steele*, 13 Neb. 1, 12 N. W. 830; *Van Doren* v. *Miller*, 14 S. D. 264, 85 N. W. 187; *Ferguson* v. *Speith*, 13 Mont. 487, 34 Pac. 1020; *Dennis* v. *Kass*, 11 Wash. 353, 39 Pac. 656; *Barnard* v. *Boller*, 105 Cal. 214, 38 Pac. 728; *Jean* v. *Dee*, 5 Wash. 580, 32 Pac. 460; *Newton* v. *Summey*, 59 Ga. 398; *Hunnicutt* v. *Summey*, 63 Ga. 586.

Messrs. **John L. Rand, C. H. Finn,** and **T. H. Crawford,** for respondents:

A timber-culture claimant who has made his entry in good faith may contract to sell his claim before final proof, and the law will uphold and enforce such contract.

Sims v. *Busse*, 4 Land Dec. 369; *Re Read*, 5 Land Dec. 313; *Church* v. *Adams*, 37 Or. 355, 61 Pac. 639.

This land being partnership property, and the partnership being insolvent, the partnership held the property in trust for the discharge of the partnership liabilities, and the distribution of the surplus, ratably, to the partners; and, in equity, neither of the partners had any title to any part of the property, but simply a right to his share of the surplus, after the debts were paid.

Arnold v. *Wainwright*, 6 Minn. 358, Gil. 241, 80 Am. Dec. 448; Story, Partn. § 93; *Rovelsky* v. *Brown*, 92 Ala. 522, 9 So. 182; *Wood* v. *American F. Ins. Co.* 149 N. Y. 382, 44 N. E. 80; *Goldthwaite* v. *Janney*, 102 Ala. 431, 28 L. R. A. 161, 15 So. 560, 48 Am. St. Rep. 56, note.

The matters here sought to be litigated are *res judicata* as between the parties to this suit. Every issue here tendered by the complaint was passed upon directly by this court in the case of *Church* v. *Adams*, 37 Or. 355, 61 Pac. 639, to which the appellant here was a party, and that suit must be held to be final in this case.

See also *Neil* v. *Tolman*, 12 Or. 289, 7 Pac. 103; *Morrill* v. *Morrill*, 20 Or. 104, 11 L. R. A. 155, 25 Pac. 362; *Barrett* v. *Failing*, 8 Or. 152; *Glen* v. *Savage*, 14 Or. 574, 13 Pac. 442; *Hall* v. *Zeller Bros.* 17 Or. 381, 21 Pac. 192; *Applegate* v. *Dowell*, 15 Or. 524, 16 Pac. 651; *Dowell* v. *Applegate*, 24 Or. 440, 33 Pac. 937.

This suit is a collateral attack upon the decree in the case of *Church* v. *Adams*, 37 Or. 355, 61 Pac. 639.

See *Morrill* v. *Morrill*, 20 Or. 96, 11 L. R. A. 155, 25 Pac. 362.

Bean, J., delivered the opinion of the court:

This is a suit to enjoin the sale of an undivided one-half of 160 acres of land in Malheur county to satisfy the debts of a partnership composed of the plaintiff and one R. M. Steel. Prior to November, 1885, the plaintiff made application to purchase the land in controversy under an act of Congress "to Encourage the Growth of Timber on the Western Prairies," and amendments thereto. 20 Stat. at L. 113, chap. 190. Shortly afterward he entered into partnership with Steel for the purpose of carrying on the business of farming and stock raising, under the firm name and style of Steel & Adams. By the terms of the partnership agreement, plaintiff's timber culture was to be considered as partnership assets, and was to be conveyed by him to the firm as soon as he obtained title from the United States. Thereafter Steel died, and, the plaintiff refusing to comply with his agreement, it was decreed, in a suit prosecuted by Steel's representatives for the purpose of determining the assets of the firm and for its dissolution, that the land in controversy was partnership property, and belonged to the firm. *Church* v. *Adams*, 37 Or. 355, 61 Pac. 639. The proof of compliance with the provisions of the act of Congress under which the land was taken was made by plaintiff, and the final certificate issued to him in 1896. The partnership debts which it is now sought to enforce against the land were contracted prior to that time, so that the sole question for decision is whether the plaintiff's interest in the land can be seized and sold under execution for debts contracted by the firm of which he was a member prior to the issuing of the certificate. The case would be clear if Adams still owned the land in his individual right. The act of Congress under which it was acquired provides as follows: "Sec. 4. That no land acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor." 20 Stat. at L. 114, chap. 190. This is a valid

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provision, and a condition annexed to the grant which Congress was authorized to make, and absolutely prohibits the seizure and sale of the land, against the will of the owner, for the satisfaction of a debt contracted by the donee prior to the issuing of the final certificate. *Nash* v. *Farmers' & M. Bank*, 3 Kan. App. 694, 44 Pac. 907; *Clark* v. *Bayley*, 5 Or. 343; *State* v. *O'Neil*, 7 Or. 141; *Faull* v. *Cooke*, 19 Or. 455, 26 Pac. 662; *Wallowa Nat. Bank* v. *Riley*, 29 Or. 289, 45 Pac. 766; *Miller* v. *Little*, 47 Cal. 348; *Russell* v. *Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Baldwin* v. *Boyd*, 18 Neb. 444, 25 N. W. 580; *Brandhoefer* v. *Bain*, 45 Neb. 781, 64 N. W. 213; *Van Doren* v. *Miller*, 14 S. D. 264, 85 N. W. 187; *Gile* v. *Hallock*, 33 Wis. 523.

But it is argued that, when the land became the property of the firm of Steel & Adams by virtue of the decree referred to, the interest of Adams therein was no longer within the provisions of the act of Congress, and thereafter became liable for the debts of the firm, whether contracted before or after the issuing of the final certificate, the same as it would for similar debts of a private individual to whom Adams had conveyed the title. The vice of this position, however, becomes manifest when it is remembered that the decree does not affect Adams's title to an undivided one-half of the land in any way, except that thereafter he held it in trust for partnership purposes, and subject to the payment of such partnership debts as it might be legally liable for, in preference to his individual liabilities. The title did not pass to the partnership, because a partnership, as such, cannot take or hold the legal title to real estate. It is not a person, either natural or artificial, and when a deed is made to a partnership it passes the title to the individual members thereof as tenants in common. *Kelley* v. *Bourne*, 15 Or. 476, 16 Pac. 40; 1 Bates, Partn. § 296; Shumaker, Partn. 202. In England partnership realty is in equity deemed personalty for all purposes; but under the American doctrine it is, even in that forum, regarded as personal property only so far as may be necessary for the payment of the debts and the adjustment of the partnership assets. For such purposes, it is considered as personal property, and governed by the rules and general doctrine applicable to that species of property. But this is not an arbitrary rule, by which real estate, when it is once owned and possessed by a partnership, is transmuted by a court of equity into personal property for all purposes. It still retains all its characteristics as real estate, and must be owned and conveyed as such. The ground of the doctrine is the special interference of equity in favor of commerce, whereby the trust in favor of the partnership is separated from the legal estate, and made subject to the rules applicable to the personal property of a partnership, so far as it concerns the partners in relation to each other, or those in privity with them. It is only when necessary to protect the equitable rights of creditors and the respective partners, or when otherwise required by the exigencies of the partnership, that it is so considered by a court of equity. The legal title is at all times held by the copartners as tenants in common, and, when no longer needed for partnership purposes, it is released from all trusts growing out of the partnership relation; and, if each partner's legal title corresponds to his interest or share in the partnership, equity will not interfere to convert it into personalty, but it will descend to the heirs of the respective partners, as in the case of any other tenancy in common. "The clear current of the American decisions supports the rule," says Mr. Chief Justice Andrews in *Darrow* v. *Calkins*, 154 N. Y. 503, 48 L. R. A. 299, 49 N. E. 61, "that, in the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty, with all the incidents of that species of property, between the partners themselves, and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner,— that, so far as is necessary, it shall be first applied to the adjustment of partnership obligations, and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes, the character of the property is, in equity, deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion, and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation." See also 1 Bates, Partn. § 279; 1 Lindley, Partn. 2d Am. ed. *332, note; Shumaker, Partn. 216; 17 Am. & Eng. Enc. Law, p. 952; *Shearer* v. *Shearer*, 98 Mass. 107; *Black* v. *Black*, 15 Ga. 445; *Lang* v. *Waring*, 25 Ala. 625, 60 Am. Dec. 533; *Goldthwaite* v. *Janney*, 48 Am. St. Rep. 56, note 71 (102 Ala. 431, 28 L. R. A. 161, 15 So. 560). It is accordingly held in many jurisdictions that a partner is entitled to claim the benefit of the local exemption or homestead laws out of partnership property, even as against partnership creditors, on the theory that the property of the firm is owned by the individual members. *Skinner* v. *Shannon*, 44

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Mich. 86, 38 Am. Rep. 232, 6 N. W. 108; *Stewart* v. *Brown*, 37 N. Y. 350, 93 Am. Dec. 578; *Evans* v. *Bryan*, 95 N. C. 174, 59 Am. Rep. 233; *Ferguson* v. *Speith*, 13 Mont. 487, 34 Pac. 1020; *Moyer* v. *Drummond*, 32 S. C. 165, 7 L. R. A. 747, 10 S. E. 952; *Blanchard* v. *Paschal*, 68 Ga. 32, 45 Am. Rep. 474; *Dennis* v. *Kass*, 11 Wash. 355, 39 Pac. 656.

Now, the only effect of the decree requiring Adams to convey the property to the partnership was to change his half thereof from individual to partnership property; but it did not remove any of the conditions annexed to his legal title, nor make it liable for any debts contracted by him either as an individual or as a member of the firm, prior to the issuing of the final certificate; nor did it place the title, so far as his interest is concerned, beyond the reason of the law prohibiting the sale of the land for debts contracted prior to that time. The same reason that exists for protecting him as an individual, and exempting the land from sale for certain debts, would seem to apply with equal force to him as a member of the firm. The object of the act of Congress is to prevent the sale of a timber-culture claim for debts contracted by the applicant prior to the issuing of the final certificate. Neither the creditors of the individual, nor of a partnership to which he may belong, have any rights against such property, and it is no hardship to enforce the exemption as against them. The debts of the partnership are the debts of each of the partners personally, which can be enforced against their individual property, and there is no more reason why the interest of one member of the firm in the partnership property should not come within the provisions of the Federal statute than if the sole title belonged to him.

It is contended, however, that the judgment or decree in the case of *Church* v. *Adams*, 37 Or. 355, 61 Pac. 639, is a conclusive adjudication of the question sought to be determined on this appeal. It has often been said, and is familar law, that a judgment or decree of a court of competent jurisdiction is conclusive between the parties, not only as to all matters actually litigated, but also as to such as might have been litigated. But the question as to whether the property decreed to be conveyed by Adams to the firm would be liable for the firm debts, and, if so, in what case and under what circumstances, was not involved in the former suit; nor could it have been litigated or determined therein. It would have been no defense to that suit for Adams to set up the fact that the land was a timber-culture claim, and not liable for any debts of the firm that had been contracted prior to the issuing of the final certificate therefor. Such an inquiry would have been wholly foreign to the purposes of the suit. Its object was to determine whether the property belonged to the firm, and that was the only issue that could have been presented or adjudicated. The decree therein is therefore in no sense a bar to this suit.

It follows that *the decree appealed from must be reversed*, and one entered here as prayed for in the complaint.

Ida M. DUNTLEY, Admrx., etc., of Marcus H. Duntley, Deceased, *Appt.*,

v.

INMAN, POULSEN, & COMPANY, *Respt.*

(.....Or.....)

1. **Want of care on the part of a master** is not shown by mere proof of the breaking of a piece of machinery under his control, so as to render him liable for the death of a servant caused thereby.
2. **A master is not liable for the death of a servant** because he failed to furnish a better belt shifter, where the one furnished was safe and suitable when properly used, and the servant made no objection to using it.
3. **A millwright with no experience** in the manufacture or testing of such articles cannot give his opinion as to what caused a pulley to break.
4. **That one employed on the night shift in a mill had never seen** the machinery tested is no evidence that proper inspection and tests of it were not made.
5. **One who has testified that no prior accident had ever happened** by the use of a pulley and belt by which an employee was injured, during the four years that it had been running, cannot be cross-examined as to other accidents which had happened in the mill during that time.

(November 10, 1902.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Statement by **Bean, J.**:

This is an action to recover damages for the death of Marcus H. Duntley, plaintiff's intestate, alleged to have been caused by the negligence of the defendant corporation. Duntley, at the time of his death, and for two or three years prior thereto, had been employed by the defendant, running one of its planers. His duty was to start up the machine and run the lumber through it, see that it was kept in condition, and, if he found anything wrong with it, to report to the foreman. The planer was operated by

NOTE.—As to presumption of negligence of master in case of injury to servant, see also, in this series, Minty v. Union P. R. Co. (Idaho) 4 L. R. A. 409; and cases in *note* to Louisville, N. A. & C. R. Co. v. Corps (Ind.) 8 L. R. A. 636, and Kehler v. Schwenk (Pa.) 13 L. R. A. 374.

As to duty of master to furnish the safest possible appliances, see cases in *note* to Sherman v. Menomonee River Lumber Co. (Wis.) 1 L. R. A. 174; Lehigh & W. Coal Co. v. Hayes (Pa.) 5 L. R. A. 441; Kehler v. Schwenk (Pa.) 13 L. R. A. 374, with *note* as to duty to furnish reasonably safe implements; Gratlis v. Kansas City, P. & G. R. Co. (Mo.) 48 L. R. A. 399.

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a belt running to an iron pulley about 22 inches in diameter, on a revolving shaft, upon which there was also a loose pulley, which revolved around the shaft. When the machine was not in operation the belt was transferred to the loose pulley, and when it was again to be set in motion the belt was slipped back to the tight pulley, immediately taking up the power from the revolutions of the shaft and conveying it to the machine, thus setting it in motion. The slipping back and forth was a part of the duties of the deceased, which he accomplished by means of a stick about 4 feet long, and 1½ inches in diameter. On August 25, 1900, when he moved the belt from the loose to the tight pulley for the purpose of starting the planer, the latter pulley suddenly broke in several pieces, and he was caught by the belt, which parted, was drawn into the machinery, and killed. The pulley and planer were purchased from and set up by a reputable manufacturer, and thoroughly tested, about four years before the accident. They had been in constant and satisfactory use since that time, and the testimony disclosed no apparent cause for the breaking of the pulley. No one saw the accident, and from the testimony it is not clear whether the belt or pulley broke first, or whether the pulley broke because Duntley was drawn into the machinery by the belt, or whether he was drawn into it and killed on account of the breaking of the pulley. Emil Klosner, one of the witnesses for the plaintiff, testified that just a moment before the accident he saw Duntley oiling the machine, and then start to move the belt from the loose to the tight pulley for the purpose of putting it in motion; that immediately thereafter he heard a noise, and, looking up, saw Duntley standing near the pulley, but that he was an instant later drawn into the machinery by the belt; that, at the time the witness looked up, the belt was flying in the air, and he could not tell whether Duntley was struck by a piece of the belt or of the pulley. Johnson, the planer foreman, testified that, a few minutes before the accident, Duntley came to him to ask about some lumber he was going to plane; that he then took his oil can and went to the machine to oil and start it up; that immediately thereafter witness heard a noise, and, looking up, saw Duntley in the machinery. The complaint charges that the defendant was negligent (1) in providing a defective belt; (2) a defective pulley; (3) in failing and neglecting to box in or protect the machinery so as to prevent injuries to persons running or operating the same; and (4) in failing and neglecting to furnish a belt shifter or other suitable appliance by which the belt could have been shifted from the loose to the tight pulley, for the want of which the deceased was compelled to, and did, stand in a place more exposed to injuries from the machinery than he otherwise would have been required to do. The last allegation was stricken out by the court below. An answer was thereupon filed, denying the negligence charged; and upon the trial the defendant had a verdict and judgment, from which the plaintiff appeals.

Messrs. **Henry E. McGinn** and **V. K. Strode,** for appellant:

The maxim, *Res ipsa loquitur*, is now fully recognized.

Esberg Cigar Co. v. *Portland*, 34 Or. 282, 43 L. R. A. 435, 55 Pac. 961; *Boyd* v. *Portland Electric* Co. 40 Or. 126, 57 L. R. A. 619, 66 Pac. 576, 68 Pac. 810.

The presumption carried by this maxim originates from the nature of the act or occurrence, and not from the nature of the relations between the parties.

Judson v. *Giant Powder Co.* 107 Cal. 549, 29 L. R. A. 718, 40 Pac. 1020; *Griffen* v. *Manice*, 166 N. Y. 188, 52 L. R. A. 922, 59 N. E. 925; *Houston* v. *Brush*, 66 Vt. 331, 29 Atl. 380; *Snyder* v. *Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 733.

The late decisions apply the rule *res ipsa loquitur* to controversies between master and servant.

Atchison, T. & S. F. R. Co. v. *Mulligan*, 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569; *Farmers' Land & T. Co.* v. *Toledo, A. A. & N. M. R. Co.* 67 Fed. 73; *Posey* v. *Scoville*, 10 Fed. 140; *Rose* v. *Stephens & C. Transp. Co.* 11 Fed. 438, 20 Blatchf. 411; *Coleman* v. *Mechanics' Iron Foundry Co.* 168 Mass. 254, 46 N. E. 1065; *Hennessy* v. *Boston*, 161 Mass. 502, 37 N. E. 668; *Graham* v. *Badger*, 164 Mass. 42, 41 N. E. 61; *Moynihan* v. *Hills Co.* 146 Mass. 586, 16 N. E. 574; *Houston* v. *Brush*, 66 Vt. 331, 29 Atl. 380; *Buhr* v. *Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *Olson* v. *Great Northern R. Co.* 68 Minn. 155, 71 N. W. 5; *Pennsylvania Co.* v. *Sears*, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; *Winkelmann & B. Drug Co.* v. *Colladay*, 88 Md. 78, 40 Atl. 1078; *Tennessee Coal, I. & R. Co.* v. *Hayes*, 97 Ala. 201, 12 So. 98; *Donnelly* v. *Booth Bros. & H. I. Granite Co.* 90 Me. 110, 37 Atl. 877; *Haggerty* v. *Hallowell Granite Co.* 89 Me. 118, 35 Atl. 1029; *Sackewitz* v. *American Biscuit Mfg. Co.* 78 Mo. App. 144; *Turner* v. *Haar*, 114 Mo. 335, 21 S. W. 737; *McCray* v. *Galveston, H. & S. A. R. Co.* 89 Tex. 168, 34 S. W. 95; *Texas & N. O. R. Co.* v. *Crowder*, 63 Tex. 502; *Louisville & N. R. Co.* v. *Northington*, 91 Tenn. 56, 16 L. R. A. 268, 17 S. W. 880; *Coelli* v. *New Jersey & P. Concentrating Works*, 87 Hun, 428, 34 N. Y. Supp. 310; *Mulcairns* v. *Janesville*, 67 Wis. 24, 29 N. W. 565; *Folk* v. *Schaeffer* 186 Pa. 253, 40 Atl. 401; *Puget Sound Iron Co.* v. *Lawrence*, 3 Wash. Terr. 226, 14 Pac. 869.

It was negligence in the first instance on the part of the master to require the servant to shift the belt onto the pulley in question with a stick, when it could have been done with much more safety by means of a belt shifter.

Oregon Short Line & U. N. R. Co. v. *Tracy*, 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931; *Mayes* v. *Chicago, R. I. & P. R. Co.* 63 Iowa, 562, 14 N. W. 340, 19 N.

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W. 680; *Hulehan* v. *Green Bay, W. & St. P. R. Co.* 68 Wis. 520, 32 N. W. 529; *Louisville & N. R. Co.* v. *Orr*, 84 Ind. 50; *Nicholaus* v. *Chicago, R. I. & P. R. Co.* 90 Iowa, 85, 57 N. W. 694; *Thompson* v. *Great Northern R. Co.* 70 Minn. 219, 72 N. W. 962; *Walker* v. *McNeill*, 17 Wash. 582, 50 Pac. 518.

It was competent for the millwright to state whether the pulley was suitable and of sufficient size and strength for the purpose for which it was used.

Camp Point Mfg. Co. v. *Ballou*, 71 Ill. 417; *Murtaugh* v. *New York C. & H. R. R. Co.* 49 Hun, 456, 3 N. Y. Supp. 483; *Woods* v. *Chicago & G. T. R. Co.* 108 Mich. 396, 66 N. W. 328; *Alabama C. Coal & Coke Co.* v. *Pitts*, 98 Ala. 285, 13 So. 135.

Messrs. **Dolph, Mallory, Simon, & Gearin** for respondent.

Bean, J., delivered the opinion of the court:

The plaintiff requested the court to charge the jury that "there is a rule of law that whenever a thing that causes injury is shown to be under the management of a defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from the want of care. So, in the case on trial, if you find that the pulley attached to the planing machine was under the management of the defendant, and that the pulley broke, which could not have happened in the ordinary course of things if those who had the management and control of that pulley used proper care, then, if in that event there is no explanation on the part of the defendant as to breaking of said pulley, you may conclude that the breaking of the pulley arose from the want of care." This was refused, but in its general charge the court instructed the jury that "negligence is never presumed. Plaintiff in this case has charged it, and she must prove it. It cannot be inferred, from the mere fact that the decedent was injured or the accident happened, that the defendant was negligent." The refusal to give the instruction requested, and the giving of the one quoted, constitute the principal assignments of error on this appeal, and present the question whether proof of the death of the plaintiff's intestate from the breaking of the pulley, in the absence of any explanation by the defendant as to the cause of such breaking, is itself evidence of a want of care on its part. In an action by a passenger against a carrier, proof of the injury itself is prima facie evidence of negligence, for the contract is to carry safely. But in an action by a servant against his master, this rule does not obtain. Before a servant can recover for an injury received by him, he must allege and prove that it was caused by the negligence of the master. It is the duty of the master to provide his servant with a reasonably safe place to work in, reasonably safe tools and appliances to work with, and to exercise reasonable care and diligence to keep them in that condition. The presumption is that he has discharged this duty, and this presumption can only be overcome by affirmative proof, either direct or circumstantial, of negligence on his part. Wood, Mast. & S. 2d ed. § 382. In some instances the circumstances attending the accident may be sufficient, if unexplained, to justify the jury in drawing an inference of negligence. In such cases, however, the physical facts themselves are evidential, and there is what the law terms evidence of negligence, in conformity with the maxim, *Res ipsa loquitur*. But this maxim is a mere rule of evidence, and not a presumption of law. *Boyd* v. *Portland Electric Co.* 40 Or. 126, 57 L. R. A. 619, 66 Pac. 576; *Boyd* v. *Portland General Electric Co.* (Or.) 68 Pac. 810. It is, as said by Mr. Justice Holmes in *Graham* v. *Badger*, 164 Mass. 42, 47, 41 N. E. 61, "merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence." There is some controversy in the authorities as to whether, under any circumstances, the doctrine is applicable in an action by an injured servant against his master. But if it can be invoked in such an action at all, it is manifest that, when the servant is injured from a defect in the machinery operated by him, it can apply only where the physical facts themselves speak of the negligence of the defendant, and not, as in the case at bar, merely show the happening of the accident. The mere circumstance that a servant is injured by defective machinery or appliances used by him does not prove negligence or want of care on the part of the master. 1 Bailey, Mast. & S. § 1597; 20 Am. & Eng. Enc. Law, 2d ed. p. 87; *Simpson* v. *Pittsburgh Locomotive Works*, 139 Pa. 245, 21 Atl. 386; *Texas & P. R. Co.* v. *Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707; *Patton* v. *Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; *Wojciechowski* v. *Spreckels' Sugar Ref. Co.* 177 Pa. 57, 35 Atl. 596; *Brownfield* v. *Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038; *Olson* v. *Great Northern R. Co.* 68 Minn. 155, 71 N. W. 5. The happening of the accident may, perhaps, tend to show that the machinery was defective, but this alone is not sufficient to entitle the servant to recover. He must go further, and show, not only that the injury resulted from a defect in the machinery, but that the defendant had notice of such defect, or by the exercise of ordinary care could have known, and was, therefore, guilty of negligence. "The mere fact that the machinery proves defective," says Mr. Wood, "and that an injury results therefrom, does not fix the master's liability. Prima facie

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it is presumed that the master has discharged his duty to the servant, and that he was not at fault. Therefore, the servant must overcome this presumption by proof of fault on the master's part, either by showing that he knew, or ought to have known, of the defects." Wood, Mast. & S. 2d ed. § 368. A master is not an insurer of the safety of his servant, and is therefore not bound to furnish absolutely safe appliances or machinery. His duty in this regard is discharged when he exercises reasonable care and caution to provide such machinery or appliances, and to keep them in that condition, and the presumption is that he has discharged this duty. He is only liable for an injury to a servant through a defect in the machinery or appliances which was or ought to have been known to him and was unknown to the servant; and, in an action therefor, it is necessary for the servant to prove, not only the defect, but the knowledge or means of knowledge thereof on the part of the master. The law on that subject is well settled in this court. *Kincaid* v. *Oregon Short Line R. Co.* 22 Or. 35, 29 Pac. 3, was an action by a servant against his master to recover damages for injuries received on account of defective appliances, wherein Mr. Justice Lord, in speaking for the court, said: "It is not enough for the party to merely show the injury or accident, but he must produce some evidence tending to show that the negligence of the defendant caused it. This is not one of the cases where proof of the accident is prima facie evidence of negligence, but it is one of the cases where the law presumes a proper performance of duty upon the part of the defendant, and the burden is imposed upon the plaintiff to show its negligence in reference to the particular matter alleged in producing the injury." And in *Nutt* v. *Southern P. Co.* 25 Or. 291, 35 Pac. 653,—a similar case,—the same justice says: "The defendant is not a guarantor that the tools, implements, or other appliances which it provides for the use of its employees are absolutely safe or free from all defects. Neither individuals nor corporations are bound to insure the absolute safety of the instrumentalities which they furnish their employees for use in their employment. Their duty is discharged when they exercise reasonable care and diligence in providing their employees with reasonably safe tools and appliances with which to work." To the same effect, see *Walsh* v. *Oregon R. & Nav. Co.* 10 Or. 250; *Knahtla* v. *Oregon Short Line & U. N. R. Co.* 21 Or. 136, 27 Pac. 91. There was, therefore, no error in instructing the jury that the plaintiff must prove the negligence alleged, or in refusing to instruct that the breaking of the pulley, if unexplained by the defendant, was itself evidence of the want of care on its part.

It is also contended that the court erred in striking from the complaint the allegation that the defendant failed to provide a belt shifter or other suitable appliance for transferring the belt from the loose to the tight pulley. There is no allegation as to what would be a suitable appliance for that purpose, or that there was one any better than that actually used by the deceased, or, indeed, that the accident was caused by the defendant's failure to furnish a suitable belt shifter. The deceased was supplied with an instrument for that purpose which seems to have been safe and suitable when properly used, and, as there is no averment that he made any objection to its use, the defendant is not liable because it failed to furnish a better one. It is not the duty of the master to furnish the best or latest appliances for the use of his servant. He may conduct his business in a manner most agreeable to himself, using either old or new machinery; and an employee who enters his service with knowledge of the circumstances attending the employment cannot complain of his master's customs or habits, nor recover for injuries sustained in and resulting from that particular service. If the machinery and appliances are such as are ordinarily used, and reasonable care is exercised to see that they are safe and suitable for the purposes intended, and are kept in proper condition, so that no harm results to the servant for want of repair, the master's responsibility in the premises ceases, and he is not liable to an employee for injuries happening to him in the use of such machinery and appliances. 20 Am. & Eng. Enc. Law, 2d ed. p. 77; Wood, Mast. & S. 2d ed. § 331; 1 Bailey, Mast. & S. § 68.

Upon the trial one Erickson was called as a witness for the plaintiff, and testified that he was a millwright employed by the defendant at the time of the accident; that his duty was to repair and look after the pulleys, except those on the planer; and that he examined the broken pulley after the accident, but was not present at the time. He was thereupon asked to state his opinion as to what caused the pulley to break, and the refusal of the court to permit him to answer is assigned as error. If the opinion of the witness upon this question was competent at all, which is at least doubtful (*Houston* v. *Brush*, 66 Vt. 331, 29 Atl. 380), it was because he was an expert, and entitled to testify as such. But there was no evidence that he possessed any special knowledge upon the subject. He had not had any experience in the manufacture of ironwork, or in testing machinery of that kind, and therefore there was no abuse of discretion in refusing to permit him to express an opinion upon a question of such importance in the case.

One Wilson, who was employed by the defendant on the night shift about the time of the accident, was asked as to whether he had ever known any of the pulleys on the planers in the defendant's mill to be tested by tapping with a hammer, and it is insisted that the court erred in refusing to allow him to answer. The evidence shows that the witness went to work at 7 o'clock in the evening, and quit about 6 in the morning, and therefore the fact that he had never seen the pulleys tested is no evidence

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that a proper inspection and examination thereof had not been made.

Mr. Inman, the president of the defendant corporation, testified, among other things, that the pulley and belt on the planer operated by the deceased had been running for about four years, and that during that time no accident of any kind had occurred. He was thereupon asked on cross-examination whether it was not a fact that there had been at least two men killed and two or three others crippled or injured in his mill during the last three or four years. Error is assigned on the ruling of the trial court in sustaining an objection to this question. This was manifestly improper cross-examination. Mr. Inman's testimony in chief was confined to the planer in controversy, and no rule of law of which we have any knowledge would permit the plaintiff to extend the inquiry to embrace the history and circumstances of all the accidents happening in the mill during the four years previous to the trial.

The judgment of the court below is affirmed.

INDIANA SUPREME COURT.

John P. HAUGHN *et al., Appts.*,
v.
STATE of Indiana.

(.....Ind.....)

Following the language of the statute providing for the punishment of bunco steering, in alleging that one was enticed to a certain place, and then, "by duress or fraud," was compelled to part with money upon a foot race, is not sufficiently certain to state the offense; but the acts constituting the fraud and duress should be set out.

(November 18, 1902.)

APPEAL by defendants from a judgment of the Circuit Court for Franklin County convicting them of bunco steering. *Reversed.*

The facts are stated in the opinion.

Messrs. **Conner & Conner, James B. Kidney,** and **Elliott, Elliott, & Littleton,** for appellants:

The information does not apprise the defendants of the charge they were required to meet.

U. S. Const. 6th Amend.; Ind Const. art. 1, § 13; *McLaughlin* v. *State*, 45 Ind. 338; *State* v. *Feagans*, 148 Ind. 621, 48 N. E. 225; *State* v. *Pasco*, 153 Ind. 214, 54 N. E. 802; *Shaffer* v. *State*, 82 Ind. 221; *Landringham* v. *State*, 49 Ind. 186; *Markle* v. *State*, 3 Ind. 535; *Whitney* v. *State*, 10 Ind. 404; *Keller* v. *State*, 51 Ind. 111; *State* v. *Hebel*, 72 Ind. 361; *Miller* v. *State*, 79 Ind. 198; *State* v. *Record*, 56 Ind. 107; *Kinningham* v. *State*, 119 Ind. 332, 21 N. E. 911; *Littell* v. *State*, 133 Ind. 577, 33 N. E. 417; *Funk* v. *State*, 149 Ind. 338, 49 N. E. 266; *State* v. *Trueblood*, 25 Ind. App. 437, 59 N. E. 975; *Bowles* v. *State*, 13 Ind. 427; *State* v. *Aydelott*, 7 Blackf. 157; *State* v. *Darlington*, 153 Ind. 1, 53 N. E. 925; Gillett, Crim. Law, § 125; *United States* v. *Moore*, 60 Fed. 738; *United States* v. *Cruikshank*, 92 U. S. 542, 558, 23 L. ed. 588, 593; *United States* v. *Carll*, 105 U. S. 611, 26 L. ed. 1135.

Where a statute does not sufficiently set out the facts or elements which constitute an offense, an indictment or information in the language of the statute is not sufficient.

Malone v. *State*, 14 Ind. 219; *Bates* v. *State*, 31 Ind. 72; *State* v. *Bruner*, 111 Ind. 98, 12 N. E. 103; *Bowles* v. *State*, 13 Ind. 427; *State* v. *Welch*, 88 Ind. 308; *Schmidt* v. *State*, 78 Ind. 41; *State* v. *Darlington*, 153 Ind. 1, 53 N. E. 925; *Com.* v. *Filburn*, 119 Mass. 297; *Com.* v. *Slack*, 19 Pick. 304; *Territory* v. *Carland*, 6 Mont. 14, 9 Pac. 578; *Boyd* v. *Com.* 77 Va. 52; *State* v. *West*, 10 Tex. 555; *Brewer* v. *State*, 5 Tex. App. 249; *United States* v. *Carll*, 105 U. S. 611, 26 L. ed. 1135; Hughes, Crim. Law, § 2704.

The information does not state facts showing that there was any fraud on the part of the appellants. Where fraud is charged facts constituting it must be alleged.

Richardson v. *Hittle*, 31 Ind. 119; *Kain* v. *Rinker*, 1 Ind. App. 86, 27 N. E. 328; *Stroup* v. *Stroup*, 140 Ind. 179, 27 L. R. A. 523, 39 N. E. 864; *Guy* v. *Blue*, 146 Ind. 629, 45 N. E. 1052; *Cotterell* v. *Koon*, 151 Ind. 182, 51 N. E. 235; Gillett, Crim. Law, § 125.

The information does not state facts showing that there was any duress on the part of the appellants.

Richardson v. *Hittle*, 31 Ind. 119; *Kraemer* v. *Deustermann*, 37 Minn. 469, 35 N. W. 276; *Buck* v. *Axt*, 85 Ind. 512.

Messrs. **Cassius C. Hadley** and **Merrill Moores,** with *Mr.* **William L. Taylor,** Attorney General, for appellee:

The affidavit and information substantially follow the language of the statute creating and defining the offense. This is sufficient.

Burns's Rev. Stat. 1901, § 2178; *State* v. *Miller*, 98 Ind. 70; *Shilling* v. *State*, 5 Ind. 443; *Sloan* v. *State*, 42 Ind. 570; *Howard* v.

NOTE.—As to sufficiency, generally, of charging offense in language of statute, see *note* to Com. use of Allegheny County v. Weiss (Pa.) 11 L. R. A. 530; also People v. King (N. Y.) 1 L. R. A. 293; State v. Schweitzer (Conn.) 6 L. R. A. 125; People v. Taylor (Mich.) 21 L. R. A. 59 L. R. A. 287; State v. Howard (Minn.) 34 L. R. A. 178; State v. Bradford (Minn.) 47 L. R. A. 144; State v. McKee (Conn.) 49 L. R. A. 542; Moses v. United States (App. D. C.) 50 L. R. A. 582.

As to necessity of specifically pleading fraud, see Southall v. Farish (Va.) 1 L. R. A. 641.

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State, 87 Ind. 68; *State* v. *Sutton*, 116 Ind. 527, 19 N. E. 602; *Benham* v. *State*, 116 Ind. 112, 18 N. E. 454; *State* v. *Beach*, 147 Ind. 74, 36 L. R. A. 179, 46 N. E. 145; *Higgins* v. *State*, 157 Ind. 57, 60 N. E. 685; *State* v. *Bougher*, 3 Blackf. 307; *State* v. *Maxwell*, 5 Blackf. 230; *Marble* v. *State*, 13 Ind. 332; *Malone* v. *State*, 14 Ind. 219; *Stuckmyer* v. *State*, 29 Ind. 20; *Shinn* v. *State*, 68 Ind. 423; *Klcespies* v. *State*, 106 Ind. 383, 7 N. E. 186; *Stewart* v. *State*, 111 Ind. 554, 13 N. E. 59; *Ritter* v. *State*, 111 Ind. 324, 12 N. E. 501; *Trout* v. *State*, 111 Ind. 499, 12 N. E. 1005; *Riley* v. *State*, 95 Ind. 446; *Betts* v. *State*, 93 Ind. 375; *Terry* v. *State*, 13 Ind. 70; *Anderson* v. *State*, 28 Ind. 22; *State* v. *M'Roberts*, 4 Blackf. 178; *Carter* v. *State*, 2 Ind. 617; *State* v. *Vawter*, 7 Blackf. 592; *Blake* v. *State*, 18 Ind. App. 280, 47 N. E. 942; *Stanton* v. *State*, 27 Ind. App. 105, 60 N. E. 999; *State* v. *Stephens*, 63 Ind. 542; *Nichols* v. *State*, 28 Ind. App. 674, 63 N. E. 783.

Gillett, J., delivered the opinion of the court:

The appellants, John S. Johns and John P. Haughn, appeal to this court from a judgment convicting them of a violation of § 2178, Burns's Rev. Stat. 1901. That statute is in the words following: "Whoever allures, entices, or persuades another to any place upon any pretense, and then, by duress or fraud, compels such person to win or lose or advance or loan money, or execute or give his note or other obligation either for money or anything of value, or to part with anything of value upon any game or wager, or by means of any trick, device, or artifice, is guilty of bunko steering, and, upon conviction thereof, shall be imprisoned in the state prison not more than fourteen years nor less than two years; and all persons present at such place at such time, and engaged therein, shall be prosecuted, tried, and punished for such offense as principals." The information, aside from the caption, is as follows: "George L. Gray, prosecuting attorney in and for the 37th judicial circuit of the state of Indiana, now gives the Franklin circuit court to understand and be informed that John P. Haughn, Albert H. King, John S. Johns, and J. C. Stillson, of Franklin county, on the 1st day of June, 1901, at and in the county of Franklin, in the state of Indiana, did then and there unlawfully and feloniously allure, entice, and persuade one Edward W. Duvall to go to a certain place in said county, to wit, to the public highway extending southwardly from the Brookville and Whitcomb free gravel road through sections 21 and 20, in township number nine (9), range two (2) west, to the East Fork of White Water river, upon the pretense that two men, to wit, Perry Ballard and J. C. Stillson, would then and there run a foot race for a wager of seventeen hundred ($1,700.00) dollars, and said John P. Haughn, Albert H. King, John S. Johns, and J. C. Stillson did then and there unlawfully and feloniously, by duress and fraud, compel the said Edward W. Duvall to lose and part with a large amount of money, to wit, the great sum of seventeen hundred ($1,700.00) dollars, upon a certain game, to wit, a foot race between two men; that all of said defendants, to wit, John P. Haughn, Albert H. King, John S. Johns, and J. C. Stillson, were then and there present at said place, and engaged in so compelling said Edward W. Duvall to so lose and part with said sum of money; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Indiana, as Edward W. Duvall has complained on oath. [Signed] George L. Gray, Prosecuting Attorney." The appellants moved to quash the information, but their motion was overruled, and they excepted. An assignment of error brings said ruling under review.

If a criminal statute provides a definition of an offense, and states specifically what acts constitute it, it will suffice to charge the offense, in the language of the statute. *State* v. *M'Roberts*, 4 Blackf. 178; *Malone* v. *State*, 14 Ind. 219; *Payne* v. *State*, 74 Ind. 203; *Howard* v. *State*, 87 Ind. 68. But where the definition of the offense contains generic terms, it is not sufficient to allege the species of the crime, but the pleader must descend to particulars. *Bowles* v. *State*, 13 Ind. 427; *Malone* v. *State*, 14 Ind. 219; *State* v. *Bruner*, 111 Ind. 98, 12 N. E. 103; *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States* v. *Carll*, 105 U. S. 611, 26 L. ed. 1135; *Boyd* v. *Com.* 77 Va. 52; *State* v. *Graham*, 38 Ark. 519; *Burch* v. *Republic*, 1 Tex. 608; *Kerry* v. *State*, 17 Tex. App. 178, 50 Am. Rep. 122. Serjeant Hawkins, in his Pleas of the Crown, said: "Neither doth it seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly, and expressly allege the fact in the doing or not doing whereof the offense consists without the least uncertainty or ambiguity." Vol. 2, chap. 25, § 111. In *United States* v. *Simmons*, 96 U. S. 360, 362, 24 L. ed. 819, 820, the Supreme Court of the United States stated the rule and the exception in the following language: "Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc. § 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute." In a later case the same court said: "A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a

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qualified sanction from this court in *United States* v. *Mills*, 7 Pet. 138, 8 L. ed. 636, that an indictment for a statutory misdemeanor is sufficient if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States* v. *Carll*, 105 U. S. 611, 612, 26 L. ed. 1135, 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" *Evans* v. *United States*, 153 U. S. 584, 587, 38 L. ed. 830, 831, 14 Sup. Ct. Rep. 934. As evincing the position of this court upon the subject, both in its early history and quite recently, we quote the following from the opinion in the case of *State* v. *Darlington*, 153 Ind. 1, 2, 53 N. E. 925: "It is generally true, as a rule of criminal pleading, that, where the principal act or acts constituting the offense are clearly defined by the statute, it is sufficient to charge the offense in the language of the statute; but, as was said in *State* v. *Aydelott*, 7 Blackf. 157, 'this mode of setting out an offense is not always attended with the requisite certainty.'" In *Malone* v. *State*, 14 Ind. 219, 222, it was said: "As an approximation to a test on this subject, perhaps it may be said that, where the statute defines the offense generally, and designates the particular acts constituting it,—as, for example, the case of larceny,—it is sufficient, in charging the crime, to follow substantially the language of the statute; but where the statute defines the crime generally, without naming the particular acts constituting it,—as, if a statute makes it a crime to encourage a slave to run away from his master, without defining the act which should be deemed to constitute encouragement,—it might be necessary to set out the acts done, that it might appear to the court that they constituted the offense." There are some crimes defined by words of technical description, such as "ravished," "murdered," etc., where it is proper to use such words in a charge of the offense. *Stuckmyer* v. *State*, 29 Ind. 20; *Betts* v. *State*, 93 Ind. 375. It is also proper to describe an act as done feloniously, burglariously, etc. Acts may be charged to have been done with a certain state of mind, where that is an element in the definition of the crime. *State* v. *Miller*, 98 Ind. 70. Thus, it has been held proper, in a prosecution under one of the embezzlement statutes, to charge that the act was fraudulently done. *State* v. *Beach*, 147 Ind. 74, 36 L. R. A. 179, 46 N. E. 145. But in such a case as the one last cited the use of the statutory term does not tend to make uncertain the offense sought to be charged. The defendant in such a case is sufficiently apprised by the charge of the character of evidence that will be offered against him, and the record sufficiently protects him against a subsequent jeopardy. There are cases also where, to avoid prolixity, a more general form of pleading is permissible; as, where combined acts constitute a single crime. *Shilling* v. *State*, 5 Ind. 443; *Shinn* v. *State*, 68 Ind. 423; *Parks* v. *State* (Ind.) *ante*, 190, 64 N. E. 862. The case at bar, however, does not fall within any of these classes. It is alleged that the prosecuting witness was compelled to lose and part with a specified amount of money upon a certain game "by duress and fraud." The element of duress or fraud is essential to the offense charged, but it is evident that they must consist of acts. Duress and fraud may take forms innumerable, and the presence of these words in the charge could but serve to admonish a person accused that such a case would be sought to be established against him, but they would not be at all calculated to advise him of the character of the evidence that he must expect to meet. In many civil cases pleadings have been condemned that attempted to aver duress or fraud in general terms. It seems unnecessary to gather the authorities upon this proposition, but, as particularly covering it, we cite *Richardson* v. *Hittle*, 31 Ind. 119, 120, where it was said: "Fraud, duress, and coercion are, alike, made up of distinct facts, and all may vary greatly in their circumstances. It has been repeatedly ruled by this court that an answer setting up fraud must aver the facts, and that an answer averring fraud without stating the facts constituting it is bad on demurrer. There is no difference in principle, as to pleading, between fraud and coercion. Mr. Chitty, in his forms, states the facts which constitute duress. 3 Chitty, Pl. 964 *et seq.* So are all the precedents." It cannot be that a degree of uncertainty that would condemn a pleading in a civil case could be upheld in a criminal case, where liberty is involved. As declared by Mr. Bishop: "The facts in allegation must be the primary and individualizing ones." 1 New Crim. Proc. 331. As stated by Mr. Wharton: "The indictment must contain a specific description of the offense; it is not enough to state a mere conclusion of law." Crim. Pl. & Pr. § 154. By the use of the words "fraud" and "duress" there was a grouping of matters of fact, and the whole was cast into the form of a legal conclusion.

We need not go the length of stating that the prosecution was in denial of the constitutional right of the appellants to demand the nature and cause of the accusation against them, but we are entirely clear that the charge did not possess that degree of certainty which is requisite in criminal pleading, and for this reason, at least, the motion to quash should have been sustained.

The judgment as against appellants is reversed, with an instruction to the trial court to sustain their motion to quash, and for further proceedings. The clerk will make the proper order for the return of appellants.

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Charles THACKER, *Appt.*,
v.
CHICAGO, INDIANAPOLIS, & LOUISVILLE RAILWAY COMPANY.

(.....Ind.....)

1. **A railroad section hand thrown from a hand car** by the application of the brakes by a brakeman, without warning, on the signal of the foreman, cannot hold the railroad company liable for the resulting injuries, under a statute making an employer liable for injuries caused by negligence of a fellow servant who at the time is acting in the place and performing the duty of the employer in that behalf, the person injured conforming at the time of the injury to the order of some superior having authority to direct.
2. **A signal by a section foreman to a brakeman on a hand car to stop the car does not require him to do so** without warning other men thereon, and thereby imperil their safety, so as to bring an injury caused by stopping without warning within a statute making employers liable for injuries to servants which result from the act or omission of any person, done or made in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.
3. **Negligence on the part of the foreman in charge of repairmen, which caused injury to one of them,** is charged by an allegation that he negligently gave the brakeman on a hand car a signal to stop it suddenly and quickly, when it was going at the speed of 20 miles per hour, without giving other persons on the car notice thereof, obedience to which would necessarily endanger the lives and limbs of such persons; and that by reason of the giving of such order, and its obedience, the injuries complained of were received.

(June 20, 1902.)

APPEAL by plaintiff from a judgment of the Circuit Court for Monroe County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Walter E. Hottel** and **East & East** for appellant.

Messrs. **E. C. Field** and **W. S. Kinnan** for appellee.

Monks, J., delivered the opinion of the court:

Complaint by appellant for personal injuries, in four paragraphs. Demurrer to each paragraph for want of facts sustained. Appellant refusing to plead further, judgment was rendered against him. The assignments of error not waived call in question the action of the court in not overruling the demurrer to the first, second, and fourth paragraphs of the complaint. Appellant was a section man engaged in the line of his duty with an extra gang of men running a hand car to Bryfogle, a station on appellee's road. One McGill was section foreman, and had ordered the men to make this trip for the purpose of doing work at said place. Appellant and the other men in the gang were working under the orders of said foreman. It required two hand cars to carry the men. Appellant, with others, was riding on the front hand car, and following this was another hand car, on which the foreman and other laborers were riding. The front car, on which appellant was riding, had two men who acted as brakemen, and who could check, stop, or control the movement of the hand car by pressing their feet on a brake; that it was the duty of said brakemen, when the signal was given by the foreman, McGill, to put on or take off the brake and otherwise control said car. In addition to the above it is alleged in the first paragraph of the complaint that in approaching Bryfogle they were going down grade at a speed of 15 or 20 miles an hour, when "McGill gave a signal to said brakemen to stop; that it was the duty of said brakemen, and each of them, when said signal to stop was given, to notify those on the car of said signal, and give them time to catch hold of something or stay themselves in some way, but that when said signal to stop was given said brakemen, without giving any warning or notice of any kind, or before any warning or notice could be given, said brakemen at once threw on the brake in a careless and reckless manner, bringing said car to such a sudden stop that appellant was pitched violently forward off said hand car" and injured. Appellant says this action was brought under the employers' liability act, and that the first paragraph is founded on the 4th subdivision of § 7083, Burns's Rev. Stat. 1901 (Horner's Rev. Stat. 1901, § 5206*s*), which reads as follows: "That every railroad . . . shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence . . . Fourth. Where such injury was caused by the negligence of *any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, loco-*

NOTE.—As to constitutionality of a statute making railroad company liable for injuries caused by negligence of servant in charge of any signal, switch yard, locomotive engine, train, etc., see in this series, Indianapolis Union R. Co. v. Houlihan (Ind.) 54 L. R. A. 787.

As to vice principalship considered with reference to the character of the act which caused the injury, see also Lafayette Bridge Co. v. Olsen (C. C. App. 7th C.) 54 L. R. A. 33, and *note;* Norton Bros. v. Nadebok (Ill.) 59 L. R. A. 54 L. R. A. 842; Wellston Coal Co. v. Smith (Ohio) 55 L. R. A. 99; Swift & Co. v. Bleise (Neb.) 57 L. R. A. 147; Kelly v. New Haven S. B. Co. (Conn.) 57 L. R. A. 494; Southern P. Co. v. Schoer (C. C. App. 8th C.) 57 L. R. A. 707; and Sroufe v. Moran Bros. Co. (Wash.) 58 L. R. A. 313.

As to statutory liability of employers for negligence of employees exercising superintendence, see Canney v. Walkeine (C. C. App. 1st C.) 58 L. R. A. 33, and *note.*

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motive engine, or train upon a railway, or where such injury was caused by the negligence of any person, coemployee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee, or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having authority to direct." Appellant concedes that said first paragraph would be bad at common law, because it shows that his injury was caused by the negligence of the brakemen, his fellow servants, but insists that the same is sufficient under that part of said subdivision not in italics. At common law a master owes certain duties to his servants which concern their safety, and if he intrusts such duties to one of his servants, who negligently performs the same, by reason of which another servant is injured without his fault, the master is liable therefor, because the servant to whom such duties are intrusted is, in the performance thereof, a vice principal, and not a fellow servant. A vice principal, therefore, is one who represents the master in the discharge of those duties which the master owes to his servants. If, however, the servant whose negligence caused the injury was not at the time discharging a duty which the master owed to his servants, but simply a duty which the servant owed to the master, he was a fellow servant with others engaged in the common business, and the master would not be liable for any injury inflicted upon such fellow servants by reason of his negligence. *Justice* v. *Pennsylvania Co.* 130 Ind. 321, 325, 30 N. E. 303, and cases cited; *Hodges* v. *Standard Wheel Co.* 152 Ind. 680, 687, 688, 52 N. E. 391, 54 N. E. 383, and cases cited; *Robertson* v. *Chicago & E. R. Co.* 146 Ind. 486, 488, 45 N. E. 655; *Mitchell* v. *Robinson*, 80 Ind. 281, 284, 41 Am. Rep. 812; *Krueger* v. *Louisville, N. A. & C. R. Co.* 111 Ind. 51, 52, 11 N. E. 957; *Brazil Block Coal Co.* v. *Young*, 117 Ind. 520, 522, 20 N. E. 423; 12 Am. & Eng. Enc. Law, 2d ed. pp. 946, 948. In this state there is a clear distinction between a superior servant and a vice principal. A superior servant is generally one who has authority to direct and control other servants, and may or may not be charged with any of the duties which the master owes his servants. Whether or not one is a vice principal does not in any way depend upon his rank. *Justice* v. *Pennsylrania Co.* 130 Ind. 321, 325, 30 N. E. 303; *Hodges* v. *Standard Wheel Co.* 152 Ind. 680, 687, 688, 52 N. E. 391, 54 N. E. 383; *Robertson* v. *Chicago & E. R. Co.* 146 Ind. 486, 488, 45 N. E. 655; 12 Am. & Eng. Enc. Law, 2d ed. pp. 948, 949. Before the passage of said act, it was held as to most, if not all, of the persons described in that part of said 4th subdivision printed above in italics, for whose negligence railroads are made liable, that they did not perform any duty which a railroad owed its servants, and that they were, therefore, mere fellow servants, for whose negligence railroads were not liable. That part of said subdivision has, therefore, enlarged the class of vice principals. *Baltimore & O. S. W. R. Co.* v. *Little*, 149 Ind. 167, 48 N. E. 862; *Indianapolis Union R. Co.* v. *Houlihan*, 157 Ind. 494, 499, 54 L. R. A. 787, 60 N. E. 943. It is evident, however, that the part of said subdivision upon which appellant bases his first paragraph of complaint only makes railroads liable for the negligence of such persons as are performing duties which it owes its servants in certain cases. Such persons were vice principals, and employees injured by their negligence in the discharge of such duties could recover therefor before said act was passed. It is clear that such part of said subdivision is the mere enactment of a liability which already existed at common law, and that the class of vice principals was not increased thereby. It is not as broad as the common-law liability, because the right to recover is limited to persons injured while obeying or conforming to the order of some superior at the time of the injury having power to direct. The right to recover for injuries caused by the negligence of vice principals is not so limited at common law. It follows that, if said appellant's first paragraph of complaint is not good at common law, which he conceded it is not, it is not good under the part of said 4th subdivision upon which he claims it is founded. It was held by this court in *Justice* v. *Pennsylvania Co.* 130 Ind. 325, 326, 30 N. E. 304, that a section foreman of a railroad having power to employ and discharge section hands is a vice principal when employing and discharging such employees, but that he is a fellow servant in his control of such men after their employment. The court said in that case: "That a section foreman may be a vice principal is not doubted. In this case he was a vice principal in the matter of hiring and discharging hands, for the master owes it as a duty to exercise reasonable care not to employ any but careful men and to discharge those who prove to be negligent. In the hiring and discharging of the men he was in the performance, therefore, of a duty which the master owed to his servants, and was, while so engaged, a vice principal. But it was not so in transporting the men to and from their work. In the matter of moving the hand car and their tools to and from the locality at which they worked upon the track they were in the discharge of a duty which they owed the master, and were, therefore, fellow servants. *Wilson* v. *Madison, etc., R. Co.* 18 Ind. 226; *Ohio & M. R. Co.* v. *Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Slattery* v. *Toledo & W. R. Co.* 23 Ind. 81; *Sullivan* v. *Toledo, W. & W. R. Co.* 58 Ind. 26; *Gormley* v. *Ohio & M. R. Co.* 72 Ind. 31; *Robertson* v. *Terre Haute & I. R. Co.* 78 Ind. 77, 41 Am. Rep. 552; *Indiana Car Co.* v. *Parker*, 100 Ind. 181; *Pittsburgh C. & St. L. R. Co.* v. *Adams*, 105 Ind. 151, 5 N. E. 187; *Boyce* v. *Fitzpatrick*, 80 Ind. 526; *Capper* v. *Louisville, E. & St. L. R. Co.* 103 Ind. 305, 2 N. E. 749." Even if Mc-

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Gill, the foreman, in giving the signal to stop the hand car, was performing a duty which the master owed its servants, and was, as to the same, a vice principal, yet no liability is shown by the allegations of said first paragraph, because no facts showing negligence on the part of said foreman are alleged therein. The court did not err in sustaining the demurrer to the first paragraph of complaint.

The second paragraph alleges the same facts as the first, but charges that the foreman, "McGill, gave the signal to said brakemen to put on brakes; that the brakemen, in obedience to the particular instruction given by said foreman, McGill, who was delegated with the authority of the corporation in the behalf of said company, put on the brakes and brought the car to such a sudden stop that appellant was pitched violently out of said car" and injured; "that said injury resulted from the act of said brakemen, done in obedience to the particular instruction given by said McGill, who was delegated with the authority of the corporation in that behalf." Appellant insists that said paragraph is sufficient under that part of the 3d subdivision of said § 7083, Burns's Rev. Stat. 1901 (Horner's Rev. Stat. 1901, § 5206*s*), which is as follows: "Where such injury resulted from the act or omission of any person done or made . . . in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf." Said subdivision 3 is the same as clause 4 of § 1 of the English employers' liability act of 1880, and clause 4 of § 2590 of the Alabama employers' liability acts of 1885. What is obedience to particular instructions was considered in *Whatley* v. *Holloway*, 6 Times L. R. 190, 62 L. T. N. S. 639, 54 J. P. 645, decided in 1890. In that case one Ancliffe was employed by the defendant to attend to an engine and boiler. His duty was also to assist the plaintiff in working a circular saw, in doing which he was instructed not to neglect the engine. At the time of the accident, Ancliffe and the plaintiff were at work with the saw; the plaintiff feeding it with wood, Ancliffe, at the other end, receiving the wood as it came from the saw, and holding the same so as to steady it. A noise being heard from the engine indicating that it required attention, Ancliffe let the piece of wood he was holding go without warning. The result was that the piece of wood the plaintiff was holding was rendered unsteady, and the plaintiff's hand was knocked against the saw and injured. The jury found a verdict for the plaintiff, with £40 damages. The question was whether, under said subdivision 4, there was an act or omission done or made in obedience to particular instructions. The plaintiff contended that the instruction to Ancliffe not to neglect the engine was a particular instruction, obedience to which caused the accident. Defendant's contention was that no particular instruction within said subdivision had been given, and, if the instruction was held to be a particular one, that Ancliffe's act was merely the negligent act of a fellow servant, and not done in obedience to the instruction. On appeal the divisional court was in favor of the defendant's contention that the instruction given to Ancliffe was not a particular instruction within the meaning of the statute. For the purposes of the case, however, the court assumed that it was, and said, in substance, that the instruction to Ancliffe was not to neglect the engine; that this meant that he was to attend to the engine with due regard to the safety and lives of others, and not that he should look after the engine at all hazards without regard to the safety of others; that the instruction was a reasonable one; that the engine was to be Ancliffe's first care, at the same time leaving his work in a proper and reasonable manner. If Ancliffe had waited a few seconds and given plaintiff notice before leaving, that would not have been a disobedience to the instruction. Therefore, Ancliffe was not required by the instruction to do as he did. "The injury, therefore, was caused here, not by Ancliffe's obedience, but by his disobedience, to his instructions." Judgment was accordingly rendered for the defendant. This was affirmed in the court of appeal, where Lindley, L. J., said (6 Times L. R. 353, 354): "No doubt Ancliffe was required to attend to the engine, but the instruction did not require him, when it was necessary to attend to the engine, to leave the saw without giving his mate notice. It was impossible to so construe Ancliffe's instructions as involving this,—that he must go away without giving notice to the plaintiff." This was the construction given said subdivision in 1890 by the English courts long before the same was re-enacted in this state in 1893 as subdivision 3 of § 1 of the employers' liability act. *Laporte* v. *Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 469, 35 L. R. A. 686, 45 N. E. 588; *Hilliker* v. *Citizens' Street R. Co.* 152 Ind. 86, 88, 52 N. E. 607, and authorities cited; *Monroe County* v. *Conner*, 155 Ind. 484, 496, 58 N. E. 828, and authorities cited. In the second paragraph the right of McGill to give the signal to stop the hand car, and that it was given in a proper manner, is not questioned. Said signal, if it may be called an instruction within the meaning of said subdivision, did not require the brakemen to stop the hand car in such a manner as to endanger the lives of the persons riding thereon, but that they should stop the car with a due regard to the safety of the persons mentioned. It is evident that if the brakemen, in response to the signal to stop, had stopped the hand car with a due regard to the lives of the persons on the car, and without injuring them, it would not have been a disobedience to such signal. Said signal did not require the brakemen to stop the car in the manner they did. The injury was therefore caused, not by the brakemen's obedience, but by their disobedience, to McGill's signal, as was said in *Whatley* v. *Holloway*, 6 Times L. R. 190, 62 L. T. N. S. 639, 54 J. P. 645; and said second paragraph is not, therefore, sufficient under said subdivision

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3. *Laughran* v. *Brewer*, 113 Ala. 509, 518, 21 So. 415. It is not necessary, therefore, to determine whether or not the signal given by McGill to the brakemen to stop the car was a particular instruction, or whether he was delegated with the authority of the railroad in that behalf, within the meaning of said subdivision 3.

Appellant contends that the fourth paragraph of complaint is sufficient, under the 2d subdivision of § 7083, Burns's Rev. Stat. 1901 (Horner's Rev. Stat. 1901, § 5206*s*), *supra*, which is as follows: "Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform and did conform." This subdivision is substantially the same as subdivision 3 of § 1 of the English employers' liability act of 1880 and the Alabama employers' liability act of 1885. Appellee insists that no negligence is charged against McGill as foreman, in said fourth paragraph, and that, before appellant can recover under said subdivision 2, "the injury must have resulted (1) from the negligence of one clothed with authority to give the order to the injured servant; and (2) the injured employee must, at the time, have been conforming to such negligent order, and conforming because he was bound to do so; that no negligent order was given appellant. The case is simply one of a proper order given in a proper way, and through the negligence of a fellow servant of appellant in the execution of the order his injury resulted." Counsel for appellee are incorrect in their claim that the fourth paragraph of complaint does not charge any negligence against McGill, but only shows that the injury was caused by the negligence of the brakemen. Said fourth paragraph is the same as the first, except it is expressly averred that "McGill, the section foreman, negligently gave the brakemen on the front hand car the signal to stop the front hand car suddenly and quickly when the same was going at the speed of 20 miles per hour, without giving appellant and the other persons on the front of said car notice thereof; and that said brakemen complied with said signal and stopped said car suddenly and quickly, as it was their duty to do, and thereby appellant was thrown violently from the car and injured; that the obedience to said order to so stop said car would necessarily cause said car to stop suddenly, and would endanger the life and limb of this appellant and others so stationed on said front car; and to so stop said car while running at the rate of 20 miles per hour was calculated to greatly increase the danger and hazard to appellant, which said McGill well knew, and did increase the danger and hazard to him, and by reason of giving said order as herein set out appellant received his injuries; that he had no notice or knowledge, and no means of knowing, said hand car was to be stopped when it was, or that such order to stop was, or would be, given by said McGill, section foreman." It is also alleged in said paragraph that "McGill, section foreman, ordered said extra gang of men, including appellant, to go on hand cars over appellee's track to meet a gravel train for the purpose of unloading the gravel from the cars of said train; that appellant, in obedience to the orders of said McGill, in company with eight others of said extra gang, got on one hand car, and McGill and others of said extra gang got on another hand car, and started to meet said gravel train;" that appellant was bound to conform, and did conform, to said order of McGill, section foreman, in going upon said hand car to meet said gravel train. It is true, as a general rule, that a section foreman, in giving such signal, has the right to assume that the brakemen will obey the same intelligently, having a due regard to the safety of themselves and others; that they will execute such signals in such manner and with such precaution as not to endanger the life or limb of anyone, if that can reasonably be done without disobedience to the order. If it was the duty of the brakemen, when the signal to stop was given by McGill, to notify those on the car with them of such signal, in order to give them an opportunity to protect themselves, and the failure to give such notice, or any other negligence on the part of the brakemen, who, under the circumstances, were the fellow servants of appellant, caused the injury, appellee was not liable. It is alleged, however, that the injury complained of was caused by the negligence of the section foreman. It is not necessary, as was held by this court in *Louisville, N. A. & C. R. Co.* v. *Wagner*, 153 Ind. 420, 53 N. E. 927, that the order or direction in said subsection be negligent, but it is sufficient if the employee was bound to conform, and was conforming at the time of the injury, to the order or direction of the person whose ne gligence caused the injury. Ruegg, Employers' Liability Act, 5th ed. 106, 107; Beven, Employers' Liability, 2d ed. pp. 152–161; Dresser, Employers' Liability, p. 308; *Wild* v. *Waygood* [1892] 1 Q. B. 783, 8 Times L. R. 410. The question as to what kind of orders and directions is referred to in subdivision 2, and the connection that must exist between such "order or direction" to which the injured employee is bound to conform and is conforming when injured and the negligence of the person giving such order or direction, is discussed to some extent in the following authorities: Ruegg, Employers' Liability Act, 5th ed. pp. 98–105; Beven, Employers' Liability, 2d ed. pp. 152–161; Dresser, Employers' Liability, §§ 64–68, pp. 295–310; *Louisville, N. A. & C. R. Co.* v. *Wagner*, 153 Ind. 420, 53 N. E. 927; *Snowden* v. *Baynes*, L. R. 24 Q. B. Div. 568, 59 L. J. Q. B. N. S. 325; *Wild* v. *Waygood* [1892] 1 Q. B. 783, 61 L. J. Q. B. N. S. 391, 8 Times L. R. 410–412; *Mobile & O. R. Co.* v. *George*, 94 Ala. 199, 218, 219, 10 So. 145; *Birmingham Furnace & Mfg. Co.* v. *Gross*, 97 Ala. 220, 226, 227, 12 So. 56; *Mary Lee Coal & R. Co.* v. *Chambliss*, 97 Ala. 171, 176, 11 So. 897. See also *Dantzler* v. *De*

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Bardeleben Coal & I. Co. 101 Ala. 309, 22 L. R. A. 361, 14 So. 10. It was said in *Louisville, N. A. & C. R. Co.* v. *Wagner*, 153 Ind. 424, 53 N. E. 928: "The order to loose the truck was the proximate cause of the plaintiff's injury. And it was both directing the plaintiff into a dangerous situation, that he was bound to enter, and the ordering the truck turned loose upon him without warning, that constitutes the actionable wrong. See *Wild* v. *Waygood* [1892] 1 Q. B. 783; *Wright* v. *Wallis*, 3 Times L. R. 779; *Sheffield* v. *Harris*, 101 Ala. 564, 14 So. 357."

We have only considered the objections to the fourth paragraph of complaint urged by appellee, as stated above, and it is clear that they are not tenable.

The judgment is, therefore, affirmed as to the first, second, and third paragraphs of complaint, and reversed as to the fourth, with instructions to overrule appellee's demurrer thereto, and for further proceedings not inconsistent with this opinion.

IOWA SUPREME COURT.

BOSTON INSURANCE COMPANY, *Appt.*,
v.
CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY.

(.....Iowa.....)

1. **A railroad company carrying mail** under contract with the United States government owes no duty to the sender of a particular registered package of mail, which will give him a right of action in case the package is destroyed through the negligence of the company's servants.
2. **The operation of trains and care of switches are not duties, the personal performance of which** the exercise of ordinary care requires of a railroad company under its contract to carry the mails, so as to give the sendee of a package a right of action against it for the loss of the package through negligence in such performance.

(October 30, 1902.)

APPEAL by plaintiff for a judgment of the District Court for Polk County in defendant's favor in an action brought to hold defendant liable for the loss of a registered mail package which it was transporting. *Affirmed.*

Statement by **Deemer, J.**:

Action to recover the value of a registered mail package which the defendant, as one of the agencies of the government, for carriage of its mails, undertook to carry from Kansas City, Missouri, to Kinsley, Kansas, and which it is claimed was destroyed by fire in a wreck at Volland, Kansas, caused by the negligence of defendant's employees. The Bankers' Mutual Casualty Company paid the loss to the owner of the package; and plaintiff, who had reinsured the loss, repaid the amount thereof to the casualty company, and as assignee of said company, and by reason of a claim of subrogation, seeks to recover the amount paid, from the defendant. The defendant demurred to the petition, and its demurrer was sustained, and judgment was rendered against plaintiff for costs. Plaintiff appeals.

Messrs. **Dale & Allen**, for appellant:

There is a duty or obligation imposed by the United States statutes upon the carrier, to carry safely both the mail and the mail clerk.

Collett v. *London & N. W. R. Co.* 16 Q. B. 984; *Philadelphia & R. R. Co.* v. *Derby*, 14 How. 486, 14 L. ed. 509; *Nolton* v. *Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623; *Sawyer* v. *Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Hammond* v. *North Eastern R. Co.* 6 S. C. N. S. 130, 24 Am. Rep. 467; *Central R. & Bkg. Co.* v. *Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Magoffin* v. *Missouri P. R. Co.* 102 Mo. 540, 15 S. W. 76; *Mellor* v. *Missouri P. R. Co.* 105 Mo. 455, 10 L. R. A. 36, 16 S. W. 849; *Baltimore & O. R. Co.* v. *State use of Wiley*, 72 Md. 36, 6 L. R. A. 706, 18 Atl. 1107; *Houston & T. C. R. Co.* v. *Hampton*, 64 Tex. 427; *Gleeson* v. *Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859.

The liability of the railroad company for the neglect and injurious act of its servant is not necessarily founded on any contract or privity between the parties, or affected by any relation, social or otherwise, which they have to each other.

Philadelphia & R. R. Co. v. *Derby*, 14 How. 486, 14 L. ed. 509; *Mogoffin* v. *Missouri P. R. Co.* 102 Mo. 540, 15 S. W. 76.

Liability is not destroyed by the fact that compensation for carriage is paid by another.

Gulf, C. & S. F. R. Co. v. *Wilson*, 79 Tex.

NOTE.—The case of German State Bank v. Minneapolis, St. P. & S. Ste. M. R. Co., mentioned in the opinion in the above case, may be reported in this series, but, having been taken by appeal to the Supreme Court of the United States, report of the case is withheld to await the decision of that court.

As to the right of the third party to sue on a contract made for his benefit, see also, in this series, Jefferson v. Asch (Minn.) 25 L. R. A. 257, and *note;* Schmidt v. Louisville & N. R. Co. (Ky.) 38 L. R. A. 809; Rogers v. Galloway 59 L. R. A. Female College (Ark.) 39 L. R. A. 636; Baxter v. Camp (Conn.) 42 L. R. A. 514; Buchanan v. Tilden (N. Y.) 44 L. R. A. 170; Embler v. Hartford Steam Boiler Inspection & Ins. Co. (N. Y.) 44 L. R. A. 512; Case v. Hoffman (Wis.) 44 L. R. A. 728; Ferris v. American Brewing Co. (Ind.) 52 L. R. A. 305; Electric Appliance Co. v. United States Fidelity & G. Co. (Wis.) 53 L. R. A. 609; Ransdel v. Moore (Ind.) 53 L. R. A. 753; and Daily v. Minnick (Iowa) *post*, —.

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371, 11 L. R. A. 486, 15 S. W. 280; *Cleveland, C. C. & St. L. R. Co.* v. *Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; *Hammond* v. *North Eastern R. Co.* 6 S. C. N. S. 130, 24 Am. Rep. 467; *Blair* v. *Erie R. Co.* 66 N. Y. 313, 23 Am. Rep. 55.

The custody of the mails while in a post-office, or in course of transmission from point to point by a contractor or carrier, is governed by the law of bailments.

2 Kent, Com. 14th ed. p. 1003, *310; Story, Bailments, 8th ed. chap. 6, art. 6, §§ 461–463, pp. 399–409; Shearm. & Redf. Neg. 4th ed. §§ 319, 321; *Schroyer* v. *Lynch*, 8 Watts. 453; *Fitzgerald* v. *Burrill*, 106 Mass. 446; *Central R. & Bkg. Co.* v. *Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Sawyer* v. *Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Christy* v. *Smith*, 23 Vt. 663; *Ford* v. *Parker*, 4 Ohio St. 576.

The duty of the bailee to return or deliver property as directed at the termination of the bailment, his liability for negligent injury to, or destruction of, property while bailed, by failing to exercise the required degree of care, and his liability to the true owner of the property bailed, no matter by whom bailed, if the true ownership is made known to the bailee before the required delivery of the property or a settlement for the loss or destruction of the property while bailed,—are elementary.

3 Am. & Eng. Enc. Law, 2d ed. p. 758.

Defendant was either a common carrier or a bailee for hire, or under a statutory obligation to carry safely; and, in any case, the measure of the responsibility and liability of the defendant is the same, where the loss occurred through the negligence of defendant.

Sawyer v. *Corse*, 17 Gratt. 245, 99 Am. Dec. 445; *Wilson* v. *Peverly*, 2 N. H. 548, 1 Am. Lead. Cas. (Hare & W.) 661; *Central R. & Bky. Co.* v. *Lampley*, 76 Ala. 357, 52 Am. Rep. 334.

Independent contractors with the government are not the agents of the government so as to exempt them from the operations of the rule of *respondeat superior*.

Shearm. & Redf. Neg. 4th ed. § 325, p. 550; *Sawyer* v. *Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Central R. & Bky. Co.* v. *Lampley*, 76 Ala. 357, 52 Am. Rep. 334.

Upon payment of a loss by an insurer, he at once becomes subrogated to all the rights of the insured, against one whose negligence or wrong doing has injured or destroyed the property, without any formal assignment or transfer of the cause of action.

24 Am. & Eng. Enc. Law, pp. 306, 308; 2 May, Ins. 4th ed. § 454, pp. 1051, 1052; *Chicago & A. R. Co.* v. *Glenny*, 175 Ill. 238, 51 N. E. 896; *Chickasaw County Farmers' Mut. F. Ins. Co.* v. *Weller*, 98 Iowa, 734, 68 N. W. 443; *Hartford F. Ins. Co.* v. *Wabash R. Co.* 74 Mo. App. 106; *Lumbermen's Mut. Ins. Co.* v. *Kansas City, Ft. S. & M. R. Co.* 149 Mo. 165, 50 S. W. 281; *Sims* v. *Mutual F. Ins. Co.* 101 Wis. 586, 77 N. W. 910; *United States* v. *American Tobacco Co.* 166 U. S. 472, 41 L. ed. 1083, 17 Sup. Ct. Rep. 619; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 462, 32 L. ed. 788, 799, 59 L. R. A. 9 Sup. Ct. Rep. 469; *Hall* v. *Nashville & C. R. Co.* 13 Wall. 367, 20 L. ed. 594; *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.* 36 C. C. A. 135, 94 Fed. 191; *The Potomac*, 105 U. S. 634, *sub nom. The Potomac* v. *Cannon*, 26 L. ed. 1195.

A contractor for carrying the mail, or carrier of mail, is liable to the owner of mail lost or destroyed through the negligence of such contractor or carrier.

Teal v. *Felton*, 12 How. 284, 13 L. ed. 990; *Dunlop* v. *Munroe*, 7 Cranch, 264, 3 L. ed. 337; *Raisler* v. *Oliver*, 97 Ala. 710, 12 So. 238; *Keenan* v. *Southworth*, 110 Mass. 474, 14 Am. Rep. 613; *Coleman* v. *Frazier*, 4 Rich. L. 146, 53 Am. Dec. 727; *Bolan* v. *Williamson*, 2 Bay, 551; *Wiggins* v. *Hathaway*, 6 Barb. 632; *Maxwell* v. *M'Ilvoy*, 2 Bibb, 211.

No contractual relation is necessary in order to raise a legal obligation in one person to take care for the safety of another.

1 Thomp. Neg. §§ 4–6; *Price* v. *Pennsylvania R. Co.* 113 U. S. 218, 28 L. ed. 980, 5 Sup. Ct. Rep. 427; *Missouri* v. *Andriano*, 138 U. S. 497, 34 L. ed. 1013, 11 Sup. Ct. Rep. 385.

First, as to the principal: To make the principal liable for the acts of all his agents and employees when working for his benefit, within the scope of their employment, whether such agents and employees are employed and directed by himself personally or by an intermediate agent appointed by himself, because all that is done by all of these agents is, in contemplation of law, done by the principal, which is expressed by the legal maxim, "*Qui facit per alium facit per se.*"

Second, as to an intermediate agent: To exempt or relieve an intermediate agent from liability for the acts or omissions of a subordinate agent, employed by him or acting under his direction, where the employment of the subordinate was authorized by the principal, because all were acting for the benefit of, and in privity with, one common principal, and the intermediate agent was only the representative of the principal.

Government contractors are subject to liability for the default, misfeasance, or negligence of their employees, under the rule of *respondeat superior*.

Harrison v. *Hughes*, 110 Fed. 545; *Robinson* v. *Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713.

Messrs. **Carroll Wright and John I. Dille,** for appellee:

The government determines that a land-grant company shall carry the mail, and the pay to be received therefor, by virtue of a previous contract giving that right.

Jacksonville, P. & M. R. Co. v. *United States*, 118 U. S. 626, 30 L. ed. 273, 7 Sup. Ct. Rep. 48; *United States* v. *Alabama G. S. R. Co.* 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; *United States* v. *Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038.

As to all other railroads, no authority is vested in the government to require the service without pay, or to fix the amount of

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pay. Contract involves consent, and without consent there can be no contract.

Minneapolis & St. L. R. Co. v. *United States*, 24 Ct. Cl. 350; *Eastern R. Co.* v. *United States*, 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320.

The defendant's duty, whatever that may be, arising out of the contract, and the plaintiff's cause of action, if he has one, arising from such contract, it is incumbent on the plaintiff to plead the contract, and the breach thereof resulting in his injury and damage.

Texas & P. R. Co. v. *United States*, 28 Ct. Cl. 379.

This contract is between the government and the defendant. A contract can only be enforced by a party thereto, or his privy.

Electric Appliance Co. v. *United States Fidelity & G. Co.* 110 Wis. 434, 53 L. R. A. 609, 85 N. W. 648; *Vrooman* v. *Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Ferris* v. *Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Burton* v. *Larkin*, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; *Parker* v. *Jeffery*, 26 Or. 186, 37 Pac. 712; *Thomas Mfg. Co.* v. *Prather*, 65 Ark. 27, 44 S. W. 218; *Anderson* v. *Fitzgerald*, 21 Fed. 297; *Austin* v. *Seligman*, 21 Blatchf. 506, 18 Fed. 519; *Montgomery* v. *Rief*, 15 Utah, 495, 50 Pac. 623; *Wright* v. *Terry*, 23 Fla. 160, 2 So. 6; *Jefferson* v. *Asch*, 53 Minn. 446, 25 L. R. A. 257, 55 N. W. 604; *German State Bank* v. *Northwestern Water & Light Co.* 104 Iowa, 717, 74 N. W. 685; *Davis* v. *Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Becker* v. *Keokuk Waterworks*, 79 Iowa, 419, 44 N. W. 694; *Houesmon* v. *Trenton Water Co.* 119 Mo. 304, 23 L. R. A. 146, 24 S. W. 784; *Mott* v. *Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L. R. A. 375, 28 Pac. 989; *Fowler* v. *Athens City Waterworks Co.* 83 Ga. 219, 9 S. E. 673; *Fitch* v. *Seymour Water Co.* 139 Ind. 214, 37 N. E. 982; *Eaton* v. *Fairbury Waterworks Co.* 37 Neb. 546, 21 L. R. A. 653, 56 N. W. 201; *Nickerson* v. *Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Hayes* v. *Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Boston Safe-Deposit & T. Co.* v. *Salem Water Co.* 94 Fed. 238; *German State Bank* v. *Minneapolis, St. P. & S. Ste. M. R. Co.* 113 Fed. 414.

Deemer, J., delivered the opinion of the court:

Defendant, a corporation organized under the laws of this state for the purpose of operating a railway, was in March of the year 1899 maintaining a line of road in the state of Kansas, and was carrying the United States mail in its passenger trains operated over said road, pursuant to the following notice:

Post-Office Department.
Office of the Second Assistant Postmaster General.
General Railway Adjustment Division.
Washington, D. C., Sept. 30, 1898.

Sir:—

The compensation for the transportation of mails, [etc.], on route No. 155, 075, between Saint Joseph, Mo., and Liberal, Kan., has been fixed from July 1st, 1898, to June 30th, 1902, under acts of March 3, 1873, July 12, 1876, and June 17th, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing April 5, 1898, at the rate of, [etc.]; . . . and pay is also allowed for the use of R. P. O. cars from July 1, 1898, at the rate of, [etc.] . . . This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

Very respectfully,
W. S. Shallenberger,
2d Asst. P. M. General.

Mr. W. G. Purdy, V. Pres. Chicago, Rock Island, & Pacific Railway Co., Chicago, Ill.

On the 16th day of March, 1899, the National Bank of Kansas City, Missouri, caused a package containing $2,000 in currency to be registered by and delivered to the postoffice authorities in Kansas City, Missouri, for transmission in the United States mails to the Kinsley Bank, of Kinsley, Kansas. This package was delivered in due course to the United States mail car operated by defendant company, and taken in charge by the mail clerks in said car for carriage to its destination. On the 17th day of March, the train, of which this mail car was a part, was wrecked at Volland, in the state of Kansas, through the negligence of defendant's employees in the construction and operation of a switch in its yards at said town, and in running the train of which the mail car was a part at too high a rate of speed. The Kinsley Bank was insured against loss of this character by the Bankers' Mutual Casualty Company, and the plaintiff reinsured the risk assumed by the casualty company. Plaintiff paid the loss to the casualty company, and the casualty company reimbursed the Kinsley Bank for the amount of its loss. The policy of insurance issued by the casualty company contained this stipulation: "In all cases of loss, when it shall be claimed by the Bankers' Mutual Casualty Company that the carrier or other party in whose custody the property may be at the time of such loss is or may be liable, then the assured shall, at the request of this company or its agents, assign and subrogate all their rights and claims to this company, to an amount not exceeding the sum paid by said company." And in the policy issued by the plaintiff, we find this provision: "It is the intent of this insurance to fully indemnify the reassured for any and all losses and damages caused by the perils insured against, but in case of loss it shall be lawful and necessary for the reassured to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the property hereby assured, without prejudice to this insurance; and upon the payment of any loss under this policy, the assured or their assigns, in consideration thereof, agree to convey to the said Boston Marine Insurance Co. the unencumbered title in the property lost, as absolute owner thereof, and to

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render all assistance in the recovery, reissue, or replacement of said property, where possible." After plaintiff had paid the loss, it received the following instruments of assignment:

To all persons coming into possession of a certain package of currency, or any part thereof, shipped by the National Bank of Commerce, of the town of Kansas City, Mo., unto Kinsley Bank, in town of Kinsley, state of Kansas, by registered mail, on March 16, 1899: You will deliver same to the Bankers' Mutual Casualty Co., or their order, on presentation hereof. Kinsley Bank,
by F. B. Hine, Cashier.

Deliver the above package to the Boston Investment Co.
Bankers' Mutual Casualty Co.,
by A. U. Quint, Treasurer.

State of Kansas, } ss:
County of Edwards. }

Know all men by these presents, that we, Kinsley Bank, hereby assign, transfer, and set over unto the Bankers' Mutual Casualty Co., or their order, all our right, title, and interest in any and all of the money contained in the package shipped by registered mail on the 16th day of March, 1899, by the National Bank of Commerce, of the town of Kansas City, Mo., unto the Kinsley Bank, town of Kinsley, state of Kansas, and hereby authorize the Bankers' Mutual Casualty Co., or their assigns, to maintain action in their own name to recover any or all of said money, with the same rights and powers as we ourselves could do it.

Kinsley Bank,
by F. B. Hine, Cashier.

The action is to recover the amount of the loss from the railway company, on the theory that it was under a duty to the Kinsley Bank to safely carry all proper mailable material properly addressed to it, and that plaintiff is either the assignee of the Kinsley Bank, or, having paid the loss, is entitled to be subrogated to the rights of that bank against the railway company. This duty is said to arise both by statute and by contract between the United States government and the defendant company. We must assume, for the purposes of the case, that defendant's employees were negligent, both in the operation of the train, and in the operation of the switch; but something more is necessary to create liability. Actionable negligence consists, not only in some careless or reckless act of commission or omission, but there must also be found a breach of duty, created or imposed by law, owing to the party injured, from him who was guilty of the negligent act. This duty may be general and owing to everybody, or it may be particular and owing to a single individual only, by reason of his peculiar position; and in every instance the complaining party must point out how the duty arose which is charged to have been neglected. Cooley, Torts, 2d ed. pp. 791–793. The defendant, as a common carrier of freight and passengers, was under a general duty to everyone whom it undertook to serve in either capacity. It might also assume particular duties to single individuals by reason of contract relations; and the first question which arises in the case is, Was it under any duty, either general or particular, to the Kinsley Bank? And if so, what was the nature of that duty?

Under authority conferred by the Constitution to establish postoffices and post roads (U. S. Const. art. 1, § 8, ¶ 7), the general government has undertaken the business of transmitting, distributing, and delivering all mail matter. It has a monopoly on this business, which it enforces by appropriate penalties. The postoffice department is a branch of the government, and all mail matter is carried by it. With reference to railways, we find the following material provisions in the Revised Statutes of the United States:

"Sec. 3999 (U. S. Comp. Stat. 1901, p. 2718). If the postmaster general is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation, he may separate the letter mail from the other mail, and contract, either with or without advertising, for carrying such letter mail, by horse express or otherwise, at the greatest speed that can reasonably be obtained, and for carrying the other mail in wagons or otherwise at a slower rate of speed.

"Sec. 4000 (U. S. Comp. Stat. 1901, p. 2719). Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.

"Sec. 4001 (U. S. Comp. Stat. 1901, p. 2719). All railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mail at such prices as Congress may by law provide; and until such price is fixed by law, the postmaster general may fix the rate of compensation.

"Sec. 4002 (U. S. Comp. Stat. 1901, p. 2719). The postmaster general is authorized and directed to readjust the compensation hereafter to be paid, for the transportation of mails on railroad routes, upon the conditions and at the rates hereinafter mentioned: First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails. Second. That the pay per mile per annum shall not exceed the following rates, *viz.*: . . ."

In addition to this, Congress in the year 1879 passed an act which provided that the postmaster general should in all cases decide upon which train and in what manner mails should be conveyed. 1 U. S. Rev. Stat. Supp. pp. 245, 250. The Revised Statutes also provide, in substance, that all railroads

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or parts of railroads which are now or may hereafter be in operation are post roads, and that the postmaster general shall provide for the carrying of the mails on all roads established by law as often as he, having due regard to productiveness and other circumstances, may think proper. U. S. Rev. Stat. §§ 3964, 3965 (U. S. Comp. Stat. 1901, pp. 2707, 2708).

Plaintiff contends that these statutes impose on all railways the duty of carrying United States mail, while defendant argues that two classes of railroads are recognized: First, "land-grant roads," and, second, roads which did not receive aid in that form; and that, as to the first, there is an absolute duty resting upon them to carry the mails, and, as to the second, the matter is simply one of contract, there being no duty resting upon them in the absence of agreement. The authorities, in a measure, at least, seem to support appellee's contention. *Eastern R. Co.* v. *United States*, 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320; *Minneapolis & St. L. R. Co.* v. *United States*, 24 Ct. Cl. 350; *United States* v. *Alabama G. S. R. Co.* 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; *United States* v. *Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038. But, however this may be,—and we make no definite pronouncement on the point,—the conclusion reached does not determine the nature of defendant's duty. The whole matter, in either event, seems to be relegated, under certain limitations, to the postmaster general; and he acts for and on behalf of the general government. The duty, then, whether created by statute or arising out of contract, is to the government; and railroad companies, in carrying the mails, are agents of the government, in the exercise of a public function. Neither the sender nor the addressee of mail matter has any contract with the railway company; nor does the one deliver to, nor the other receive such matter from, the railway company. The railway company does not carry for individuals, nor receive any compensation from them. Letters and packages are inclosed in government mail bags, secured by locks provided by the government, taken in charge by agents of the government, delivered by these to other agents of the government in cars of such character as the general government requires, handled by government agents within these cars, and by them delivered to other agents of the government for transmission or delivery to the addressees. Mailable matter is at all times in charge of government appointees or contractors. Railroads, as carriers of the mail, have no knowledge of the contents of the mail sacks, and no authority or right to control these sacks, except to obey the instructions of the postoffice department. In so far as they handle the mail, they are simply instrumentalities of the government for the performance of a public function, and are neither common nor private carriers for the government or the individual. There is no contract between the carrier and the individual, and no duty owing from the one to the other, except as that other is an integral part of the whole people. There is no privity whatever between the individual and the railway company in the carriage of mail, and, as the railway has no control thereof, and cannot direct as to how it shall be handled, while on the train, it would be most unjust to hold it responsible to the individual addressee. Manifestly, the railway is neither a common, nor a private, carrier for the individual. It neither receives nor undertakes to deliver any of the letters or packages carried over its line. They are received by the government or its agents, which undertakes to deliver them at their destination. The railway company is not, as we understand it, a bailee of the matter carried by it; that is, a bailee in the ordinary sense. Neither the sender of the letter nor the government delivers mail to the railway company. It is at all times in charge of officers and agents of the government. The railway company simply has charge of the car in which the mails are carried, and its responsibility with respect thereto is to the general government. *Muster* v. *Chicago, M. & St. P. R. Co.* 61 Wis. 325, 50 Am. Rep. 141, 21 N. W. 223. Nor do we think the relation of master and servant exists between the sender or addressee of mail matter and the railway company. To the existence of this relation it is necessary that the master (the individual) have complete control of the servant (the railway company); that is, that he have the right to say, not only what shall be done, but how it should be accomplished. These elements are not present in the case now before us.

Defendant's liability, then, must be predicated upon contract, or arise out of a duty created by statute. The contract in this case was made by the general government for the benefit of the public, and mediately for individuals, and not distributively for individuals and indirectly for the public. The Kinsley Bank was a stranger to this contract, and it was not made for its benefit. True, it had an indirect interest in the performance of the contract, as had all who had occasion to use the mails being carried over defendant's line of road; but this interest was not sufficient to constitute a privity, which must exist, either directly or by substitution, in order to give it a right of action upon the contract. *Parker* v. *Jeffery*, 26 Or. 186, 37 Pac. 712; *German State Bank* v. *Northwestern Water & Light Co.* 104 Iowa, 717, 74 N. W. 685; *Davis* v. *Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Becker* v. *Keokuk Waterworks*, 79 Iowa, 419, 44 N. W. 694. It is clear, we think, there can be no action against the defendant founded upon contract.

We are also constrained to hold, as heretofore indicated, that defendant, in carrying the mails, is neither a private, nor a common, carrier. It owed no duty to the sender or to the addressee of mail matter. The law had made it an instrumentality of government for the performance of acts in execution of functions assumed and controlled by it. It received its compensation from the government, and, at most, is a pub-

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lic agent or agency, discharging public duties. What is the liability of such an officer or agent? If it owes no duty to the individual, it incurs no liability to him, even though the individual may have been injured by its action or nonaction. And the mere fact that an individual has sustained injury by reason of the act of a public officer is not enough to create a right of action in that individual. *Moss* v. *Cummings*, 44 Mich. 359, 6 N. W. 843; *Butler* v. *Kent*, 19 Johns. 223, 10 Am. Dec. 219; *State ex rel. Travellers' Ins. Co.* v. *Harris*, 89 Ind. 363, 46 Am. Rep. 169. To sustain a right of action by a private individual as against a public officer, it must not only appear that the duty violated was one owing to individuals, but the individual must show some reason why he singles himself out as the party injured. *Moss* v. *Cummings*, 44 Mich. 359, 6 N. W. 843. Governmental duties in the exercise of constitutional powers are owing to the public; and, as a general rule, no public officer or agency charged with the exercise of governmental functions, such as are involved in this case, can be called upon to answer in a private action for the manner in which that authority has been exercised. But in some cases, if the duty is purely ministerial, and is one in which individuals have a special interest, they may be liable for neglect or default in the performance of such duty. Even where this exception prevails it must be shown that the party sought to be charged was himself guilty of some neglect of duty to the individual, and he cannot be charged with the negligence or default of his agent necessarily employed in the work. *Mersey Docks & Harbour Board* v. *Gibbs*, 11 H. L. Cas. 686; *Walsh* v. *New York & B. Bridge*, 96 N. Y. 427. In other words, the maxim, *Respondeat superior*, does not obtain. A public officer or agent who has exercised ordinary care in the selection of competent subordinates is not responsible for the misfeasance or positive wrongs, or for the nonfeasance or negligence, of these subordinates properly employed by or under him in the discharge of his official duties. *Robertson* v. *Sichel*, 127 U. S. 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286. To charge a public officer for the negligent performance of a ministerial duty, it must appear, not only that the individual has a distinct and direct interest in its performance, but also a legal right to require its performance. Hence, when the duty is one owing solely to the public, although the individual may have a mediate interest therein, no liability is incurred to the individual, however much he may be injured. *Eslava* v. *Jones*, 83 Ala. 139, 3 So. 317. This rule, also, has some exceptions, which find place under the maxim, *Sic utere tuo*, etc. But none of these exceptions apply to this case.

These rules and exceptions will harmonize and fully explain most, if not all, of the cases cited by counsel. Thus a postmaster or clerk who personally receives a letter from an individual owes that individual a duty, and is liable for its nonperformance, or for his negligent acts in connection therewith. This is because he becomes, in a sense, a bailee for the time being of the person from whom he receives it. And the same rule obtains when the postmaster, clerk, or carrier receives a letter or package for delivery to a private individual. See *Christy* v. *Smith*, 23 Vt. 663; *Ford* v. *Parker*, 4 Ohio St. 576; *Coleman* v. *Frazier*, 4 Rich. L. 146, 53 Am. Dec. 727; *Maxwell* v. *M'Ilvoy*, 2 Bibb, 211; *Fitzgerald* v. *Burrill*, 106 Mass. 446; *Raisler* v. *Oliver*, 97 Ala. 710, 12 So. 238; *Sawyer* v. *Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Central R. & Bkg. Co.* v. *Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Joslyn* v. *King*, 27 Neb. 38, 4 L. R. A. 457, 42 N. W. 756. A railway mail or postal clerk is also held to be a passenger while riding on trains, and entitled to protection as such. This is because he is rightfully on the train, and personally entitled to all the rights of a passenger. *Philadelphia & R. R. Co.* v. *Derby*, 14 How. 486, 14 L. ed. 509; *Seybolt* v. *New York, L. E. & W. R. Co.* 95 N. Y. 563, 47 Am. Rep. 75; *Magoffin* v. *Missouri P. R. Co.* 102 Mo. 540, 15 S. W. 76; *Mellor* v. *Missouri P. R. Co.* 105 Mo. 455, 10 L. R. A. 36, 16 S. W. 849; *Houston & T. C. R. Co.* v. *Hampton*, 64 Tex. 427; *Gulf, C. & S. F. R. Co.* v. *Wilson*, 79 Tex. 371, 11 L. R. A. 486, 15 S. W. 280; *Cleveland, C. C. & St. L. R. Co.* v. *Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; *Baltimore & O. R. Co.* v. *State use of Wiley*, 72 Md. 36, 6 L. R. A. 706, 18 Atl. 1107; *Lawton* v. *Waite*, 103 Wis. 244, *sub nom.* *Lawton* v. *Chilton*, 45 L. R. A. 616, 79 N. W. 321. But see, in this connection, *Price* v. *Pennsylvania R. Co.* 113 U. S. 218, 28 L. ed. 980, 5 Sup. Ct. Rep. 427.

If, then, the doctrine of *respondeat superior* does not apply,— and we think it does not,—defendant, if responsible at all, is liable only for its own personal negligence. That is to say, it must be shown that the corporation itself did or neglected to do some act which was required of it in the exercise of ordinary care. If the defendant were an individual, instead of a corporation, the case would not be difficult of solution; but as it is a corporation, and can act only through agents, there is always some difficulty in determining whether or not the act complained of was its act, or the act of a mere subordinate. If it used ordinary care to supply suitable cars and a sufficient number of competent employees for the work, it fulfilled its duty, and it is not liable for the negligence of subordinate employees to whom it must of necessity delegate its work. Now, the negligence charged is not a failure to perform any of these duties, but the neglect and default of its employees charged with the operation of trains and care of switches. The work required of these subordinates could all be properly delegated, and none of these employees were vice principals. They were not, in the work they were performing, the *alter ego* of the defendant. Even if the rules contended for by appellant are to be applied, we do not think a cause of action is stated.

Our conclusions find some support in *Con-*

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well v. *Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Hutchins* v. *Brackett*, 22 N. H. 252, 53 Am. Dec. 248. The only case directly in point is *German State Bank* v. *Minneapolis, St. P. & S. Ste. M. R. Co.* 113 Fed. 414, which we understand has recently been affirmed by the United States circuit court of appeals for this circuit. That case is in line with our holding, and we approve of the reasoning therein.

These conclusions render it unnecessary that we consider the other points made by appellee regarding plaintiff's right to recover.

The ruling on the demurrer was right, and *the judgment is affirmed.*

WASHINGTON SUPREME COURT.

Mona Gertrude LOUGH, by Guardian *ad Litem, Appt.*,
v.
JOHN DAVIS & COMPANY *et al., Respts.*

(.....Wash.....)

1. **That a case has not been disposed of as to one defendant** who has never been served with notice or appeared in the action will not prevent an appeal from a judgment entered in favor of a codefendant.
2. **An agent having charge of buildings** to be leased for his principal, with authority to make necessary repairs, is liable for injuries to tenants caused by his failure to make them.

(October 9, 1902.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Frederick R. Burch** and **Robert H. Lindsay**, for appellant:

Liability on the part of the agent to third parties arises in acts of misfeasance or malfeasance on the part of the agent.

8 Case & Comment, p. 159; *Ellis* v. *McNaughton*, 76 Mich. 237, 42 N. W. 1113; *Osborne* v. *Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Baird* v. *Shipman*, 132 Ill. 16, 7 L. R. A. 128, 23 N. E. 384; *Lottman* v. *Barnett*, 62 Mo. 159; *Harriman* v. *Stowe*, 57 Mo. 93; *Bell* v. *Josselyn*, 3 Gray, 309, 63 Am. Dec. 741; *Campbell* v. *Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; *Horner* v. *Lawrence*, 37 N. J. L. 46; 1 Am. & Eng. Enc. Law, 1st ed. p. 407, note 2, 2d ed. pp. 1132–1135, note 1, p. 1134; 1 Parsons, Contr. 6th ed. p. 490; *Alcalda* v. *Morales*, 3 Nev. 132; *Miliani* v. *Tognini*, 19 Nev. 133, 7 Pac. 279; 7 Am. & Eng. Enc. Law, pp. 104 *et seq.*; Wharton, Neg. § 440.

The landlord was bound to repair and keep in repair.

Watkins v. *Goodall*, 138 Mass. 533; *Looney* v. *McLean*, 129 Mass. 33, 37 Am. Rep. 295.

Mr. **Charles F. Munday**, for respondents:

The judgment appealed from is not a final judgment.

Freeman, Judgm. 3d ed. § 28; 1 Black, Judgm. § 23; 13 Am. & Eng. Enc. Law, 2d ed. pp. 26, 38, 39; 2 Enc. Pl. & Pr. pp. 61, 103, 104, notes 3, 4; *Hohorst* v. *Hamburg-American Packet Co.* 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Liliensterne* v. *Lewis* (Tex.) 12 S. W. 750; *Thompson* v. *Follansbee*, 55 Ill. 427.

No action can be maintained by third persons against the agent to recover damages for any injury which they may have sustained by reason of the nonperformance or neglect of a duty which the agent owes to his principal.

Mechem, Agency, § 539; 1 Am. & Eng. Enc. Law, 2d ed. p. 1131; *Colvin* v. *Holbrook*, 2 N. Y. 126; *Carey* v. *Rochereau*, 16 Fed. 87; Black, Law Dict. 779; Rapalje & Lawrence, Law Dict. 783, 877.

No attempt is made to charge any misfeasance, but merely a nonfeasance.

An agent having charge of a building, and owing to his principal the duty to keep it in repair, is not liable to a stranger who receives an injury on account of the agent's neglect to repair.

Mechem, Agency, § 570; *Delaney* v. *Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Labadie* v. *Hawley*, 61 Tex. 177, 48 Am. Rep. 278; *Van Antwerp* v. *Linton*, 89 Hun, 417, 35 N. Y. Supp. 318, Affirmed in 157 N. Y. 716, 53 N. E. 1133; *Feltus* v. *Swan*, 62 Miss. 415.

Dunbar, J., delivered the opinion of the court:

This is an action against an agent, who was authorized to rent and repair the tenement house described in the complaint, for permitting the house to become unsafe for want of repairs, from which cause the plaintiff was injured. Paragraph 2 of the complaint is as follows: "That at all said times, and for a long time before, the above-named defendant, Sheldon R. Webb, has been and still is the owner of that certain real property known as lots 8 and 9, in block 38, of A. A. Denny's addition to the city of Seattle, and of the buildings thereon situated, and that the above-named defendant John Davis & Co. has had, and still has, sole and absolute control and management of said real property as the servant and agent of said Sheldon R.

NOTE.—As to liability of agent to third person for his own negligence or nonfeasance, see *note* to Mayer v. Thompson-Hutchison Bldg. Co. (Ala.) 28 L. R. A. 433.

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Webb, with full power, authority, and direction from their said principal to rent and repair the same, and to keep the same in repair and safe condition for tenants." The other pertinent allegations are to the effect that a wide veranda, extending along two sides of the building about 15 feet from the ground, was used in common by all of the tenants, and was inclosed by a railing; that the railing was allowed to become old, rotten, and unsafe through the negligence of the defendants, and that, while the plaintiff was playing on said veranda, by reason of the unsafe condition, the railing gave way, and she fell from said veranda from a height of 15 feet and more from the ground, and was injured, etc. To this complaint the defendant John Davis & Co. interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action against it, the demurring defendant. There was no appearance by Sheldon R. Webb. The demurrer was sustained, and, the plaintiff electing to stand on her complaint, judgment was entered on the demurrer. From such judgment sustaining the demurrer this appeal was taken.

The respondent has interposed a motion to dismiss the appeal for the reasons: (1) That the judgment appealed from is not a final judgment; (2) because no final judgment has been entered in this action; (3) because this court has no jurisdiction to hear and determine this action upon the attempted appeal herein. The idea embraced in all these assignments is that the judgment is not final, because there has been no disposition of the case so far as one of the defendants, Sheldon R. Webb, is concerned. Many authorities are cited, but we will notice only those from this court. *Freeman* v. *Ambrose*, 12 Wash. 1, 40 Pac. 381, simply decided that an order setting aside a default and vacating judgment thereon was not appealable. *Nelson* v. *Denny*, 20 Wash. 327, 67 Pac. 78, is simply an affirmance of the doctrine announced in that case. In *Johnson* v. *Lighthouse*, 8 Wash. 32, 35 Pac. 403, the appeal was dismissed because the Pacific Loan & Trust Investment Company was not served with notice of appeal; but in that case the said company had appeared in the action and filed a demurrer to the complaint. *Fairfield* v. *Binnian*, 13 Wash. 1, 42 Pac. 632, was a case where a notice of appeal had not been given to a party who had appeared in the court below by intervention, and it was held that he was as much a party in interest as the parties who originally appeared in the action, and was entitled to a notice of appeal from any judgment upon issues raised by the original parties. These cases hardly seem to us to be in point on the questions involved here. In this case Sheldon R. Webb never had become a party to the action, never had appeared in the action nor been served with notice, and the case falls squarely within *Keef* v. *Tibbals*, 18 Wash. 656, 52 Pac. 227, where it was held that, where a complaint has been filed against several defendants, and before service has been obtained against all of them the complaint has been stricken on motion of those served, an appeal lies from such order striking the complaint, although there has been no dismissal or other action taken with reference to the defendants not served. The motion to dismiss will be denied.

It is the contention of the respondent that the law is well settled that for a misfeasance the agent is personally liable, but that he is never liable for a mere nonfeasance; and that, the respondent being charged only with a nonfeasance or neglect to do its duty, and not with any misfeasance or act which it ought not to do, the complaint on its face shows that it is not liable, and that the demurrer was therefore properly sustained. This rule is announced by some of the law writers and many of the courts. One of the leading cases sustaining this doctrine is *Delaney* v. *Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456, where it was held that, under the doctrine of both the common and civil law, agents are not liable to third persons for nonfeasance or mere omissions of duty, being responsible to such parties only for the actual commission of those positive wrongs for which they would be otherwise accountable in their individual capacity under obligations common to all men. In this case a balcony which needed repairs fell, fatally injuring the plaintiff; and, while the agent was not responsible for the injured party's being in the house at that particular time,—he having obtained entrance by means of a key obtained from someone else,—the case is discussed and the judgment based upon the doctrine above announced. This is also the established doctrine in New York. The case of *Carey* v. *Rochereau*, 16 Fed. 87, is a Louisiana case, and bases its decision on *Delaney* v. *Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456, without discussion. *Labadie* v. *Hawley*, 61 Tex. 177, 48 Am. Rep. 278, held, in accordance with the same rule, that an agent renting his principal's house with authority to construct a cooking range was not liable for injury to an adjoining proprietor, caused by the use of the range: citing Story, Agency, 309, and other authorities. In *Feltus* v. *Swan*, 62 Miss. 415, it was held that an agent in charge of a plantation was not liable to the owner of an adjoining plantation for damage resulting from the malicious neglect and refusal of the agent to keep open a drain which it was his duty as such agent to keep open. The announcement of this doctrine is accredited by many of the courts indorsing it to the opinion in *Lane* v. *Cotton*, 12 Mod. 472, but it was, as a matter of fact, announced only incidentally in that case in a dissenting opinion. The question of the responsibility of the agent could not have been before that court, for the action was against a postmaster for the loss of a letter which was taken from the mail by a clerk, and it was only the responsibility of the master, and not that of the servant or agent, which was under discussion. The reason assigned to sustain this rule is that the responsibil-

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ity must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation to their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility; there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a nonperformance of duty, then the responsibility would not attach. If it does involve a nonperformance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates, first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages.

But the honorable judge who wrote the opinion in *Delaney* v. *Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456, was mistaken in his announcement that the civil law indorsed the distinction upon which his decision was based, for, while the doctrine is stated in the Justinian Code that no man could usually be made liable for a mere omission to act, it was otherwise when the omission to act involved a negligence of duty. Domat argues that, as an agent is at liberty not to accept the order and power which are given him, so he is bound, if he does accept the order, to execute it; and, if he fail to do so, he will be liable for the damages which he shall have occasioned by his not acting. Under the Aquilian law the distinction between omission and commission was not recognized under such circumstances. In the ninth Digest of the Aquilian law the following instance is given: One servant lights a fire, and leaves it to another. The latter neglects to check the fire at the proper time and place, and a villa is burned. The first servant was charged with no negligence, because it was his duty to light the fire, and it is argued, very sensibly, that, if the second could not be charged because not putting out the fire was simply an omission of duty, there would be a miscarriage of justice. Is the keeper of a drawbridge, whose duty it is to close the draw after a ship passes through, and who negligently fails to perform that duty, allowing a car loaded with passengers to be hurled into the river below, to escape responsibility to the injured, while the man who attempts to operate it, but, in so attempting, operates it negligently and unskilfully, is held responsible? Instances in the ordinary transactions of life might be multiplied almost without end, the very statement of which shows conclusively the fallacy of the rule.

The attempt by the courts to maintain this indistinguishable distinction has led to many inconsistent decisions. Thus, in *Albro* v. *Jaquith*, 4 Gray, 99, 64 Am. Dec. 56, the plaintiff was not allowed to recover of the superintendent of a canal company for damages caused by negligence in the management of the apparatus used for the purpose of generating, containing, and burning inflammable gas; the superintendent being the agent of the company, and being charged with carelessly, negligently, and unskilfully managing the business. It was held that he was not charged with any direct act of misfeasance, but only with nonfeasance, and that there was no redress, because, as the court said, the obligation to be faithful and diligent was founded in an express contract with his principal. As we have before indicated, this would be equally true of the acts of commission or misfeasance in his stewardship. But in *Bell* v. *Josselyn*, 3 Gray, 309, 63 Am. Dec. 741,—also a Massachusetts case, and decided the same year,—it was held that an agent who negligently directed water to be admitted to a water pipe was liable to a third person, because such action was misfeasance. In that case it was not claimed that the admission of water to the pipe was negligent or wrongful; but the negligent act or omission was in allowing the pipe to become obstructed,—certainly as pure an omission or nonfeasance as could be conceived of. But the court, in order to maintain the distinction which it deemed itself bound by precedent to do, virtually obliterated the distinction by the following circuitous reasoning: "The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts

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are, the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly, from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance." Much more cogent and judicial is the reasoning of the same court many years after in *Osborne* v. *Morgan*, 130 Mass. 102, 39 Am. Rep. 437, where an agent of premises was held responsible to a third person for suffering to remain suspended from a room a tackle block, which fell upon and injured the plaintiff. The court, speaking through Chief Justice Gray, said: "The principal reason assigned was that no misfeasance or positive act of wrong was charged, and that for nonfeasance,—which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer,—an agent or servant was responsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that, if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly." There is still another class of cases which hold what seems to us to be the correct doctrine, *viz.*, that the obligation, whether for misfeasance or nonfeasance, does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal or in the operation of the property of another as agent. One of the leading cases maintaining this view is *Baird* v. *Shipman*, 132 Ill. 16, 7 L. R. A. 128, 23 N. E. 384. There it was held that an agent who has complete control of a house belonging to an absent principal, and who lets the house in a dangerous condition, promising to repair it, is responsible to the third person injured by an accident caused by want of such repair. There is nothing to distinguish this case from the case at bar excepting the promise to repair, and that does not seem to have been deemed by the court an important feature; but the case was decided upon the broad principle above announced. Said the court: "It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. . . . 'If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts,'"—citing approvingly *Osborne* v. *Morgan*, 130 Mass. 102, 39 Am. Rep. 437. To the same effect is *Mayer* v. *Thompson-Hutchison Bldg. Co.* 104 Ala. 611, 28 L. R. A. 433, 16 So. 620. The court there, after noticing the doctrine that the agent can be held liable to third persons for misfeasance only, says: "It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason why a person who, while acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury." In that case *Baird* v. *Shipman*, 132 Ill. 16, 7 L. R. A. 128, 23 N. E. 384, is cited approvingly, with the remark that the rule laid down in that case is the better rule. So, in *Ellis* v. *McNaughton*, 76 Mich. 237, 42 N. W. 1113, it was held that an agent who had entire control of premises was liable for injuries resulting from the removal of a walk on the premises by one of his employees, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises, and allowed them to remain in that condition. It would seem that, if there is anything in definitions, this was a pure nonfeasance, and yet the court, in trying to harmonize the distinction with the general rule announced and above discussed, said, speaking of the agent's duty in relation to the work: "Every day it was so permitted to remain, when the defendant had the entire control of it, and the authority, without question, to replace it, was a wrong and a misfeasance." It is also said that, irrespective of his principal, the agent was bound while doing the work to so use the premises, including the sidewalk, as not to injure others. Misfeasance, said the court, may involve the omission to do something which ought to be done,—as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances, as when he does not exercise that degree of care which due regard for the rights of others requires. To the same effect, *Campbell* v. *Portland Sugar Co.* 62 Me. 552, 16

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Am. Rep. 503. In *Lottman* v. *Barnett*, 62 Mo. 159, it was held that one having the general charge and superintendence of the construction of a building was responsible for the killing of a workman caused by the falling of a wall, which resulted from the giving way of supports on which the wall rested under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person, employed by the owner of the building and while the architect was absent, where it appeared that the manager of the jack screw was employed under the advice of the architect, and subject to his discretion, and that he knew and approved of the method adopted for effecting the raising. Whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, it was held that in either case the disaster was attributable to positive misfeasance for negligence in a work which the architect had undertaken, but in which he failed to exhibit the care and skill which the law imposed upon him. To make this distinction more shadowy, if possible, Mr. Mechem, in his work on Agency, § 572, after announcing the general rule, says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing, as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, does not take that precaution—does not exercise that care —which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation." The author then quotes approvingly the language of Chief Justice Gray in *Osborne* v. *Morgan*, 130 Mass. 102, 39 Am. Rep. 437, and of Judge Metcalf in *Bell* v. *Josselyn*, 3 Gray, 309, 63 Am. Dec. 741, so that it will be seen that, even according to Mr. Mechem, a lack of care and a lack of precaution, when once the duty is assumed, are as much misfeasance as an active misdoing. The irresistible logic of his statement is that the agent is responsible to third persons when he is negligent in the performance of the duties which he undertakes, whether such act be termed misfeasance or nonfeasance. The rule is thus announced in 1 Am. & Eng. Enc. Law, p. 407: "Where a principal engages an agent to do a certain work, and to take entire control over it, while the principal does not interfere, but leaves it entirely with the agent, the agent, and not the principal, will be liable to third parties for injuries or damages sustained by the negligence or unskilful manner in which the work is done." The question of whether or not the principal is liable is not under discussion here. In the same section, and in another paragraph, that author announces that an agent is, in general, not liable to third parties for acts of negligence for nonperformance of duty; that as such he is only responsible to the principal, and the principal to the third party. So that in the mind of the author the distinction must have been established between an agent that did not have complete or entire control and one who did. There is no other way of harmonizing the two statements. This is, in effect, the same rule enunciated by Mr. Wharton in his work on Agency, § 538. Under the announcement that "wherever there is liberty there is liability," it is said: "Hence, to strike at the general principle that lies at the basis of the adjudications we have just noticed, wherever the agent is at liberty to choose his own mode of action, then he is distinctively liable in damages, if by such mode of action he invades another's rights." The same doctrine is announced in § 537, where it is said: "Where an agent, who has general liberty of action, injures a third person, there the agent is personally liable for negligent as well as for malicious acts." The author here discriminates between an agent and a servant, holding that a servant is a part of the machinery by which the master works, and there is no emancipation or liberty of action; but that this reasoning does not apply to agents, who have complete control, and therefore perfect liberty of action. Doubtless much of the mist and fog which have enveloped the decisions on this subject is due to confusing the omission of an act which one is not bound to perform with the imperfect performance of an act to which he is bound. In other words, whoever undertakes a duty, and is clothed with authority to perform that duty, is responsible to the party injured for negligent imperfection in the discharge of such duty, on the broad doctrine announced above that he is obligated in transacting business to so transact it that his neighbor shall not thereby be injured; but there is no liability for the nonperformance of a duty not assumed, or not independently controlled. But for neither the nonperformance nor malperformance of a positive duty can one escape responsibility, whether that duty is imposed by contract or by general obligation; for under any and all circumstances it is the essence of negligence to omit to do something which ought to be done. While some detached expressions of Mr. Wharton have been quoted in support of the distinction contended for by the respondent, that author puts the question at rest in his work on the Law of Negligence, 2d ed. § 535, where he says: "The mere fact that I am the agent, in doing the injurious act of another, does not relieve me from liability to third persons for hurt this act inflicts on them. Judge Story, in-

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deed, tells us that for omissions of the agent the principal alone is liable, while for misfeasances the agent is also liable; but this distinction, as has been already shown, can no longer be sustained. The true doctrine is that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is primarily due to the agent's negligence; the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct centre of legal responsibilities and duties. But wherever there is no such interruption of causal connection,—in other words, wherever the agent's negligence directly injures a stranger, . . . [the agent having liberty of action in respect to the injury],—then such stranger can recover from the agent damages for the injury."

There is some contention in respondent's brief on the alleged barrenness of the allegations of the complaint, but we think the allegations were ample to show that the respondent was authorized to keep the building in repair; that it undertook that office or duty, and was in complete control of the work. It is alleged that it was in absolute control and management, with full power, authority, and direction to repair, and to allege that it agreed to do so would only be to allege the agreement to do the duty which the law imposed upon it after it had assumed the control and management which is alleged.

Our conclusion is that the complaint states a cause of action against the respondent. *The judgment is therefore reversed*, with instructions to the lower court to overrule the demurrer to the complaint.

Reavis, Ch. J., and **Anders**, **Mount**, and **Fullerton**, JJ., concur.

ILLINOIS SUPREME COURT.

Augusta S. BILLINGS, *Appt.*,
v.
PEOPLE of the State of Illinois.

CORNELIUS K. G. BILLINGS *et al.*, *Appts.*,
v.
SAME.

(189 Ill. 472.)

1. **The words "intestate laws" in a statute imposing a transfer tax upon property passing by the intestate laws of the state refer to the laws which govern the devolution of estates of persons dying intestate, including applicable rules of the common law which are in force, so that the tax will be applicable to a widow's dower interest and her award under the administration laws.**
2. **Life estates may be subjected to an inheritance tax** where the remainder is to lineal descendants, and exempted therefrom where the remainder is to collateral heirs or strangers, without transcending the legislative power of classification.
3. **A transfer tax law is not unconstitutional** for lack of uniformity in imposing the tax upon lineal descendants to whom a life estate is given with remainder to lineal descendants, while lineal descendants taking a fee are exempt.
4. **The tax on the remainders under a will giving to certain persons life estates with remainders over in case such persons should die leaving no children is not presently payable on the death of the testator, notwithstanding the statute provides that the value of the property shall be immediately appraised, and, after deducting the value of the life estate, the tax "on the remainder shall be immediately due and payable," since the reversionary interests are incapable of valuation, and the literal language of the statute must give way to reasonable interpretation.**

(February 20, 1901.)

APPEAL by representatives of Albert M. Billings, deceased, from a judgment of the Cook County Court fixing a succession tax with reference to his property. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Frederick S. Winston** and **James J. Meagher**, for appellants:

The right of dower is one of the most ancient of all rights.

Scribner, Dower, pp. 1, 9, 16, 21, 22; 2 Lenormant, Ancient History of the East, English ed. 1869, p. 7; *Hill* v. *Mitchell*, 5 Ark. 608; *Combs* v. *Young*, 4 Yerg. 218, 26 Am. Dec. 225.

So sacredly guarded was this right of dower that it was held at an early day that even if the husband dies indebted to the Crown, yet his wife's dower is by law privi-

NOTE.—As to constitutionality of tax on inheritances, see the earlier cases in this series of State *ex rel.* Davidson v. Gorman (Minn.) 2 L. R. A. 701; *Re* Howe (N. Y.) 2 L. R. A. 825, and *note;* Wallace v. Myers (C. C. S. D. N. Y.) 4 L. R. A. 171, and *note;* State v. Hamlin (Me.) 25 L. R. A. 632; Minot v. Winthrop (Mass.) 26 L. R. A. 259; State v. Alston (Tenn.) 28 L. R. A. 178; State *ex rel.* Schwartz v. Ferris (Ohio) 30 L. R. A. 218; State *ex rel.* Gelsthorpe v. Furnell (Mont.) 39 L. R. A. 170; State *ex rel.* Garth v. Switzler (Mo.) 40 L. R. A. 280; Kochersperger v. Drake (Ill.) 41 L. R. A. 446; *Re* Cope (Pa.) 45 L. R. A. 316; Drew v. Tifft (Minn.) 47 L. R. A. 525; and Ferry v. Campbell (Iowa) 50 L. R. A. 92.

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leged from any distress therefor, for, as it is quaintly remarked, "the very name *dos* doth import a freedom, and the law doth give her therewith many freedoms. And the reason why a tenant in dower shall not be distrained from the debt due to the King in his lifetime in the lands which she holds in dower seems to be her prior title by relation."

1 Thomas's Coke, Inst. 443; 2 Bacon, Abr. 387.

It is significant that our statute on dower provides that a wife shall be "endowed" of the third part, etc. "Endowment" means, technically, assigning dower to a woman.

1 Bouvier, Law Dict. p. 674.

Dower in Illinois is a common-law right, not conferred by the statute, but enlarged and extended by the statute.

Sisk v. *Smith*, 6 Ill. 503; *Gauch* v. *St. Louis Mut. L. Ins. Co.* 88 Ill. 251, 30 Am. Rep. 554; *Kauffman* v. *Peacock*, 115 Ill. 212, 3 N. E. 749; *Warren* v. *Warren*, 148 Ill. 653, 36 N. E. 611; *Alexander* v. *Northwestern Masonic Aid Asso.* 126 Ill. 558, 2 L. R. A. 161, 18 N. E. 556.

Practically the only difference between endowment at the common law and endowment as used in our statute relates to the extent to which a wife is endowed; and by the further fact that by the old learning the wife endowed *ad ostium ecclesiæ* was said to take and hold by virtue of the contract of marriage, and therefore that the right of dower was founded in contract. The right of dower which she holds, and which is inalienable save by her own act in the manner directed by the statute, is a right guaranteed to her by positive law, and, in Illinois, a positive law, which is separate, distinct, independent of, and in no way related to, the statute of wills or intestate laws of the state. The current of authority now is that a wife's dower is founded in positive law, and not in contract.

2 Scribner, Dower, pp. 2, 3.

The integrity of the inheritance act, if a valid law, is not assailed by holding that it does not apply to, or comprehend, dower estates; and this holding is consistent and in accord with the whole history of the right of dower, so far as it can be traced, which is that it is a conspicuous favorite of the law, that finds its inspiration in the human breast and from the loftiest motives.

Scribner, Dower, p. 20.

Dower is a life estate. It exists when a man is seised of estate of inheritance and dies in the lifetime of his wife.

4 Kent, Com. p. 35.

Dower is an estate of freehold.

McManaman v. *Blocks*, 15 Ill. App. 476; *Hart* v. *Burch*, 31 Ill. App. 22; *Walker* v. *Rand*, 31 Ill. App. 636.

It is undoubtedly true that prior to the death of a husband the dower right is inchoate and an expectancy of freehold, contingent on the death of the husband; but, when consummate, it is an estate of freehold, and relates back to the marriage with and seisin of the husband. The dower attaches as soon as there is the concurrence of marriage and seisin, and it cannot be devested, except by the wife in the manner pointed out by the statute.

Sisk v. *Smith*, 6 Ill. 503; *Warren* v. *Warren*, 148 Ill. 653, 36 N. E. 611.

The right of dower is an encumbrance.

McCord v. *Massey*, 155 Ill. 123, 39 N. E. 592.

Being an encumbrance, it is, of course, an interest in the lands, and it is this interest, created by the common law on the marriage with, and seisin of, the husband, in favor of the wife, and of which she cannot be devested except by her own act, that has been so jealously guarded from time immemorial.

A provision in a will for a wife is a mere offer on the part of the husband to buy out the dower right, and if the widow accepts the provision made for her in the will she takes, not as heir or devisee, but as purchaser. It is the price put by the testator himself upon that right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gift, and she becomes a purchaser for a valuable consideration of the property left to her by the will.

Blatchford v. *Newberry*, 99 Ill. 11; *Carper* v. *Crowl*, 149 Ill. 465, 36 N. E. 1040; *Corrigan* v. *Reid*, 40 Ill. App. 404; *Borden* v. *Jenks*, 140 Mass. 562, 54 Am. Rep. 507, 5 N. E. 623; 2 Scribner, Dower, 2d ed. 527.

Statutes levying taxes upon the citizen must not be extended by implication beyond the clear import of the language used, nor their operation enlarged so as to embrace persons and things not specifically pointed out, though standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government and in favor of the citizen.

Cooley, Taxn. 202; 25 Am. & Eng. Enc. Law, p. 78; *McChesney* v. *People ex rel. Kern*, 148 Ill. 225, 35 N. E. 739; *Fisher* v. *People*, 84 Ill. 493; *Mix* v. *People ex rel. Pierpont*, 72 Ill. 245; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850.

Inheritance taxes are to be construed strictly against the government, and favorably to the taxpayer.

Re Enston, 113 N. Y. 174, *sub nom. People* v. *Sherwood*, 3 L. R. A. 464, 21 N. E. 87; *Re Vassar*, 127 N. Y. 12, 27 N. E. 394; *Clarke* v. *Chicago*, 185 Ill. 362, 57 N. E. 15.

If by the act to tax gifts, legacies, and inheritances, approved June 15, 1895, life tenants, where the remainder is to lineals, are taxed; but life tenants, where the remainder is to collaterals, or to the stranger in blood, are not taxed,—appellants say the general assembly is powerless to validly make this discrimination against members of a class; and the act is therefore unconstitutional and void.

Ill. Const. arts. 2, 9; *Millett* v. *People*, 117 Ill. 301, 57 Am. Rep. 869, 7 N. E. 631; *Frorer* v. *People use of School Fund*, 141 Ill. 180, 16 L. R. A. 492, 31 N. E. 395; *Ritchie* v. *People*, 155 Ill. 105, 29 L. R. A. 79, 40 N. E. 454; *Braceville Coal Co.* v. *People*, 147 Ill. 71, 22 L. R. A. 340, 35 N. E. 62; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853,

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32 N. E. 364; *Harding* v. *People*, 160 Ill. 465, 32 L. R. A. 445, 43 N. E. 624; *Chicago & A. R. Co.* v. *Livingston County*, 68 Ill. 458; Cooley, Const. Lim. 6th ed. 481, 483.

Appellants are life tenants, with remainder to lineals. To tax them under this act (as was done in the court below), and to exempt all life tenants where the remainder is to collaterals or to the stranger in blood, is a denial to appellants of the equal protection of the laws; is a taking of private property without due process of law, and as such in conflict with and in violation of both the state and the Federal Constitutions and amendments thereto.

Ill. Const. art. 2; U. S. Const. 14th Amend.; *Railroad Tax Case*, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Hallinger* v. *Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *Hurtado* v. *California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 119, 292.

While the power of the state to classify is not denied, that power stops at injustice, and while it is conceded that classification and the degree of taxation of the selected subjects are within the legislative discretion, yet they are under the restraint of the supreme law of the land, which ordains that taxes shall be levied through equal laws impartially administered. And the limits upon the power of classification are that the classification must be based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification, and is not mere arbitrary selection.

Lippman v. *People*, 175 Ill. 101, 51 N. E. 872; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Re Grice*, 79 Fed. 627; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State* v. *Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.

To tax appellants, life tenants, for exercising the privilege of succeeding to property, solely because the remainder happens, by the will of the testator, to be vested in their lineal descendants, and to exempt all life tenants who succeed to property where the remainder is to collaterals or to strangers, is not classification. It is mere arbitrary, uncontrolled selection in the matter of taxation, and if upheld by the court will be the forerunner of others. The Constitution of the state is not a delegation of power to the general assembly, but a limitation upon its power.

Du Page County v. *Jenks*, 65 Ill. 275; *Richards* v. *Raymond*, 92 Ill. 612, 34 Am. Rep. 151; *Braun* v. *Chicago*, 110 Ill. 186.

On petition for rehearing.

Where a widow renounces a provision in a will, and elects to take her dower rights, this renunciation will not render the property intestate. It may lessen the quantity of the estate devised, to the extent of the estate which the law gives the widow, but otherwise the property must pass by the will.

McMurphy v. *Boyles*, 49 Ill. 110; *Skinner* v. *Newberry*, 51 Ill. 203; *Marvin* v. *Ledwith*, 111 Ill. 144.

This right of election proceeds upon the ground that the wife has an interest in the estate of the husband of which he cannot deprive her by will or otherwise without her consent. And when he attempts to do so she has the right to elect whether she will take the provision made for her by the will or renounce it and hold such rights in his estate as the law gives to her. She cannot claim a portion of the provisions of the will and reject others and claim under the statute. She must claim alone under the will, or altogether independent of its provisions. When, however, she has renounced the provisions of the will, she is restored to her rights under the statute.

Lessley v. *Lessley*, 44 Ill. 530; *Gullett* v. *Farley*, 164 Ill. 571, 45 N. E. 972.

It is significant that a widow who renounces is under no obligation to make an election until letters testamentary or of administration have been issued, because, as said by this court in *Stone* v. *Vandermark*, 146 Ill. 312, 34 N. E. 150, it would be manifestly unjust to require a widow to make her election before she had accurate and reasonable information in regard to the condition of the estate; and the legislature must have had this fact in view when the section was framed giving the widow one year after the issue of letters to make her election. This doctrine is wholly inconsistent with the language of the opinion in this case, that the widow takes under the intestate laws of the state.

The settled rule of this court is that the widow's dower is a separate estate of which she is vested, that attaches before death of the husband, and of which she cannot be devested save by her own act.

Carper v. *Crowl*, 149 Ill. 465, 36 N. E. 1040.

Messrs. **E. C. Akin, Julius A. Johnson, Frank L. Shepard, Robert S. Iles, C. A. Hill,** and **B. D. Monroe** for the People.

Carter, J., delivered the opinion of the court:

Albert M. Billings died testate in Chicago, February 7, 1897, leaving a large estate. He left surviving him Augusta S. Billings, his widow, and Cornelius K. G. Billings, his son (who was married and had two children), and Albert M. Billings Ruddock, a minor grandson, who was the son of a deceased daughter, who had intermarried with Charles H. Ruddock. He left also a son by a former marriage, Henry A. Billings. These were his only heirs. The first clause of his will was as follows: "I give unto and bequeath to my beloved wife, Augusta S. Billings, for her use and benefit during her natural life (and at her death to be divided as hereinafter set forth), my entire estate, both real and personal, wherever located, excepting such reservations as are hereinafter set forth

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and made." Then followed devises of certain real estate to his said son Cornelius, and his grandson, Albert M. Billings Ruddock, and certain annuities to his son Henry A. Billings, and to his sister. The will then provided as follows: "I do also herein give and bequeath to my son Cornelius Kingsley Garrison Billings, and to my grandson, Albert M. Billings Ruddock, to be held and owned by them at the death of my wife, Augusta S. Billings, as is hereinafter explained and set forth, all the property and estate herein bequeathed to her, my wife, not otherwise disposed of by my said executors hereinafter named, in the manner following, to wit: Two thirds thereof to my son C. K. G. Billings, and one third thereof to my grandson, Albert M. Billings Ruddock, to be held and owned by them, as above stated, during their lifetime; and, should my son C. K. G. Billings die not leaving a living child or children of his own issue, the property herein bequeathed to him shall revert and be held and owned by my grandchild, Albert M. Billings Ruddock, during his lifetime; and should my grandson, Albert M. Billings Ruddock, die not leaving a child or children of his own issue, then all the property and estate herein bequeathed to him shall revert and become the property and estate of my brother, John D. Billings (should he be alive at that time), and my living nephews and nieces, who shall be living at the time of the death of my said grandson, as aforesaid, said brother, nieces, and nephews to share and share alike in said estate. I hereby make, constitute, and appoint my dear wife, Augusta S. Billings, and my dear son Cornelius Kingsley Garrison Billings, and my dear son-in-law, Charles H. Ruddock, to be the sole executors of this, my last will and testament."

The widow renounced the provision made for her in the will, and elected to take her dower and legal share in the estate under the statute. The county court appointed an appraiser to fix the fair market value of the estate for the purpose of assessing the inheritance tax, as provided by an act entitled "An Act to Tax Gifts, Legacies, and Inheritances in Certain Cases, and to Provide for the Collection of the Same," approved June 15, 1895 (Hurd's Rev. Stat. 1899, p. 1460). The widow's dower award and one third of the personalty were appraised at the total sum of $2,363,151.75, the tax upon which, after deducting the $20,000 exemption, was fixed at $23,443.53. The life interest (as it was decreed to be) of said Cornelius in the two thirds bequeathed to him was appraised at $2,472,118.75, and, after deducting his exemption of $20,000, the tax to be paid by him was assessed at $24,821.18. This included the specific devise of real estate valued at $30,000. The life interest of Albert M. Billings Ruddock in the one-third interest bequeathed to him was appraised at $1,408,374.77, and, after deducting his exemption of $20,000, his tax was assessed at $14,043.74. This included also the tax on a specific devise to him of real estate valued at $16,000. The court, in approving the appraiser's report, found that Cornelius K. G. Billings took a life estate in the two thirds of the residuary estate bequeathed to him, and that there was a remainder therein of the value, at the testator's death, of $864,584.70, which had not vested, and that there was a remainder in the one third bequeathed to Albert M. Billings Ruddock for life, of the value of $259,976.95, which had not vested, and ordered that the tax on these remainders be postponed until they shall have become vested. The said Augusta S. Billings alone, and said Cornelius K. G. Billings and Albert M. Billings Ruddock together, have appealed from the order and decree assessing and fixing the amount of said tax. The two appeals will be considered together as one case.

The widow having renounced the life estate given her by the will in the whole estate, the estates given to the son Cornelius and the grandson, Albert, were severally accelerated, and they became entitled at once to their several interests without waiting until the death of the widow. *Blatchford* v. *Newberry*, 99 Ill. 11. But we shall consider, first, the objections to the tax interposed by the widow, Augusta S. Billings, on her appeal.

It will be seen, by reference to the first section of the statute taxing inheritances, that the tax is confined to property "which shall pass by will or by the intestate laws of this state (Hurd's Rev. Stat. 1899, p. 1460), and it was contended below, and is contended here, that the property which came to the widow by reason of the death of her husband and of her renunciation did not pass from him either by will or the intestate laws of the state, and was not, therefore, subject to the tax. The total sum of $2,363,151.75 fixed as the value of the property which passed to the widow was made up of $13,070 for her award, $69,266.70 for her dower, and the balance for her one third of the personalty. It must, of course, be conceded that no part of this property passed to her on the death of Mr. Billings by his will, for she renounced the provision made for her in the will, and therefore became entitled to the same share or interest in the estate that she would have been entitled to if her husband had died intestate. Section 1 of the statute relating to dower (Hurd's Rev. Stat. 1899, p. 657) provides that "the surviving husband or wife shall be endowed of the one-third part of all of the lands whereof the deceased husband or wife was seised of an estate of inheritance, at any time during the marriage, unless the same shall have been relinquished in legal form." And § 10 of the act provides that "any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one third of the personal estate, after the payment of all debts." Section 1 of the act in regard to

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the descent of property (Hurd's Rev. Stat. 1899, p. 652) provides "that estates, both real and personal, of residents and nonresident proprietors in this state dying intestate, or whose estates or any part thereof shall be deemed and taken as intestate estate, after all just debts and claims against such estates are fully paid, shall descend to and be distributed in manner following, to wit: . . . Fourth. When there is a widow or a surviving husband, and also a child or children or descendants of such child or children of the intestate, the widow or surviving husband shall receive, as his or her absolute personal estate, one third of all the personal estate of the intestate."

The widow's award is provided for by the act in regard to the administration of estates. It is true, as contended, that the legal institution of dower is of great antiquity, and was not created by our statute, but was fully established and provided for by the common law. Still, it is also true that it may be and has been, not only recognized, but also modified and regulated, by statute. The estate by the curtesy also existed by the common law, but it has been abolished in this state, and the surviving husband given the right of dower in lieu of it, and no one doubts the legislature had the power to change or abolish the estate by the curtesy. Nor can it be doubted that the institution of dower is subject to full legislative control, and may be modified or changed at any time before it has become a vested estate by the death of the spouse owning the land. *Henson* v. *Moore*, 104 Ill. 403; *Best* v. *Jenks*, 123 Ill. 447, 15 N. E. 173; *Randall* v. *Kreiger*, 23 Wall. 148, 23 L. ed. 126; *McNeer* v. *McNeer*, 142 Ill. 388, 19 L. R. A. 256, 32 N. E. 681. True, the husband cannot deprive his wife of her inchoate right of dower, but the state may. She does not hold by contract, but holds by laws which the state may change.

It is contended, however, that whatever the power of the legislature may be to control dower or to impose burdens upon it, the act imposing a tax upon inheritances, when strictly construed, as it should be, does not include dower, because, it is said, dower does not "pass by the intestate laws of this state," and the act does not, by any necessary terms, include dower. There are no laws of this state which are specifically designated as "intestate laws," and we are called upon to determine what laws or system of laws were referred to under that appellation by the act in question. The same term is employed in similar statutes in other states, and we have no doubt the laws referred to are those laws of the state which govern the devolution of estates of persons dying intestate, and include all applicable rules of the common law in force in this state. The statutes from which we have above quoted are intestate laws, and they govern, regulate, and control the interest which the widow, Augusta S. Billings, took in her husband's property at his death. As a general rule, the property of persons dying passes in two ways,—that is, by will, or by descent in the modes provided by law; and when it does not pass by will it generally passes by law,—that is, by the law governing the disposition of property of persons dying intestate.

Counsel for Mrs. Billings contend that had she taken the provision made for her by the will she would have taken as purchaser, and not as a devisee or legatee; that the provision in the will was a mere offer of the testator to purchase, for the benefit of his estate, her legal share in the estate, which he could not otherwise eliminate; and that had she accepted she would have stood in the position of a purchaser for value, and would not have been subject to the succession tax. In support of this view, reference is made to *Carper* v. *Crowl*, 149 Ill. 465, 36 N. E. 1040, and authorities there cited, and others, where it is said that "a provision by will in lieu of dower is, in fact and legal effect, a mere offer by the testator to purchase out the dower interest for the benefit of his estate." "Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view, she becomes a purchaser of the property left to her by the will." This doctrine need not be questioned here. It is often applied in adjusting the equities of the widow, heirs, and others succeeding to the estates of deceased persons. But we cannot agree to the view that it is applicable against the state, where the question is not only one of power of the state to tax her succession to such an estate, but of the interpretation of a statute designed to exercise such power, and to make the tax uniform in its operation. In a certain sense, and in her relation to the testator and those claiming under him, she may well be regarded as a purchaser, and the will and her acceptance a matter of contract or convention between them, by which she becomes entitled to the property and her rights thereto protected. But the question here is not one having reference to the adjustment of the equitable rights of different persons succeeding to the property of a deceased person, but one arising between the claimant and the state; that is, whether or not the property falls within a general class upon which, or upon the succession to which, a tax is imposed for public revenue. The statute is comprehensive, and was designed to embrace, as nearly as practicable, all property passing from a person, upon his death, by will or intestacy, except such as the statute exempts. This is manifest from the following of the 1st section: "All property, real, personal, and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state or any interest therein or income therefrom, which shall be transferred by deed, grant, sale, or gift made in contemplation of the death of the grantor or bargainor or intended to take effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or other-

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wise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county, for the use of the state; and all heirs, legatees, and devisees, adminstrators, executors, and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the benficial interests to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter or any child or children adopted as such in conformity with the laws of the state of Illinois, or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock; in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property received by each person and at and after the same rate for every less amount, provided that any estate which may be valued at a less sum than $20,000 shall not be subject to any such duty or taxes; and the tax is to be levied in above cases only upon the excess of $20,000 received by each person."

It will be noticed that neither dower, nor any provision made in lieu of dower, is exempted, but that the wife is entitled to an exemption of $20,000, and this the widow received the benefit of in this case. We would expect to find in such a statute, as we do find, that the classes of property would be defined only in general language. If appellants' contention were sustained, it would seem that there would have been no necessity of an exemption in the statute for the wife; for, whether she accepts the provision made for her in the will or renounces it, or whether there is a will or not, her interests, according to appellants' argument, are exempt, for the reason that if she accepts she takes by purchase, and not by will, and if she renounces, or in case there is no will, she takes in her own right at common law, as widow, and not under the intestate laws of the state. The argument, therefore, proves too much, and amounts to a claim that the widow cannot be taxed at all. In the case at bar the will gave the whole estate to the widow for life, and it is contended she could have taken this life estate in the whole as purchaser, and without liability to the burden of tax imposed on other life estates. If this be so, it might be pertinent to inquire whether it would not follow that Mr. Billings could have devised and bequeathed his whole estate to his wife absolutely, free from taxation under the statute. We cannot accept appellants' view, and think it unnecessary to pursue this question further. The county court properly held that the widow's dower was subject to the tax.

Counsel on both sides seem to agree that, subject to the widow's dower, and after her award and one third of the property were set off to her, Cornelius K. G. Billings was entitled to and took two thirds of the estate for life, and Albert M. Billings Ruddock one third for life, and the only point made on the appeal by these appellants is that under the statute these life estates, which were so adjudged and held by the court below to be liable to the tax, were not, under the statute, liable at all. It is not denied that by § 1, standing alone, above quoted, they would be liable, but it is claimed that by § 2 they are excluded from the provisions of § 1. Section 2, or so much of it as affects this question, is as follows: "When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of the son or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood, or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax, and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and, after deducting therefrom the value of said life estate, or term of years, the tax transcribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon, shall be and remain a lien on said property until the same is paid."

The point made is that by the express terms of this section all life estates are exempted from the tax imposed by § 1, whether the remainder be to lineals or collaterals. But we have held that the proper reading of the clause, "or remainder to the collateral heir," etc., should be, "and remainder," etc. (*Ayers* v. *Chicago Title & T. Co.* 187 Ill. 42, 58 N. E. 318); and that the meaning of that provision is that when the bequest is to the mother, father, husband, wife, brother and sister, widow of the son, or a lineal descendant, during the life or for a term of years, and remainder to the collateral heir of the decedent or to the stranger in blood, etc., such estate for life or for a term of years shall not be subject to any tax, but that where the remainder is to lineals the prior estate would, under § 1, be subject to the tax.

But it is contended that this construction renders the statute unconstitutional, under both the state and the Federal Constitutions; that it violates § 2 of article 2 of the Constitution of this state, which provides that "no person shall be deprived of life, liberty, or property without due process of law," and § 1 of article 9, because the law imposing the tax is not "uniform as to the class upon which it operates," and the 1st section of the 14th Amendment to the Constitution of the United States, which provides "that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the

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laws." The constitutionality of the statute has been established by the decisions in several cases (*Kochersperger* v. *Drake*, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321; *Ayers* v. *Chicago Title & T. Co.* 187 Ill. 42, 58 N. E. 318; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594), and we shall consider only the question whether, by the classification made, there was any arbitrary or unwarranted discrimination between life tenants by the statute imposing the tax.

It is said that the statute discriminates between life tenants with remainder to lineal descendants and life tenants with remainder to collateral heirs, by imposing the tax on the first and excluding the second from its operation. But we cannot see that this is a mere arbitrary exaction from one class while another class, which cannot be differentiated from it, is allowed to go untaxed. A life estate with the fee descending in the lineal line might well be more desirable than a life estate with remainder to collateral heirs or strangers to the blood. At any rate, there is a sufficient difference upon which the legislature could, without transcending its power, base a classification. It may be observed that as to the rate of tax to be imposed and the amount of the exemption the beneficiaries are divided by the first section into three classes, which, for purposes of designation, may be called—First, the lineals; second, the collaterals; and, third, the strangers to the blood. It is not questioned in this case that these differences in relationship to the decedent have been properly used by the legislature as a just and legal basis for purposes of classification, and, although the constitutionality of the statute has heretofore been attacked because of such classification, it has been sustained by this court and by the Supreme Court of the United States. *Kochersperger* v. *Drake*, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. Now, to exempt, by the second section, beneficiaries of the first class who are given only a life estate with remainder over to beneficiaries of the second or third class, is to apply the same principle of discrimination in favor of those standing nearest in relationship to the deceased owner. No life tenant falling within the second or third class is exempt, and the mere fact that life tenants of the first class, where the remainder is kept in the lineal line, are not included in the exemption, does not render the statute unconstitutional for lack of uniformity as to the class upon which it operates; as supposed by counsel. Section 2 does not interfere with the classification made by § 1, but recognizes it, and excludes only from the operation of that section life tenants who are beneficiaries of the first class where the remainder is given to those of the second or third class; that is, to collateral heirs or strangers to the blood or the body politic or corporate. It cannot be said, we think, that no reason whatever appears for the distinction made by this exemption. It may be regarded as a concession—a further exemption—to beneficiaries of the first class who are the last of their line to hold and enjoy the property; and, even if it were one which the legislature had no power to make, that provision only would be void, leaving the rest of the act in full force. And such a construction would not affect the order of court appealed from, nor aid appellants in their contention.

The most serious questions in the case arise on the cross errors assigned, that the court erred in postponing the assessments of the tax on the remainder created by the will upon the termination of the life estates. The court below, and counsel in this court on both sides, have treated the interest of Cornelius K. G. Billings as only a life estate in two thirds of the property left after the widow had received her portion, and the interest of Albert M. Billings Ruddock as only a life estate in the other third, and for the purposes of this case we shall treat the view so agreed upon as correct, and consider only whether the contingent remainders created by the will are presently taxable, or, rather, whether the taxes are presently payable. The court below held that they were not, but that decision was rendered before this court had decided the case of *Ayers* v. *Chicago Title & T. Co.* 187 Ill. 42, 58 N. E. 318, in which case we held that, where property was devised to a trustee for the use of his wife and children during their lives, and after the death of all of them the remainder to be distributed according to the intestate laws of the state, both the life estates and the remainder were taxable upon the death of the testator. It was also held in that case that expectant estates were taxable by the plain provisions of the statute, whether such expectancies were in the nature of reversions or remainders, and whether vested or contingent.

All such interests are certainly taxable, as said in that case, but the language there used must be construed with reference to the questions there presented. In that case the whole estate was by the will given to the trustee to manage and control, invest and reinvest, and to pay over and distribute the net income to and among the wife and children of the testator and the survivor of them, provided, however, that the children and descendants of those dying should enjoy their parent's or ancestor's share during the continuance of the trust, but that upon the death of the last survivor—that is, of the wife and children of the testator—the whole of the trust fund remaining was to go and be set apart and divided by the trustee to and between such persons as should be entitled thereto under the statute in regard to intestate estates; and the county court had decided in that case that no part of the succession tax, either on the life interests or the

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remainders, could be presently ascertained or collected. We reversed that decision, for it was clearly erroneous, and in doing so used language applicable to the case, and to all cases where the property or interest passing is capable of valuation, and the amounts of the tax and of the exemptions are capable presently of determination. In the *Ayers Case*, the county court postponed the entire tax, holding that no part of it could then be fixed or collected. In this that court was in error. But in the case at bar the county court not only caused the estates to be appraised which passed to the widow, to the son Cornelius for his life, and to the grandson, Albert, for his life, and the tax to be assessed, but also, under § 2, caused to be appraised the estates which passed to the widow, to the son Cornelius for his life, and to the grandson for his life, and the tax to be assessed, but also, under § 2, caused to be appraised that part of the estate which had not vested, and which cannot vest until the happening of the contingencies mentioned in the will, and postponed only the tax thereon until the same shall have become capable of being fixed and collected. In this we think the court below decided correctly, because as to those remainders or so-called reversionary interests they were incapable of valuation, and in such a case the literal language of the statute must give way to reasonable interpretation. Manifestly, it cannot be determined now whether the son Cornelius will die leaving children or a child surviving him or not, and hence it cannot now be determined whether the grandson, Albert, will take a life estate or not, on the death of Cornelius, in the two thirds bequeathed to him for life, or, if Cornelius's children should not survive him, neither may Albert, and in such case there would be no life estate remaining in said two thirds after the death of Cornelius. How, then, can any such life estate be now valued or the tax thereon be fixed or collected? Treating the estate of Cornelius as a life estate only, the will seems to make no bequest or devise over in case he should survive Albert, and die leaving no child of his own issue surviving him. How could this possible reversionary interest be now valued and taxed? Questions practically as difficult of solution would arise as to the remainder of the one third bequeathed to Albert. By what rule or recognized table could it be determined whether he will marry and have children who will survive him? If he shall, there will be no remainder over to the collaterals,—the uncle, the nephews, and nieces; if he shall not, there will be. How can estates depending upon such contingencies be valued and taxed at the rates provided by the statutes? It is to be borne in mind that the tax is levied on the succession, and not on the property as such, and the rate and the exemptions must be determined by the succession, and it would seem to follow, necessarily, that when the basis of the tax cannot be fixed the tax itself cannot be fixed. It is, however, made a lien on the property, which will continue until the uncertainties change to certainties, as they will in time, when it may be collected.

We find upon examining the authorities that the courts of last resort in other states have found it necessary to take substantially the same view in interpreting statutes similar to the one under consideration. Among many cases, see *Re Roosevelt*, 143 N. Y. 120, 25 L. R. A. 695, 38 N. E. 281, and *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311.

The tax imposed by § 1 of our statute is fixed upon the "clear market value of the property received by each person" at the prescribed rate; that is, as shown by the context, the clear market value of the beneficial interest so received. Surely, by such language it was not intended by the legislature that the courts should undertake to ascertain the clear market value of a mere possible interest, which, from its very nature, could not have any market value, and which, for all practical purposes, such as taxation, is incapable of valuation. The courts, in order to enforce the immediate collection of such taxes, as the statute seems to contemplate shall be done, cannot change the tax from one on succession to one on property; nor can they classify such remote and contingent interests, and fix the tax or rate of tax upon the whole class, as possibly the law-making power might do or provide for. No other course is left open in the practical administration of the statute than to postpone, as was done in this case, the assessing and collecting of the tax upon such remote and contingent interests as are incapable of valuation, and as to which the rate and the exemptions cannot be determined. It is apparent that in many cases the tax on remainders, mentioned in § 2 as becoming immediately due and payable, can be immediately ascertained and collected; but in other cases, while, in contemplation of the statute, they are due and payable, and remain a lien on the property, their payment cannot be enforced until the amount can be determined by the happening of the event or fulfilment of the conditions upon which the beneficial estate itself is made to depend. This construction of the statute leads to its broadest, fairest, and fullest enforcement, while to so construe it as to require the fixing and collection of the tax immediately upon the death of the donor, upon all interests in property passing or to pass upon any contingency, would embarrass, and for practical purposes might have the effect to defeat, the full operation the statute was intended to have. We are of the opinion that the case was correctly decided by the county court.

The order and judgment of that court will therefore be affirmed.

Rehearing denied.

Affirmed by Supreme Court of United States January 19, 1903.

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PENNSYLVANIA SUPREME COURT.

Erasmus D. CRARY, *Appt.*,
v.
LEHIGH VALLEY RAILROAD COMPANY.

(203 Pa. 525.)

To hold the carrier responsible for an injury received by a passenger while using an excursion ticket, one of the conditions on which is that the passenger assumes all risk of accident, he must show affirmatively that the carrier was guilty of negligence which caused the injury.

(October 13, 1902.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Luzerne County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **George R. McLean, William R. Gibbons,** and **William S. McLean,** for appellant:

The release is inoperative, and the maxim *Res ipsa loquitur* applies if the circumstances warrant its application.

Buffalo, P. & W. R. Co. v. *O'Hara,* 3 Pennyp. 190; *Camden & A. R. Co.* v. *Bausch* (Pa.) 6 Cent. Rep. 121, 7 Atl. 731; *Pennsylvania R. Co.* v. *Henderson,* 51 Pa. 315; *Pennsylvania R. Co.* v. *Butler,* 57 Pa. 335; *Burnett* v. *Pennsylvania R. Co.* 176 Pa. 45, 34 Atl. 972.

Negligence is to be inferred from the proof of the "injurious accident."

Laing v. *Colder,* 8 Pa. 479, 49 Am. Dec. 533; *Delaware, L. & W. R. Co.* v. *Napheys,* 90 Pa. 135; Black, Law & Pr. in Acci. Cases, § 182; *Pennsylvania R. Co.* v. *Raiordon,* 119 Pa. 577, 13 Atl. 324; *Buck* v. *Pennsylvania R. Co.* 150 Pa. 170, 24 Atl. 678; *Sullivan* v. *Philadelphia & R. R. Co.* 30 Pa. 234, 72 Am. Dec. 698; *Pennsylvanic R. Co.* v. *MacKinney,* 124 Pa. 462, 2 L. R. A. 820, 17 Atl. 14; Ray, Pass. Carr. p. 696.

Messrs. **Woodward, Darling, & Woodward** and **H. W. Palmer,** for appellee:

Where the person who took the ticket admits that he acted with full knowledge of the conditions, and with such knowledge purchased at a lesser rate and made use of the ticket to secure a passage, the evidence of his assent is as complete as if he had actually signed.

Illinois C. R. Co. v. *Read,* 37 Ill. 484, 87 Am. Dec. 260; *Wells* v. *New York C. R. Co.* 24 N. Y. 181; *Fonseca* v. *Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665.

The legal effect of this contract was to require the plaintiff, in case of accident and damage, to prove that the defendant was negligent.

Goldey v. *Pennsylvania R. Co.* 30 Pa. 246, 72 Am. Dec. 703; *New Jersey Steam Nav. Co.* v. *Merchants' Bank,* 6 How. 344, 12 L. ed. 465; *Marsh* v. *Horne,* 5 Barn. & C. 322; *Farnham* v. *Camden & A. R. Co.* 55 Pa. 60.

Brown, J., delivered the opinion of the court:

On July 3, 1896, the plaintiff purchased at a reduced rate from the Lehigh Valley Railroad Company a ticket designated an "employee's excursion ticket." It was for a passage from Wilkes-Barre to New York and return. Upon it there was the following, among other conditions: "The person accepting and using this ticket thereby assumes all risk of accident and damage to person or property." There was nothing on the ticket requiring that it be signed by the passenger, to make the conditions upon which it was issued binding upon him, but it was accepted by him with the indorsement plainly stamped on it that all of the conditions imposed by the company were "fully understood and agreed to." The evidence of the assent of the appellant to the conditions is, therefore, as complete as if he had signed the ticket. *Illinois C. R. Co.* v. *Read,* 37 Ill. 484, 87 Am. Dec. 260; *Wells* v. *New York C. R. Co.* 24 N. Y. 181; *Fonseca* v. *Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665. By the purchase and acceptance of the ticket at a reduced rate, with the condition indorsed on it that the appellant, in using it, would assume all risks of accident and damage to his person, there was an agreement between him and the railroad company that the common-law rule making the common carrier an insurer of his safety should be set aside, and that he would be bound by the agreement between them as the law defining the duty and liability of the appellee in carrying him to New York and bringing him back. *Farnham* v. *Camden & A. R. Co.* 55 Pa. 53. That such an agreement may be made has long since been settled. *Atwood* v. *Reliance Transp. Co.* 9 Watts, 87, 34 Am. Dec. 503; *Laing* v. *Colder,* 8 Pa. 479, 49 Am. Dec. 533; *Powell* v. *Pennsylvania R. Co.* 32 Pa. 414, 75 Am.

NOTE.—As to rights of person riding free or on pass, generally, see *note* to Muldoon v. Seattle City R. Co. (Wash.) 22 L. R. A. 794; Rogers v. Kennebec S. B. Co. (Me.) 25 L. R. A. 491; Meuer v. Chicago, M. & St. P. R. Co. (S. D.) 25 L. R. A. 81; Davis v. Chicago, M. & St. P. R. Co. (Wis.) 33 L. R. A. 654; Illinois C. R. Co. v. Beebe (Ill.) 43 L. R. A. 210; and Whitney v. New York, N. H. & H. R. Co. (C. C. App. 1st C.) 50 L. R. A. 615.

As to validity of condition exempting carrier from liability for injuries received while riding on freight trains, see Central R. Co. v. Lippman (Ga.) 50 L. R. A. 673; and Richmond v. Southern P. Co. (Or.) 57 L. R. A. 616.

As to notice to passengers of conditions on tickets, see also Potter v. The Majestic (C. C. App. 2d C.) 23 L. R. A. 746, and *note;* Louisville & N. R. Co. v. Turner (Tenn.) 43 L. R. A. 140; and Watson v. Louisville & N. R. Co. (Tenn.) 49 L. R. A. 454.

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Dec. 564; *American Exp. Co.* v. *Sands*, 55 Pa. 140; *Adams Exp. Co.* v. *Sharpless*, 77 Pa. 517; *Pennsylvania R. Co.* v. *Miller*, 87 Pa. 395; *Clyde* v. *Hubbard*, 88 Pa. 358; *Buck* v. *Pennsylvania R. Co.* 150 Pa. 170, 24 Atl. 678. But it is equally well settled that by such an agreement the common carrier cannot relieve itself from liability for its negligence. "The reason for this qualification of the power to limit liability rests on public policy. At common law, if property was lost or injured while in the hands of the carrier, the burden of proof was on the carrier to show the existence of such circumstances as were sufficient to excuse him from liability. Such is still the general rule; but, when a special contract is entered into between the shipper and the carrier, the contract takes the place of the common-law rule, and fixes the liability of the carrier." *Pennsylvania R. Co.* v. *Raiordon*, 119 Pa. 577, 13 Atl. 324. The liability of the common carrier being by such an agreement confined to its negligence, there is no reason why the ordinary rule, that negligence is not to be presumed, but must be proved, should not apply. The agreement of the parties is that there shall be no liability at all by the common carrier for injury to the passenger; but, on grounds of public policy, the law says to the passenger that he cannot contract to relieve the carrier from negligence, and the carrier cannot, for any consideration, be absolved from its duty to exercise proper care in carrying its passengers. If, however, injury results from the negligence of the common carrier to one with whom such an agreement is made, the injured party, having taken himself out of the protection of the common law, which makes the railroad company that carries him an insurer of his safety, and which, in case of accident resulting in injury, is presumed to have been negligent, must show affirmatively, as in all other cases of negligence, the specific negligence complained of. The law, in the face of his agreement to the contrary gives him the protection against negligence; but when so given to him against his will, and he afterwards calls for it, he ought, in good conscience, to be compelled to show that negligence existed, and this is the law's requirement, established by authority. "A contract limiting their liability as carriers does not relieve them from ordinary care in the performance of their duty, and the most that it can do is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable, even by the highest care, and to require that negligence be actually proved against them." 59 L. R. A. *Goldey* v. *Pennsylvania R. Co.* 30 Pa. 242, 72 Am. Dec. 703. "The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care or by gross negligence lies on the libellants, which would be otherwise in the absence of any such restriction." *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 12 L. ed. 465. The same principle is laid down in *Marsh* v. *Horne*, 5 Barn. & C. 322; *Farnham* v. *Camden & A. R. Co.* 55 Pa. 53; and *Patterson* v. *Clyde*, 67 Pa. 500.

We are not to be understood as holding that there may not be cases in which the proof of the accident carries with it the presumption of the common carrier's negligence. Such, by way of illustration, was the case of *Camden & A. R. Co.* v. *Bausch* (Pa.) 6 Cent. Rep. 121, 7 Atl. 731, where the plaintiff was seriously injured, while riding on a train of the defendant company, in consequence of a collision between that train and another moving in the opposite direction upon the same track. Another illustration can be found in *Buffalo, P. & W. R. Co.* v. *O'Hara*, 3 Pennyp. 190, where the train on which the passenger was riding was run into by a special train, the engine of which plunged into the rear coach. In these two cases, and others that might be cited, the only inference to be drawn from the accident itself was that the common carrier had been negligent. But the present is not such a case, for the mere proof of the accident does not carry with it the presumption or inference of the appellee's negligence. The falling of the door of the freight car may have been due to the sudden breaking of a lock or hinge, of a defect in which the company may have known nothing; the bricks with which the car was loaded may have been jolted and thrown against the door by some sudden, but unavoidable, violent motion of the train, causing the door to break; or the door may have fallen from other causes which may have existed, but of which the company had neither actual nor constructive notice, nor ought reasonably to have been aware of; and it could not, therefore, as the learned judge below properly held, have been presumed to be guilty of negligence against this specially contracting passenger. The burden was upon him to submit some proof of it, and, in the absence of any, the jury ought not to have been allowed to guess that the appellee had been negligent.

Judgment affirmed.

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VERMONT SUPREME COURT.

Robert AVERY, Trustee,
v.
VERMONT ELECTRIC COMPANY *et al.*

(.....Vt.....)

1. **The generation of electricity by water power for the operation of a railroad** is not a public use for which property may be taken by eminent domain, where there is nothing which binds the petitioner to serve the railroad, or to give equal advantages to all.
2. **The right of the legislature to regulate the rights common to riparian owners** does not empower it to permit a lower owner to dam the water back on the upper owner's land when necessary to do so to develop the full power of the stream, and require the upper owner to take his share of the value of the stream in money.
3. **The flowing of land by a dam for manufacturing purposes** is a taking within the meaning of the constitutional provision regulating the taking of land by right of eminent domain.

(March 6, 1903.)

EXCEPTIONS by petitioner to a ruling of the Chittenden County Court dismissing a petition for the appointment of commissioners to assess damages to be paid for the flooding of property under the flowage acts. *Affirmed.*

The facts are stated in the opinion.

Mr. **Edmund C. Mower,** for petitioner:

An electric plant such as the petitioner proposes to erect is a "mill or manufactory," within the terms of Vt. Stat. 3623.

Lamborn v. *Bell,* 18 Colo. 346, 20 L. R. A. 241, 32 Pac. 989.

The purpose to which this water power is to be applied contemplates a public benefit.

Williams v. *School Dist. No. 6,* 33 Vt. 271; *Talbot* v. *Hudson,* 16 Gray, 417; *Bloomfield & R. Natural Gaslight Co.* v. *Richardson,* 63 Barb. 437; *Re Whitestown,* 24 Misc. 150, 53 N. Y. Supp. 397; *Allen* v. *Jay,* 60 Me. 140, 11 Am. Rep. 185; *Ryan* v. *Louisville & N. Terminal Co.* 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744.

There is a presumption in favor of the public character of a use for which a taking is authorized by the legislature.

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I. *Right to dam back.*

a. *No natural right.*

Among the rights of a riparian owner on a water course is that of enjoying the natural fall of the stream as it flows through his property. He is entitled to this to the full extent to which it may be made available within the limits of his boundaries. And for the purpose of determining the possibilities of his fall he

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Rensselaer v. *Leopold*, 106 Ind. 29, 5 N. E. 761: *Welton* v. *Dickson*, 38 Neb. 767, 22 L. R. A. 496, 57 N. W. 559; *Beekman* v. *Saratoga & S. R. Co.* 3 Paige, 73, 22 Am. Dec. 679; *Hazen* v. *Essex Co.* 12 Cush. 475; *Com.* v. *Breed*, 4 Pick. 463; *Newcomb* v. *Smith*, 2 *Pinney* (Wis.) 131; *Stewart* v. *Polk County*, 30 Iowa, 9, 1 Am. Rep. 238; *Fletcher* v. *Peck*, 6 Cranch, 128, 3 L. ed. 175.

In flowing the lands described, the petitioner would acquire at most only an easement, the rule being that, if an estate less than a fee will answer the purpose of the taking, such lesser estate will be presumed to have been taken, unless, of course, the statutory grant of power expressly authorizes and contemplates the taking of a fee.

Quimby v. *Vermont C. R. Co.* 23 Vt. 387; *New Orleans P. R. Co.* v. *Gay*, 32 La. Ann. 471; *Paul* v. *Detroit*, 32 Mich. 108; *Brainard* v. *Clapp*, 10 Cush. 6, 57 Am. Dec. 74; *Lance's Appeal*, 55 Pa. 16, 93 Am. Dec. 722.

Where an easement in land has been acquired for public use, and that use is abandoned, the easement is at an end, and the owner is restored to his original rights in the land.

10 Am. & Eng. Enc. Law, 2d ed. p. 1203; *Wood* v. *Mobile*, 47 C. C. A. 9, 107 Fed. 846.

The diversion of property from the uses for which it was taken, and its application to other uses, operate as an abandonment.

Proprietors of Locks & Canals v. *Nashua & L. R. Co.* 104 Mass. 1, 6 Am. Rep. 181; 10 Am. & Eng. Enc. Law, 2d ed. p. 1203.

In case of nonuser the landowner has his remedy by a common-law action for damages.

Baird v. *Hunter*, 12 Pick. 556.

State legislatures have not made public

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is entitled to measure from the point at which the water stands in its natural condition where it flows across his boundary. The owner below him, therefore, can do nothing which will cause the water to stand higher at that place than is natural. The same rule, of course, is binding on him. He cannot set the water back over his upper boundary so as to raise it above the point where it would naturally stand.

What is natural condition.

In considering what is the natural condition, or ordinary stage, of the water, one court, in considering the meaning of such term, held that by ordinary stage of water in a river, as the term is used in a decree directing the abatement of a dam so as not to interfere with a prior dam at such stage, is meant the stage of water that ordinarily flows in the spring or other seasons of the year when the stream stands at the highest water mark, and not that which continues for the longest time in ordinary seasons. Decorah Woolen Mill Co. v. Greer, 58 Iowa, 86, 12 N. W. 128.

But that decision plainly cannot be made applicable to all cases, because the riparian owner is entitled to whatever advantage there may be in the change of the seasons; and a better definition, therefore, is that which has been adopted by the Minnesota court, as follows: The natural state of a stream is that condition in which the stream is, under the ordinary operation of the physical laws which affect it. This may be different at different seasons of the year, and yet be ordinary by the recurrence of the same condition about the same season every year. Dorman v. Ames, 12 Minn. 451, Gil. 347; Ames v. Cannon River Mfg. Co. 27 Minn. 245, 6 N. W. 787.

Water cannot be backed over line.

Although, as will be seen as the discussion progresses, there are a few cases which hold that no action will lie unless the upper proprietor is injured, the great majority of the cases hold that no injury need be shown. And, according to true principle, the latter doctrine is correct. For any swelling of the stream over the line is an invasion of the rights of the upper owner, who has a right to the stream in its natural condition, which he may protect, not only for present needs, but for possible future ones.

Therefore, it is held that there is no right to throw water back on the upper proprietor. Jones v. Fisher, 17 Can. S. C. 515; Ramsdale v. Foote, 55 Wis. 557, 13 N. W. 557; Haas v. Choussard, 17 Tex. 588.

Of course, this is true if a building is flooded thereby. Masonic Temple Asso. v. Banks, 94 Va. 695, 27 S. E. 490.

As a general rule, a riparian proprietor is restricted in the management of his property by the maxim, *Sic utere tuo ut alienum non lædas*, and he cannot take the initiative and construct a dam on a stream that will cause the water to overflow and injure the land of his neighbor, that may lie opposite or above his own premises, either when the water is at its usual height, or in an ordinary freshet; or that so obstructs its flow as to prevent the land of the other riparian proprietor from being properly drained. Wilhelm v. Burleyson, 106 N. C. 381, 11 S. E. 590.

Although the erection of the dam may be, in itself, lawful, yet, if, as a consequence of it, the property of another is damaged, the injured party can recover reparation commensurate with the injury sustained. Moffett v. Brewer, 1 G. Greene, 348.

So, although a riparian proprietor owning the land on both sides of a stream may erect a mill and dam thereon if he owns or can get all the land the milldam will overflow, yet he has no right to back the waters so as to injure other proprietors above, or detain them so as to injure any below. Delaney v. Boston, 2 Harr. (Del.) 489.

A lower riparian proprietor cannot dam back the water to the injury of an upper owner without a grant, actual or presumptive. Morris v. Commander, 25 N. C. (3 Ired. L.) 510.

Overflowing the lands of another by maintaining a milldam at a certain height is an illegal act, where the right does not exist by grant, prescription, or license; and its continuance for fifteen years without complaint does not create a right, that time being short of the prescriptive period. Miller v. Stowman, 26 Ind. 143.

A riparian proprietor may restrain the construction of a weir in the *alveus* of a stream where it affects the flow of the water of the stream past his lands. Belfast Ropeworks v. Boyd, Ir. L. R. 21 Eq. 560.

So, an upper proprietor is entitled to maintain an action against a lower one for increasing the height of a weir, where the effect is to raise the water of the river as it flows past the upper proprietor's land, although no actual damage is done. M'Glone v. Smith, Ir. L. R. 22 C. L. 559.

One who raises a dam, whereby the lands of

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control an indispensable condition of the enjoyment of special privileges by way of eminent domain.

Boston & R. Mill Corp. v. *Newman*, 12 Pick. 467, 23 Am. Dec. 622; *People* v. *New York C. & H. R. R. Co.* 28 Hun, 543.

When private property is devoted to a public use it is subject to public regulation.

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd* v. *New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

No general definition of what degree of public good will meet the constitutional requirement can be framed, because it is in every case a question of local policy.

Cape Girardeau v. *Houck*, 129 Mo. 607, 31 S. W. 933; *Hartwell* v. *Armstrong*, 19 Barb. 166; *Turner* v. *Nye*, 154 Mass. 579, 14 L. R. A. 487, 28 N. E. 1048; *Maffet* v. *Quine*, 93 Fed. 347; *Re Tuthill*, 36 App. Div. 492, 55 N. Y. Supp. 657; *Prescott Irrig. Co.* v. *Flathers*, 20 Wash. 454, 55 Pac. 635; *Johnston* v. *People's Natural Gas Co.* (Pa.) 5 Cent. Rep. 564, 7 Atl. 167; *Re Ohio Valley Gas Co.* 6 Pa. Dist. R. 200; *Bloomfield & R. Natural Gaslight Co.* v. *Richardson*, 63 Barb. 437; *West Virginia Transp. Co.* v. *Volcanic Oil & Coal Co.* 5 W. Va. 382; *Lamborn* v. *Bell*, 18 Colo. 346, 20 L. R. A. 241, 32 Pac. 989; *Dayton Gold & S. Min. Co.* v. *Seawell*, 11 Nev. 394.

In determining whether the use is public, it has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in the benefits to be derived from the purpose for which the property is appropriated. It is enough if the taking tends to enlarge the resources, increase the industrial

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an upper riparian owner are flooded, is liable for the resulting damage. The maxim of the common law that the owner of the soil has absolute dominion over it above and below the surface, and that damage caused to others by his rightful command over his own soil is *damnum absque injuria*, has no application to such case. Coloney v. Farrow, 91 Hun, 82, 36 N. Y. Supp. 164.

2 Rolle Abr. 140, pl. 6, says if a man stops a stream of water which runs through his land by which my land is surrounded it is a nuisance to me; citing 9 Edw. IV. 35. The question there was as to the right to enter the land and throw down the obstruction, and the question of nuisance was only incidentally passed on.

But it has been decided that if a dam is so used as wrongfully to throw the water upon the lands or mills of another it may be called a nuisance. Snow v. Cowles, 22 N. H. 302.

Every injury by throwing the water of a water course back upon the land of an upper proprietor is a species of tort, denominated a nuisance, for which he is entitled to redress by an action, in which he may recover damages, or may have such nuisance abated. Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

Therefore, a lower riparian owner cannot dam back the waters of his stream onto the land of a higher owner without committing an actionable nuisance, as the upper owner is entitled to the natural flow of the stream. Beech v. Kuder, 15 Pa. Super. Ct. 89.

It is not essential to a party's liability in damages for injury caused by the back water of a dam which he erected, that he should own the freehold of the whole, or that of a part, of the land on which the dam is situated. Dorman v. Ames, 12 Minn. 451, Gil. 347.

The erection of a dam by one to whom land is conveyed without any water rights or privileges is a nuisance subject to abatement, where it floods the land of an adjoining riparian owner, and injures his water privileges. Winchell v. Clark, 68 Mich. 64, 35 N. W. 907.

Interference with mill.

A lower riparian owner is not entitled to erect a mill and dam in such proximity to a mill higher up the stream that the operation of the latter is completely impeded by the reflux of water. Boatner v. Henderson, 5 Mart. N. S. 186.

So, the owner of a milldam who erects the same upon his own land across a stream flowing through such land, will be liable to damages, commensurate with the injury sustained by the owner of land, and a mill seat above, by the backing up of the water thereon, and it is not material which owner built his mill first, unless the lower owner has acquired the right to back water upon the other's land by prescription. Hill v. Ward, 7 Ill. 285; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Hutchinson v. Coleman, 10 N. J. L. 78.

A dam across a stream, which causes the water to back upon the wheels of an upper riparian owner's mill, when it is not shown that the stream was a public highway when the dam was erected, is a private nuisance. Moffett v. Brewer, 1 G. Greene, 348.

The upper riparian proprietor is entitled to at least nominal damages if his water wheel is flooded by the dam of a lower owner. Little v. Stamback, 63 N. C. 285.

The mere fact that the injury suffered by the upper mill owner by the damming back of the water is small will not prevent his recovery. Thompson v. Crocker, 9 Pick. 59.

Interference with drainage.

Every owner of land is entitled to the use of a natural outlet for water for all useful purposes, whether it be a current of fresh, or of salt, water passing through or by his land, including necessary drainage, and is entitled to an action against one obstructing the flow upon his own land. Murdock v. Stickney, 8 Cush. 113.

The owner of lands on which there is a natural water course is entitled to the free drainage thereof on his lands unobstructed by a lower owner. Oliver v. New York Bay Cemetery Co. 38 N. J. Eq. 109; Treat v. Bates, 27 Mich. 390; Hastings v. Livermore, 7 Gray, 194; Pugh v. Wheeler, 19 N. C. (2 Dev. & B. L.) 50.

The lower owner cannot obstruct the water course so that it will not carry off the water which is accustomed to flow in it. Ferris v. Wellborn, 64 Miss. 29, 8 So. 165.

One who ponds water by means of a dam, in such a way as to cut off the drainage from land adjoining the stream, will be liable for the injury thereby inflicted. Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 Am. Dec. 179.

Where a lot is drained by means of a natural channel through which water flows most of the year, an owner of adjoining land through which the stream flows has no right to dam up the channel of the water course, and thereby cause the water to overflow such lot to the injury of the owner. Booker v. McBride, 16 Tex. Civ. App. 348, 40 S. W. 1031. In that case

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energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of capital and labor.

Talbot v. *Hudson*, 16 Gray, 417.

The element of private gain does not affect the question of public use.

Re Bloomfield & R. Natural Gaslight Co. 63 Barb. 437; *Bennington* v. *Park*, 50 Vt. 178.

The necessity for condemnation need not be an absolute physical necessity, but may be one created by expediency or reasonable convenience.

Aurora & G. R. Co. v. *Harvey*, 178 Ill. 477, 53 N. E. 331; *Rialto Irrig. Dist.* v. *Brandon*, 103 Cal. 384, 37 Pac. 484; *Overman Silver Min. Co.* v. *Corcoran*, 15 Nev. 147; *Re Rhode Island Suburban R. Co.* 22 R. I. 457, 52 L. R. A. 879, 48 Atl. 591.

To remove the obstacle of private obstruction to a great public improvement in which large numbers are interested would be, in the language of the Constitution, "for the benefit and welfare of the state."

Great Falls Mfg. Co. v. *Fernald*, 47 N. H. 444; *Olmstead* v. *Camp*, 33 Conn. 532, 89 Am. Dec. 221.

The flowage acts are constitutional.

Jordan v. *Woodward*, 40 Me. 317; *State* v. *Edwards*, 86 Me. 102, 25 L. R. A. 504, 29 Atl. 947; *Blair* v. *Cuming County*, 111 U. S. 363, 28 L. ed. 457, 4 Sup. Ct. Rep. 449; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Chicago, M. & St. P. R. Co.* v. *Minnesota*,

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some cases dealing with surface water were distinguished, on the ground that the common-law rule that when an adjoining proprietor in the ordinary use of his property diverts the surface water to and upon the land of his neighbor he is not liable, and the injury which results therefrom is *damnum absque injuria*, has no application to a case where an adjoining proprietor dams up a natural water course, and thereby causes the surface water to overflow the land of his neighbor.

One who erects an embankment which absolutely stops the flow of a stream of water, causing it to dam back upon the land of another, rendering it boggy and marshy in places; and which also interferes with the flow of the water in times of freshet, changing its course to the damage of the soil,—is liable for the damages inflicted during the six years prior to the commencement of the action. Smith v. Philadelphia & R. R. Co. 57 Fed. 903.

The owner of premises damaged by flood water of a river, and by accumulated surface water, due to the maintenance of a levee or dam stopping up a slough through which such waters were accustomed to flow, is entitled to recover damages therefor against those maintaining the same. Montgomery v. Locke (Cal.) 11 Pac. 874, Reargument in 72 Cal. 75, 13 Pac. 401.

That a right of drainage through an ancient water course has become of no value by reason of the construction of a public sewer system will not defeat an action for injuries caused by obstruction of the water course so as to interfere with the right of drainage through it. Hastings v. Livermore, 7 Gray, 194.

So, a right of action for obstructing a water-course through which plaintiff has a right of drainage is not affected by the construction at the same time of a new drain, although plaintiff's land is thereby as effectually drained. Hastings v. Livermore, 15 Gray, 10.

Raising lakes and ponds.

An owner of land bordering upon a natural lake is liable to another owner of land also bordering upon it for damage to the latter resulting from the flooding of his land caused by the act of the other in damming up the outlet of the lake, and causing the lake to rise to a greater height than the natural level. Dole v. Clow, 21 Ill. App. 477.

Making an embankment across the outlet of a natural lake, so as to cause the waters of the lake to overflow an owner's land, creates a liability, although the outlet is not a running stream in the usual sense, but submerges itself and filters through a bed of gravel. Hebron Gravel Road Co. v. Harvey, 90 Ind. 192, 46 Am. Rep. 199.

The permanent maintenance of the water of a navigable lake at a height above high-water mark constitutes a taking of the property of the adjoining owners which entitles them to compensation. *Re* Minnetonka Lake Improv. Co. 56 Minn. 513, 58 N. W. 295.

One who has been granted an injunction to restrain the cutting of trees and undergrowth on the banks of his pond, and the digging of ditches which would empty surface water therein and fill it in, but has been refused such relief against the cultivation of land already cleared; and who undertakes to prevent such cultivation by raising his dam so as to overflow such cleared portion by back water,—may be ordered by the court to lower the dam to the height at which it stood at the time of the granting of the injunction, and may be attached for contempt for refusal to obey such order. Baker v. Weaver, 104 Ga. 228, 30 S. E. 726.

Equity will not restrain the owner of a dam from raising it or deepening the channel so as to change the natural level of the lake forming the reservoir, when the injury done may be compensated for in money damages, and the question of avoiding a multiplicity of suits does not arise, because no action at law had been brought. Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co. 37 N. H. 254.

Other injuries.

The owner of a dam is bound so to use his own property, and so to govern and control it that injury will not result to mining claims above by overflow. Fraler v. Sears Union Water Co. 12 Cal. 555, 73 Am. Dec. 562.

The locators of a mining claim upon the banks of a creek, using the bed of the stream for the working of their claim, are entitled to recover for damages caused by the subsequent construction of a dam, which turns back the water upon such claim so as to interfere with the operation thereof, preventing the tailings therefrom from being carried off. Sims v. Smith, 7 Cal. 149, 68 Am. Dec. 233.

Without a right acquired, either by prescription, purchase, or assent, or under mill-dam statutes, a riparian owner can put no dam across a stream that causes the water to back up and overflow the lands of an adjacent landowner, or render impassable his only available

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134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Hazen* v. *Essex Co.* 12 Cush. 475; *Todd* v. *Austin*, 34 Conn. 79; *Dayton Gold & S. Min. Co.* v. *Seawell*, 11 Nev. 394; *Occum Co.* v. *A. & W. Sprague Mfg. Co.* 35 Conn. 496; *Harding* v. *Stamford Water Co.* 41 Conn. 87; *Ash* v. *Cummings*, 50 N. H. 591; *Beekman* v. *Saratoga & S. R. Co.* 3 Paige, 73, 22 Am. Dec. 679; *Great Falls Mfg. Co.* v. *Fernald*, 47 N. H. 444; *Amoskeag Mfg. Co.* v. *Head*, 56 N. H. 386; *Amoskeag Mfg. Co.* v. *Worcester*, 60 N. H. 522; *Amoskeag Mfg. Co.* v. *Goodale*, 62 N. H. 66; *Hankins* v. *Lawrence*, 8 Blackf. 266; *Burnham* v. *Thompson*, 35 Iowa, 421; *Stewart* v. *Polk County*, 30 Iowa, 9, 1 Am. Rep. 238; *Fleming* v. *Hull*, 73 Iowa, 598, 35 N. W. 673; *Miller* v. *Troost*, 14 Minn. 365, Gil. 282; *Burgess* v. *Clark*, 35 N. C. (13 Ired. L.) 109; *King* v. *Shuford*, 32 N. C. (10 Ired. L.) 100; *Rhines* v. *Clark*, 51 Pa. 96; *Mowry* v. *Sheldon*, 2 R. I. 369; *Humes* v. *Shugart*, 10 Leigh, 332; *Hunter* v. *Coalter*, 4 Rand. (Va.) 58, 15 Am. Dec. 726; *Atty. Gen. ex rel. Eason* v. *Perkins*, 17 N. C. (2 Dev. Eq.) 38; *Trabue* v. *Macklin*, 4 B. Mon. 407; *McDougle* v. *Clark*, 7 B. Mon. 448; *Scudder* v. *Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756; *Harding* v. *Funk*, 8 Kan. 315.

Those acts are sustainable on well-established principles of law as a legitimate statutory regulation of the enjoyment of common rights by riparian owners, and regardless of any special interest the public may have in the water privileges involved.

Head v. *Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Fiske* v. *Framingham Mfg. Co.* 12 Pick. 68; *Bates* v. *Weymouth Iron Co.* 8 Cush. 548; *Allen* v. Ford. Harmon v. Carter (Tenn. Ch. App.) 59 S. W. 656.

The erection of a dam on a stream, so as to cause the overflow of another's lands above, thereby covering up and rendering certain springs of fresh water useless, and creating near his residence ponds of stagnant water injurious to the health of his family, is not such a cautious and prudent use of property in an appropriate manner as to exempt such dam owner from damages for such injuries caused as aforesaid. Neal v. Henry, Meigs, 17, 33 Am. Dec. 125.

The flooding of land by water set back by artificial obstructions placed in a running stream is a taking of such land within the meaning of the provision of Wisconsin Constitution requiring compensation to be made where private property is taken for public use. Arimond v. Green Bay & M. Canal Co. 31 Wis. 316.

Immemorial use of stream not necessary.

Among the earlier cases there is some uncertainty as to the basis for the right to the use and flow of the stream. Some of the cases indicated a belief that the right depended upon priority of use. See *note* to Isaacs v. Barber (Wash.) 30 L. R. A. 665. But that doctrine did not prevail. It was also suggested that the right depended on immemorial usage. But in Saunders v. Newman, 1 Barn. & Ald. 258, it was held that if a person stops the current of a stream that has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action, although the use to which the injured person puts the stream is not immemorial. And it is now settled that the right to the natural flow of the stream is a natural right, given by nature, and that it depends solely on ownership of the banks of the stream, regardless of whether any use has been made of it or not.

Temporary obstruction.

In an action by a mill owner for obstructions to his machinery from back water from a dam erected by another on a river below, such obstructions need not be continuous to entitle him to a recovery. One hour's obstruction would furnish as complete a cause of action as any longer period of time. Cory v. Silcox, 6 Ind. 39.

No injury need be shown.

Of course, there can be no question that neither a dam across a stream, nor the collection of water in a reservoir formed thereby, is a nuisance *per se*. Rogers v. Barker, 31 Barb. 447.

The mere erection of a dam, with the usual waste gates, by which a mill owner is enabled to flow back water higher than he has a right to, furnishes no ground of action against him, or any agent engaged in superintending the erection of such dam; but it is its subsequent control and management which will give rise to liability for damage done. Sargent v. Stark, 12 N. H. 332.

The mere erection of the frame of a dam, which, by further work in putting on or grooving plank or boards, would so pond the water back as to create a nuisance, does not constitute a nuisance before any injury inures. State v. Suttle, 115 N. C. 784, 20 S. E. 725.

An owner of a dam cannot be held liable for the flowing of upper riparian lands when it is evident that the dam as constructed could not throw the water back onto the damaged lands. Lowery v. San Joaquin & K. River Canal & Irrig. Co. 134 Cal. 185, 66 Pac. 225.

So, an upper riparian proprietor cannot maintain an action as a prior appropriator of a stream to prevent the erection of a dam in the stream on the lands of a lower owner when he fails to show that he has suffered, or will necessarily sustain, any injury to his premises by such erection, where, instead of a proposed 8-foot dam, one would be required 70.66 feet high to back the water to his lower line. Blair v. Boswell, 37 Or. 168, 61 Pac. 341.

From the principles established in the last preceding cases, some of the courts have deduced the further rule that, in order to give the upper proprietor a right to relief, some injury to him must be shown.

Thus, it has been held that an action cannot be maintained against the owner of a milldam for backing water unless special damage has been inflicted, and the mere raising the height of the water within the channel does not constitute special damage. Chalk v. McAlily, 11 Rich. L. 153.

That there must be proof of special damage to entitle the upper proprietor to maintain an action on the case for the throwing back of water by a dam. Garrett v. McKie, 1 Rich. L. 445, 44 Am. Dec. 263.

That an action cannot be sustained unless some injujry has been inflicted. Omelvany v. Jaggers, 2 Hill L. 634, 27 Am. Dec. 417.

That no damages are incurred when the water backed by a dam erected under legislative

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Jay, 60 Me. 124, 11 Am. Rep. 185; *Jones* v. *Skinner*, 61 Me. 25; *Waddy* v. *Johnson*, 27 N. C. (5 Ired. L.) 333; *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Wurts* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Olmstead* v. *Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Coster* v. *Tide Water Co.* 18 N. J. Eq. 54, 518, 90 Am. Dec. 634.

The proceeding is of a proper judicial nature, and one peculiarly appropriate for the determination of the issues involved. It is due process of law.

Re Weatherhead, 53 Vt. 653; *Gold* v. *Vermont C. R. Co.* 19 Vt. 478; *Scudder* v. *Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756; *Wurts* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086.

Messrs. **W. L. Burnap** and **A. G. Whittemore**, for defendants:

The taking of land for water power for running mills or machinery is not for a "public use."

1 Lewis, Em. Dom. 180; *Tyler* v. *Beacher*, 44 Vt. 648, 8 Am. Dec. 398; *Re Barre Water Co.* 62 Vt. 27, 9 L. R. A. 195, 20 Atl. 109.

The test of "public use" is: Will all persons, upon demand, be served by the party who claims to be fulfilling the public purpose or use on his application, and can such demand be enforced?

Property cannot be taken under the right of eminent domain simply because the public will be incidentally benefited by the use, so long as the public has no right of control.

Scudder v. *Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756.

The purpose for which the right is asked is outside the scope of the flowage statute.

When one claims to acquire lands under a delegation of the power of eminent domain,

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authority, rises no higher than the natural high-water mark. State *ex rel.* Beise v. Hennepin County Dist. Ct. 83 Minn. 464, 86 N. W. 455.

That, in order to maintain an action for raising the water by a dam to some small degree between the banks on the upper riparian proprietor's land there must be actual damage. The mere invasion of his right is not sufficient. Cooper v. Hall, 5 Ohio, 328; M'Elroy v. Goble, 6 Ohio St. 187.

And in Cooper v. Barber, 3 Taunt. 99, in discussing the acquisition of a right by prescription, it is said that there is a right to pen the water back until a neighbor is prejudiced.

It would seem that those cases went too far. Of course one who seeks to compel a lower riparian owner to lower a dam on his property because it is an injury to land of the upper proprietor has the burden of proving the injury. Avery v. Empire Woolen Co. 82 N. Y. 583.

But, from the principles thus far noticed, it is evident that injury is shown as soon as it appears that the water is backed over the line. The upper proprietor has a right to protect himself from the acquisition of prescriptive rights at least, and that right is not diminished by the fact that he has no present use for his rights to their full extent. Consequently the majority of the courts refuse to follow the doctrine that substantial injury must be shown.

A riparian owner may, by means of a dam, swell water, when it is in its natural state, to his neighbor's line above, but not further, without being guilty of a wrong. Miller v. Shenandoah Pulp Co. 38 W. Va. 558, 18 S. E. 740.

The water cannot be set back 1 foot by the lower proprietor upon the land of the upper proprietor. Hill v. Ward, 7 Ill. 285.

The mere throwing the water back in the channel upon the land of the upper proprietor, although it does not overflow its bank, is actionable. Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Ripka v. Sergeant, 7 Watts & S. 9, 42 Am. Dec. 214.

If a lower proprietor undertakes to obstruct or change the natural stream, and thereby backs the water on the upper owner, the latter, although he cannot show any injury, is entitled to nominal damages. Whipple v. Cumberland Mfg. Co. 2 Story, 661, Fed. Cas. No. 17,516.

The law implies damages from flooding the ground of another, though it be in the least possible degree and without actual prejudice. 59 L. R. A.

Alexander v. Kerr, 2 Rawle, 83, 19 Am. Dec. 616.

Flowing water back on the land of an owner by the erection of a milldam on a river below will entitle such owner to nominal damages without proof of actual damages. Cory v. Silcox, 6 Ind. 39; Pastorius v. Fisher, 1 Rawle, 27; Branch v. Doane, 18 Conn. 233.

Nominal damages for the overflow of land, caused by a milldam, may be recovered, without proof of special damage thereby, where it appears that there has been an illegal invasion of the plaintiff's property. Ellington v. Bennett, 59 Ga. 286.

In an action for damages to one's land caused by the erection of a dam or embankment by another, it is not necessary to a cause of action that such landowner should prove that the obstruction complained of caused the water both to overflow and remain on the land to a greater extent than it would have done if the obstruction had not been made. It is sufficient to prove either result. Doud v. Guthrie, 11 Ill. App. 104.

That the injury from the setting back of water by a dam is small will not prevent the maintenance of the action. Alexander v. Kerr, 2 Rawle, 83, 19 Am. Dec. 616; Rigney v. Tacoma Light & Water Co. 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147.

If the lower owner throws the water back upon a mill wheel of the upper proprietor the latter may maintain an action to protect his right, although the water is not thrown out of the banks, and no perceptible damage is done. Hendrick v. Cook, 4 Ga. 241.

The law will imply nominal damages, if, by the erection of dams and dykes by a person, the waters of a stream are caused to overflow an owner's land; and in an action therefor actual damages need not be proved to entitle him to a recovery. Doud v. Guthrie, 13 Ill. App. 653.

When a riparian proprietor has established the fact that water is backed onto his land by a lower proprietor, he is entitled to an inquiry as to the relief which should be granted, and the rule *de minimis* will have no force. Dickson v. Burnham, 14 Grant Ch. (U. C.) 594.

The slightest flooding back caused by a dam complained of will entitle the upper proprietor to damages, nominal if the injury is very slight, compensatory if substantial. Kemmerer v. Edelman, 23 Pa. 148.

Flowing water back on the land of another is not answered by the plea that the portion so

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he must show express authority of law to justify the claim.

Rensselaer & S. R. Co. v. *Davis*, 43 N. Y. 137.

Munson, J., delivered the opinion of the court:

The petition alleges that the petitioner is the owner in trust of a certain mill property on the Winooski river, and that he desires to raise to the height of 50 feet a dam now existing on said property, and proposes to use the water power so provided in generating electricity for the operation of the Burlington & Hinesburgh railroad; shows further that the raising of this dam will flow the lands of other owners, and that the petitioner is unable to agree with them as to the damages they will sustain; and prays that he may be permitted to raise said dam, and for the appointment of commissioners to ascertain the damages caused thereby. It was moved that the petition be dismissed because it did not appear from the allegations that the flowage would be a public benefit, or such a public benefit as would warrant the taking under the Constitution. The county court sustained the motion. No objection is taken as to the manner in which the question is raised. It is provided in chapter 159 of the Vermont Statutes that one who desires to set up or continue a mill or manufactory on his land, and to erect or continue or raise a dam to obtain water therefor, and thereby flow the lands of another person, may secure the right to do so in the manner there provided, if commissioners appointed for that purpose, or the court itself, shall find "that the flowing of the land as proposed will be of public benefit." For the purposes of this discussion, it will be assumed, without consideration, that

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flooded was not thereby depreciated in value. The law implies damages for such an act, not alone for the present injury, but also to preserve the rights of property, distinct and free from encroachment. Graver v. Sholl, 42 Pa. 58.

The fact that the owner of a water privilege is not applying it to any useful purpose does not deprive him of the right to restrain a lower proprietor from damming back the water to the injury of such water right. Graham v. Burr, 4 Grant Ch. (U. C.) 1.

An action will lie for penning back water, as soon as it interferes with a use to which the upper proprietor attempts to put his land, although he was not making such use of the land when the dam was built. McLaren v. Cook, 3 U. C. Q. B. 299.

If the flowage will ripen into an adverse right if not interrupted, an action will lie, although the injury is small. Bassett v. Salisbury Mfg. Co. 28 N. H. 455.

Request to remove.

A request to remove a dam is not necessary to entitle plaintiff to recover for flowage, where the dam was erected by the defendant. Branch v. Doane, 17 Conn. 402.

b. *Legislative authority.*

1. *In general.*

The legislature cannot authorize the raising of a dam so as to overflow land of the adjoining proprietor, without providing compensation for the injury thereby caused to him. Colwell v. May's Landing Water Power Co. 19 N. J. Eq. 245.

Legislative authority to erect a lower mill will not authorize the throwing back of water upon an upper one, although they are within the limits of tide water. Lee v. Pembroke Iron Co. 57 Me. 481, 2 Am. Rep. 59.

An act of the legislature conferring power upon a corporation to build and maintain a dam will not authorize it to flow the land of a riparian proprietor without his consent. Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53.

A legislative grant of authority to build and maintain a dam across a stream, after providing certain public benefits, does not exempt the grantee from payment of damages to an upper owner whose land is flowed in consequence. Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; Rowan v. Johnson, 17 N. J. L. 154.

Statutory authority to build a dam across a stream which is a public highway, upon one's own land, will not protect the builder from liability for flowing a neighbor's land. Crittenden v. Wilson, 5 Cow. 165, 15 Am. Dec. 462.

A statute authorizing a certain person to build a dam does not take away the right of an upper riparian owner who is injured by the dam's causing the back water to be thrown on the wheels of his mill, although not so as to stop them entirely, to abate it as a nuisance by tearing it down. State v. Moffett, 1 G. Greene, 247.

Injuries by backing water seem to be embraced within the constitutional inhibition against injuring property by legislative authority without making compensation. Wabash & E. Canal Co. v. Spears, 16 Ind. 441, 79 Am. Dec. 444.

He who assumes, under color of legislative authority, to overflow an ancient mill, "takes" that mill and privilege from the owner as effectively and directly as though he entered upon the premises and demolished the building. Lee v. Pembroke Iron Co. 57 Me. 481, 2 Am. Rep. 59.

A mill owner on a fresh-water stream, owning its bed, has an appurtenant right to the natural descent of the waters and their unobstructed outlet, which is part of the freehold and as much property as the title to the soil; and of this he cannot be deprived without compensation, by any grant of the legislature to a lower proprietor to dam the stream. Trenton Water Power Co. v. Raff, 36 N. J. L. 335.

Where a mill owner flows another's mill property under sanction of legislative authority, he will be liable therefor under the common law if no statutory remedy is furnished or found applicable. Lee v. Pembroke Iron Co. 57 Me. 481, 2 Am. Rep. 59.

Legislative authority to do an act which, however carefully done, will naturally result in damage to private property, must be complied with as to provisions for ascertaining such damage and securing an indemnity to the injured party, in order to prevent those who act under it from being dealt with at common law as wrongdoers. *Ibid.*

A statute authorizing the maintenance and construction of booms, but making no provisions against the flowing of lands higher up the stream, or for the recovery of damages caused by such flowing, does not show a legislative intent to exempt boom companies from

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a plant for the generation of electricity is a manufactory, within the meaning of the statute.

The first question for consideration, as stated by the petitioner, is whether the application of water power to the generation of electricity for use in the operation of a railroad is such a public benefit as will justify an exercise of the right of eminent domain under the provisions of this chapter. But this statement of the inquiry is hardly broad enough for our purpose, for this assumes that the statute names a constitutional ground of condemnation, and proposes to test the petitoner's right by inquiring whether his case is within its terms. A more accurate statement of the question would be whether this is a public use, within the meaning of the Constitution, for no finding of public benefit under the statute can avail unless the statute and the constitutional provision are brought together by construction. The argument of the petitioner is an earnest plea for a liberal construction of the term "public use." It is evidently considered that the term "public benefit" is a better expression of what is meant, and cases are cited where it is said that "public use" is synonymous with that term. We are also referred to the utterance of this court in *Re Barre Water Co.* 62 Vt. 27, 9 L. R. A. 195, 20 Atl. 109, where it is said that the power of condemnation "must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever-varying and constantly increasing necessities of an advancing civilization." It is urged that the use of electricity has become so important to the prosperity and development of the

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such liability, or authorize them to flow land if necessary to the successful prosecution of their business. Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

No authority may be conferred on a water-power company to enter upon, flow, or make any improvement upon, the shores of an island in a river without the consent of the owners of that island. Eastman v. St. Anthony Falls Water-Power Co. 43 Minn. 60, 44 N. W. 882.

To constitute a taking of overflowed lands for public use, entitling the owner thereof to compensation under constitutional provisions, it is not necessary that the land should be absolutely appropriated, nor that the owner be permanently deprived of the use of it; the serious and direct interruption of the use of such land by reason of the public improvement is sufficient. Payne v. Kansas City, St. J. & C. B. R. Co. 112 Mo. 6, 17 L. R. A. 628, 20 S. W. 322.

A water-power company organized and continued for private profit, empowered by statute to maintain for its own emolument a dam erected by public officers, is not immune from liability for injury to private citizens consequent upon such maintenance; such immunity extends only to acts done under valid legislation in the execution of a public trust for the public benefit, with care and skill, within the scope of authority. Trenton Water Power Co. v. Raff, 36 N. J. L. 335.

An act authorizing the owner of a millidam "to raise the dam" to the height of the natural surface of the water at the line of his lands will be construed to authorize the raising of the water in the dam to that height, and not to authorize the raising of the structure of the dam by which the water will be made to flow back upon the lands of the adjoining proprietor. Colwell v. May's Landing Water Power Co. 19 N. J. Eq. 245.

An act of the legislature permitting the damming of the outlet of a lake with a dam 7 feet high, but forbidding the raising of the water of the lake above its ordinary level, is inoperative when any dam of appreciable service to the grantee would raise the water of the lake above its ordinary level. Arimond v. Green Bay & M. Canal Co. 31 Wis. 316.

A state statute authorizing the flowage of land is not applicable to a place within the state, jurisdiction over which has been ceded to the United States, and does not justify a mill owner in flowing back water so as to obstruct machinery for the manufacture of fire-arms operated by the government, and thereby defeat the object for which the cession was procured. United States v. Ames, 1 Woodb. & M. 76, Fed. Cas. No. 14,441.

Authority conferred by statute upon a railroad corporation to construct its road upon its own land does not justify the obstruction by it of a natural water course due to the insufficiency of a culvert, by means of which the water was thrown upon the plaintiff's property to his injury. Mundy v. New York, L. E. & W. R. Co. 75 Hun, 479, 27 N. Y. Supp. 469.

A railroad company is not relieved from liability for a dam on its right of way which amounts to a nuisance, and which it uses and keeps in repair, by reason of the fact that it was built by county commissioners under an act of the legislature, but with the railroad company's knowledge and consent. Payne v. Kansas City, St. J. & C. B. R. Co. 112 Mo. 6 17 L. R. A. 628, 20 S. W. 322.

When a legislative grant of authority to flow lands contains a condition that the grantee shall pay more than the value of the property taken under the power, the grantee, accepting the grant and exercising the power, cannot question the constitutionality of the condition. Dow v. Electric Co. 68 N. H. 59, 31 Atl. 22.

It is no defense to an action for a private nuisance by erecting a millidam that the same was erected pursuant to a license from the town. Nichols v. Pixly, 1 Root, 129.

If a person, pursuant to a right claimed by him under contract with the police jury, and by its authority, constructs a dam across a non-navigable water course, a neighboring inhabitant, whatever his rights therein, cannot take the law in his own hands and physically oppose its construction or tear it down when built, but must assert his rights by an appropriate action. Egan v. Russ, 39 La. Ann. 967, 3 So. 85.

The English common law of flowage was changed in Massachusetts and Maine by the ordinance of 1714, which authorized mill owners to flow the lands of upper riparian owners when they legally occupied their mill site, and a site already occupied was not flowed thereby. Jones v. Skinner, 61 Me. 25.

Regulation of stream.

The question of the validity of the mill acts is not within the scope of this note, but the authorities upon that question can be found in a *note* to Turner v. Nye (Mass.) 14 L. R. A. 487.

AVERY V. VERMONT ELECTRIC COMPANY, however, presents a collateral phase of that ques-

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state that the utilization of our water powers for its production ought to be regarded as a public necessity. We have in the petitioner's brief an extended presentation of the views expressed by other courts in dealing with the question of public use. In considering these opinions, it must be remembered that some states have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision. It is true, nevertheless, that some of the cases cited proceed upon grounds that afford support to the petitioner's contention. In fact, the reasoning of some of them comes dangerously near the argument that it is for the public benefit to have property of this character in the hands of those who will put it to the best use, and that the refusal of an obstinate or grasping owner to part with his property ought not to be allowed to block the wheels of progress. It is needless to say that arguments of this character can have no weight in the determination of cases arising under the Constitution of this state. Our only decision upon the flowage law is found in *Tyler* v. *Beacher*, 44 Vt. 648, 8 Am. Rep. 398. It was there held that the owner of a gristmill, who was under no obligation to grind for the public, could not flow the lands of another to increase his power, for the reason that the use was private. It is said by the petitioner that that case is opposed to the decisions of most of the states which have passed upon the question, and this is true. But we find nothing in the arguments of other courts that leads us to question its soundness, and have no disposition to recede from it. A review of the adverse line of decision will be found in Lewis

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tion of much interest. The contention that the legislature may permit a lower owner to dam the water back on to the upper owner's land when necessary to do so to develop the full power of the stream, and compel the upper owner to take his share of the value of the stream in money, under its power to regulate the common rights in the stream, is based directly upon Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441. In that case, Chief Justice Gray stated that the New Hampshire mill act was clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good in a more general sense, as well as to the rights of the riparian proprietor, to regulate the use of the water power of running streams, which, without some such regulation, could not be beneficially used. The petitioner in that case sought to establish a dam to create power for the manufacture of cotton, woolen, iron, and other materials. The petition was attacked by demurrer on the ground that the statute permitting the taking of land for such a purpose was unconstitutional and void. The court held that the constitutionality of the statute had been established by Great Falls Mfg. Co. v. Fernald, 47 N. H. 444, and Ash v. Cummings, 50 N. H. 592. The provision as to eminent domain, in the New Hampshire Constitution, is that "no part of a man's property shall be taken from him or applied to public uses without his consent, or that of the representative body of the people." That provision affords the individual much less protection than do most of the Constitutions, and it might well be argued that, when the legislature consents to the taking of property, the individual is bound thereby. The court, however, in the Fernald Case, states that the right of flowing land cannot be taken without the owner's consent, unless it is for a public use; and it decides that the establishment of power, for manufacturing purposes is a public use, holding that to create and improve water power in the streams and waters of a country is a matter of such general public advantage that private property taken for that purpose is taken for a public use. And that ruling was made the basis for the decision in the Ash Case. The Head Case was taken to the Supreme Court of the United States upon several grounds, but the court said that the single question presented for its decision was whether the landowner had been deprived of his property without due process of law in violation of the 14th Amendment of the Constitution of the United States. The only ground upon which absence of due process of law was claimed was the unconstitutionality of the statute. This statute had been held constitutional by the supreme court of the state, and the matter was so far one of local policy that the Supreme Court of the United States might well have considered itself bound by that holding. But the court, instead of doing so, proceeds to enter upon a discussion of the question of the constitutionality of the act, refuses to consider whether the flooding of lands for manufacturing purposes is a public use, and upholds the statute on local Massachusetts law, applying the ruling of Chief Justice Shaw in Bates v. Weymouth Iron Co. 8 Cush. 548, where he says that the right granted by the mill acts "is not a right to take and use the land of the proprietor above against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community. It is a provision by law for regulating the rights of proprietors on one and the same stream from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." In Massachusetts, the mill acts had their rise in 1714, long before the adoption of the first Constitution; and, when the Constitution was adopted, it provided "that no part of the property of any individual can, with justice, be taken from him or applied to public uses without his own consent, or that of the representative body of the people. . . . Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." There is nothing in that language to forbid the taking for private use, and the landowner is expressly bound by the act of the legislature. When the question of the validity of the mill acts came before the courts, there was no claim that they were unconstitutional. The sole question was whether the common-law remedy had been taken away by them.

The court, in Stowell v. Flagg, 11 Mass. 366, says the statute goes far "to establish a right in the owners of mills to flow the adjoining lands if necessary to the working of their mills," treating the question as merely one of local regulation within the power of the legislature. And it decides that there can be no doubt of the intention of the legislature to take away the common-law action, which might be renewed for every new injury, and so burden the owner of a mill with continual law suits and expenses, stating that the legislature has a right to substitute one process for another. The judge writing the opinion, says: "I cannot help thinking

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on Eminent Domain, §§ 178–181. This author considers that mills which are not required by law to serve the public, while they may be a public benefit, are not a public use, within the meaning of the Constitution, and says that the circumstances under which the contrary decisions were made may explain, but do not justify, them. But it is said that the purpose of this condemnation is to provide motive power for a railroad, and that the railroad is unquestionably a public servant. Treating the case as if the application were by the railroad company itself, the reasoning of this court in *Eldridge* v. *Smith*, 34 Vt. 484, is decidedly against the right. The distinction between taking the land necessary for the road, and the taking of property for use in the production of the means to be employed in carrying it on, is there clearly pointed out. But it is not necessary to resort to an application of this doctrine, for the reason of the decision in *Tyler* v. *Beacher* is controlling here. If the petitioner's purpose were found to be as alleged, this would not meet the requirement. It is true that the railroad must serve the public, but there is nothing that binds the petitioner to serve the railroad. And if we look to some direct service of the general public, there is nothing that binds the petitioner to give equal advantages to all. The suggestion that a failure in this respect would work a forfeiture does not remove the difficulty. The conditions which make the use public must exist at the time of the taking.

We have thus far considered the statute upon the theory that it was designed to give the right of eminent domain to every riparian owner for the maintenance of a mill or

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that the statute was incautiously copied from the ancient colonial and provincial acts, which were passed when the use of mills from the scarcity of them bore a much greater value compared to the land used for the purpose of agriculture than at present. But with this we have nothing to do. As the law is so, we must declare it." That language is utterly inapplicable in every state where the Constitution prevents the taking of private property for private use expressly, and also in those where it is held to do so by implication. In those states the question must recur, whether or not taking for mill purposes is for a public use. In Lowell v. Boston, 111 Mass. 464, 15 Am. Rep. 39, Judge Wells, in distinguishing the mill acts from an act authorising the issuance of bonds for the rebuilding of a city, said the mill acts are not founded upon the power of eminent domain, and do not authorize its exercise. No private property, or right in the nature of property is taken by force of the mill acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the right of another proprietor. This right of flowage is sometimes inaccurately called an easement. But it is not so. It confers no right in the land upon the mill owner, and it takes none from the landowner. This regulation of the rights of riparian proprietors above in respect to the stream and to their adjacent lands liable to be affected by its use involves no other governmental power than that "to make, ordain, or establish all manner of wholesome, reasonable orders, laws, statutes, and ordinances" as the legislature shall judge to be for the good and welfare of the commonwealth, and for the government and ordering thereof, and of the subjects of the same.

The distinction between permanently covering land with water, and with dirt or other *débris* from a public improvement, is not clear; and it would certainly be difficult to convince anyone that a railroad company, which, in making an excavation for its right of way, placed the excavated material on adjoining property to remain there permanently, had not effected a taking within the meaning of the constitutional provision requiring compensation to be made therefor. In fact, the Supreme Court of the United States, in Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557, held that the backing of waters so as to overflow the land of an individual, or any other superinduced addition of water, earth, sand, or other material, or artificial structure placed on land for the public benefit, is such a taking as by the constitutional provision demands compensation. And that that is the general rule, fully appears by the cases cited *supra*. The doctrine that it is not so appears to be local to Massachusetts, and Head v. Amoskeag Mfg. Co., being founded upon it, cannot be held to be of general application. The reasoning in that case is based upon the analogy between owners upon water courses and tenants in common generally; but that reasoning is conclusively answered by the observation in AVERY V. VERMONT ELECTRIC CO. that it seems "to assume that the land goes with the stream, instead of the stream with the land, and to give the riparian owners a joint interest in the land because of their peculiar rights in the water. But the owners of the various properties are the several and independent owners of their respective parcels of land, and their only right to the water is such as this ownership gives them. To say that one's holding of the land is subservient to such use as the lower owner may desire to make of the water is to reverse all our theories regarding the use of streams."

2. *For improvement of navigation.*

A corporation formed under a river improvement law is not entitled to improve a nonnavigable stream, and has no power to flow lands, nor to take lands for the location of dams or other improvements, for that purpose. East Branch Sturgeon River Improv. Co. v. White & F. Lumber Co. 69 Mich. 207, 37 N. W. 192.

A corporation having charter authority to improve the navigation of a stream cannot, after placing a dam at a place not authorized by its charter, defeat a common-law action by the riparian owner injured thereby, on the ground that he ought to have proceeded for his damages under the statute. Davis v. Mattawamkeag Log Driving Co. 82 Me. 346, 19 Atl. 828.

The bed of navigable waters does not include low lands which, although subject to frequent overflow, are valuable as meadows and pastures; and the state has no right, even in aid of navigation, to raise the water by artificial means, so as to injure or destroy such lands, without making compensation. *Re* Minnetonka Lake Improv. Co. 56 Minn. 513, 58 N. W. 295.

A navigation corporation is not a riparian owner, and cannot claim the privilege of one. It has no right to swell the water of the river at all, except what it derives from its charter

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manufactory of public benefit. This was the view formerly taken of the mill act of Massachusetts, but the more recent doctrine of that state is that the provision is not an exercise of the right of eminent domain, but a statutory regulation of rights common to the riparian owners. It is insisted that the petition can be sustained on this ground. The doctrine referred to is claimed to be analogous to that upon which provision is made for the partition of land held by several tenants in common. The different owners of the bed and banks of the stream are treated as having a common interest in the reasonable use of the flowing water. It is said that one reasonable use of the water is the use of the power inherent in the fall of the stream, that this power cannot be used without damming the water and causing it to flow back, and that one man may own the fall, and another the land which it is necessary to flow. The courts of Massachusetts hold that the legislature may secure the full value of the stream to the different owners by combining these two interests for use, and compelling the owner of the flooded land to take his share in money. This doctrine is apparently approved by Judge Redfield in his note to *Allen* v. *Jay* (in the American Law Register for August, 1873) 12 Am. L. Reg. N. S. 481, and sanctioned by the Supreme Court of the United States in *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441. We cannot adopt this view. It seems to assume that the land goes with the stream, instead of the stream with the land, and to give the riparian owners a joint interest in the land because of their peculiar rights to the water. But the owners of the various properties are the sev-

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and under the conditions therein imposed. Monongahela Nav. Co. v. Coon, 6 Pa. 379, 47 Am. Dec. 474.

Compensation must be made to the abutting owner before a boom can be maintained the effect of which is to raise the water and cast it, together with dirt and sticks, upon his land. Weaver v. Mississippi & R. River Boom Co. 28 Minn. 534, 11 N. W. 114; McKenzie v. Mississippi & R. River Boom. Co. 29 Minn. 288, 13 N. W. 123.

The ground of the liability of a boom company for causing a log jam, raising of the water in a river so as to overflow certain property, is not the negligent construction or operation of its works, but the fact that the boom company had no legal right to overflow or damage the premises until such right had been acquired by purchase or in condemnation proceedings. Hueston v. Mississippi & R. River Boom Co. 76 Minn. 251, 79 N. W. 92.

A river improvement company's right to maintain its dams across nonnavigable streams for the purpose of aiding the driving of logs is subordinate to that of the riparian owner to have his land free from overflow and damage resulting from raising the water above ordinary high-water mark. Carlson v. St. Louis River Dam & Improv. Co. 73 Minn. 128, 41 L. R. A. 371, 75 N. W. 1044.

So, one who, by means of dams and appurtenances on a nonnavigable river, causes water to flow on private property, although by these improvements the river is made navigable for logs, takes private property without compensation. *Ibid.*

A boom company can only acquire the right to overflow lands by grant, or by the exercise of eminent domain upon payment of compensation to the owner. Gravel v. Little Falls Improv. & Nav. Co. 74 Minn. 416, 77 N. W. 217.

In cases of rivers, the beds of which belong to the public, and the title of the riparian owners on which goes only to high-water mark, a corporation authorized to improve a river may, in aid of navigation, raise and permanently maintain the water up to the high-water mark, without making any compensation to riparian owners, and without incurring liability in case of injury to them. Between high and low water mark the riparian proprietor's title is qualified or limited by the public right. Gniadek v. Northwestern Improv. & Boom Co. 73 Minn. 87, 75 N. W. 894.

A purchaser of lands on a navigable lake, patented by the United States without reservations, does not take the same subject to an easement in favor of the improvement of the navigation of the Fox and Wisconsin rivers, in aid of which the United States had previously granted lands to the state, so as to defeat his right of action for damages by the overflowing thereof by a dam constructed in an outlet of the lake and forming part of the works for the improvement of navigation. Arimond v. Green Bay & M. Canal Co. 31 Wis. 316.

The rights of a riparian owner in the ebb and flow of the tide in a navigable river are subordinate to the government's control of the waters for the purpose of navigation; and the confinement of the waters for the purposes of scouring and deepening the channel, whereby canals and ditches used to drain rice fields are flooded and rendered unavailable, is *damnum absque injuria*. Mills v. United States, 12 L. R. A. 673, 46 Fed. 738.

In the above case it was held that the fact that the drainage of rice lands is impaired by the erection of a dam constructed by the government for the improvement of a navigable river, and that the raising of the low-water level thereby renders the lands liable to overflow, and has rendered the construction of levees necessary, does not constitute a taking of property, within the meaning of the constitutional prohibition against the taking of property for public use without compensation.

In accordance with the above it has been held that in the exercise of powers of eminent domain no liability will be incurred for consequential damages caused by the back water of a dam. Freeland v. Pennsylvania R. Co. 66 Pa. 91, 5 Am. Rep. 329.

But subsequent cases held that land flooded by a government dam so as to be unfitted for cultivation is taken for public purposes, and compensation must be made therefor, under the act of Congress of March 3, 1887, although no part of the property is actually occupied by the government. King v. United States, 59 Fed. 9.

And again, that a rice plantation is taken by the government in the exercise of its power of eminent domain, so that the owner is entitled to compensation therefor, where, in improving the navigation of a river upon which the plantation lies, the level of the water is raised so that the plantation is flooded, drainage rendered impossible, and the property rendered valueless. Williams v. United States, 104 Fed. 50.

So the Supreme Court of the United States held that the conversion of adjoining property from a valuable plantation into an irreclaimable

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eral and independent owners of their respective parcels of land, and their only right to the water is such as this ownership gives them. To say that one's holding of the land is subservient to such use as the lower owner may desire to make of the water is to reverse all our theories regarding the use of streams. It is true that in *Johns* v. *Stevens*, 3 Vt. 308, Judge Prentiss seems to assume that it would be within the power of the legislature to encourage the building of mills by a statute of this character. But in *Adams* v. *Barney*, 25 Vt. 225, where the right of the owner of one side of the stream to maintain a dam across it was involved, Judge Redfield said that the land on the opposite side was the defendant's, and that the plaintiff had no right to use it, and that no court or legislature had the power to give him the right. This certainly excluded the idea of an acquirement of mill privileges through a statutory regulation of riparian rights. It should be noticed also, that the argument advanced in support of the statute as thus classified is not coextensive with the right given. The argument is based upon the existence of a common interest in the stream, while the statute applies to all flowable lands. A dam of moderate elevation may flood the land of one whose premises are not contiguous to the stream, and who consequently has no interest in it. The maintenance of the petition upon the ground last urged would amount to a holding that all private lands in the state that can be flowed by the highest practicable dams are held subject to the full utilization of the streams upon which they lie. The Massachusetts court supports its position by holding that the mere flowing of land is not a taking of the property,—a conclusion which we are not ready to adopt. We think Mr. Lewis is right in saying that appropriations of this character cannot be sustained without virtually expunging the words "public use" from the Constitution.

Judgment affirmed.

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bog by the raising of the level of the river for the purpose of improving navigation is a taking of the property for which compensation must be made. United States v. Lynah, 188 U. S. 445, 47 L. ed. —, 23 Sup. Ct. Rep. 349.

A state cannot, for the improvement of navigation of a stream, construct a dam which will overflow riparian property without making compensation for the injury so caused, where the Constitution prohibits the taking of property for public use without compensation. Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557.

The repeal of an act of Congress conferring the right to recover damages for injury to land flooded by the improvement of navigable rivers limits the recovery to damages accruing between the time the plaintiff acquires title to the lands flooded and the repeal of the statute. Paine Lumber Co. v. United States, 55 Fed. 854.

A riparian owner is entitled to compensation for damages sustained to his dock by the raising of a dam to improve navigation, provided the dock does not encroach upon the waters of a river navigable in fact so as to obstruct navigation and impede commerce, where the statute provides for compensation in case any land or other property shall be flooded or injured. *Ibid.*

When lands which were granted with absolute power of sale, to a state for the purpose of aiding the improvement of the navigation of certain rivers, are sold absolutely without express reservation by the state, there will be no reservation of the right to flow such lands in the course of such improvement implied from the purpose for which the lands were granted to the state; nor, when the lands had not yet been entered upon at the time of their sale, from a statute providing that, when any lands appropriated shall belong to the state, such lands, or so much of adjoining land as shall be valuable for hydraulic purposes, shall be absolutely reserved to the state. Zemlock v. United States, 73 Wis. 363, 41 N. W. 445.

The New Hampshire statute authorizes the erection of dams to facilitate the floatage of logs, and provides that an owner of property injured thereby may apply to the supreme court for the assessment of damages. Schoff v. Upper Connecticut River & Lake Improv. Co. 57 N. H. 110.

59 L. R. A.

The declaration in the ordinance of 1787 and in the Wisconsin Constitution that the Mississippi river, and the navigable waters leading into it, and the carrying places between the same shall be common highways, and be forever free, applies only to the streams themselves and to the channels and natural beds of the streams and lakes, and not to the dry lands on either side of them, and does not affect the right of a riparian owner, whose land is overflowed by a dam in aid of the navigation of such waters, to compensation therefor. Arimond v. Green Bay & M. Canal Co. 31 Wis. 316.

In an action against the United States for damages to land by the flowage thereof, under the act of Congress authorizing the ascertaining of compensation for lands taken and for damages occasioned by works theretofore and thereafter constructed in aid of the navigation of the Fox and Wisconsin rivers, the measure of damages is the depreciated value of the use of the land by reason of the injuries thereto from soakage and flowage down to the time of the taking by the United States, within the statute of limitations, and the value of the land at the time it was so taken. Jones v. United States, 48 Wis. 385, 4 N. W. 519.

In order to defeat a claim for future and permanent damages in an action for past and future damages to land by the flowage thereof, under the act of Congress of March 3, 1875, authorizing the ascertainment of damages to lands flowed either before or after its passage by works previously or subsequently constructed, where compensation for such flowage was then or should thereafter become legally owing, if, in the opinion of the officer in charge, it is not prudent to lower the dam, there must be such final and conclusive action of the United States, through such officer, as would relinquish the right to maintain and continue the dam, and not the mere expression of such officer's opinion. *Ibid.*

The United States government will be liable if those in special charge of one of the dams for the improvement of navigation permit a person to raise the height of the dam, or fail to remove the structure so added, to those whose lands are thereby flooded. Veite v. United States, 76 Wis. 278, 45 N. W. 119.

An abandonment in good faith, and of a

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character conclusive and binding at law, by a company, of an enterprise to erect dams and locks in a river so as to make the same navigable, and a removal of a dam erected by it, before final judgment had been entered, upon the report of a jury, thereby abating the nuisance claimed, would take away the right of a riparian owner, whose lands were overflowed by such dam, to insist upon the value of his property and transfer of title to such company, and leave him to recover such damages, only, as he may have sustained by the erection of such dam, during its continuance; where the charter of such company provided for summary remedy for the assessment of damages claimed by such riparian owners for such overflowing, by a jury of view, whose report was to be returned to the court and judgment had thereon; and provided that the court might, at the same time, condemn and vest such lands as may have been overflowed, and for which damages were assessed, in said company, upon payment by it of the amount so assessed. Stevens v. Duck River Nav. Co. 1 Sneed, 237.

If any part of a tract of land which is not taken by eminent domain for purposes of overflow, bordering on the part overflowed, will be benefited by such overflow, or if thereby it will be directly made more available for practical and advantageous use and enjoyment,—this shall be taken into consideration in estimating the owner's damages by the appropriation; but remote and speculative benefits may not be considered. Whitely v. Mississippi Water Power & Boom Co. 38 Minn. 523, 38 N. W. 753.

The raising of a dam by a corporation engaged, under legislative sanction, in improving the navigation of a river will not result in a taking of the property of a water-power company whose fall may be thereby diminished, where there is no resulting overflow of its land, and water is not set back upon its wheel-pits and canals. Holyoke Water Power Co. v. Connecticut River Co. 22 Blatchf. 131, 20 Fed. 71.

That other lands than those taken for the erection of a lock and dam for the improvement of a navigable river will be temporarily flooded, or an anticipated change in the current of the river, or an anticipated increase of danger to the property of the landowner from fire during the construction of the improvement, is not a proper subject of compensation, each being a consequential injury. High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 284, 69 Fed. 320.

A condemnation proceeding, in which an allowance for consequential damages is refused, does not bar a right of action to recover for the permanent flooding, by the improvement, of other lands than those taken. *Ibid.*

If an individual is given a right to erect a dam across a navigable river for the improvement of navigation, he will not, although privileges in the way of tolls, etc., are given to him, be liable to an action for damages for injury to upper proprietors; but the damages must be assessed in the way provided by statute. Calking v. Baldwin, 4 Wend. 667, 21 Am. Dec. 168.

The time of the taking of land by the United States by flowing it with water from a dam, so far as the period from which interest is to be computed is concerned, is the time when the land is first permanently flowed and its value lessened or destroyed, and not the date of its appraisement by the commissioners. Velte v. United States, 76 Wis. 278, 45 N. W. 119.

Where an improvement company has illegally caused land to be overflowed, and threatens and intends to continue to do so, injunction is a proper remedy. Carlson v. St. Louis River Dam & Improv. Co. 73 Minn. 128, 41 L. R. A. 871, 75 N. W. 1044.

c. *Grant of right.*

1. *Form and manner.*

It is generally held that a right to flow lands involves such an interest in them that it must be created by deed. An early Maine case is an exception to this rule, holding that the right of flowage is not an interest in lands within the meaning of the statute of frauds, but is rather in the nature of a license to do certain things in, or upon, the land of another, of which parol proof is always admissible. Clement v. Durgin, 5 Me. 9.

See also *infra*, I. d.

The weight of authority is, however, the other way.

The right to maintain a mill pond on another's land is an easement which can only be acquired by grant or prescription. Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149.

A vested right permanently to flow lands by back water from a dam is a power concerning and relating to such lands, within the meaning of a statute prohibiting the creation of such a power or interest except by operation of law or a deed or conveyance in writing, which cannot be granted by parol. French v. Owen, 2 Wis. 250.

A privilege permanently to overflow the land of another by the waters of a milldam to be constructed on the stream below confers a permanent easement in the soil itself, and a grant thereof must be in writing to be valid. Harris v. Miller, 1 Meigs, 158, 33 Am. Dec. 138.

The right of one to overflow the land of another is an easement in the nature of an incorporeal hereditament, and is such an interest in real estate as must be conveyed by a grant, or acquired by prescription, from which a grant will be inferred. Snowden v. Wilas, 19 Ind. 10, 81 Am. Dec. 370.

A flowage easement can only be created by an instrument under seal, or by long user, from which such a conveyance is presumed to have been made. Cagle v. Parker, 97 N. C. 271, 2 S. E. 76.

An instrument granting, for a valuable consideration, liberty to flow the grantor's land continuously for a definite period, and after that time during the winter half of the year for a stated number of years, is a lease, and not a mere license, and must be recorded. Smith v. Simons, 1 Root, 318, 1 Am. Dec. 48.

A perpetual easement to overflow land is an interest in land requiring a written instrument to pass title thereto, and acceptance by the owner of an oral award of damages made on an oral submission to arbitration does not create such easement. Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083.

But an easement acquired by the owner of a milldam to overflow the lands of another by the waters of the dam does not constitute a freehold in such lands. Lucan v. Cadwallader, 114 Ill. 285, 7 N. E. 286.

A tenant in common of mill property cannot, by a grant of land owned by him in severalty lower down the stream, give any right to flow the water back on the wheel of a mill situated on the common property. Crippen v. Morss, 49 N. Y. 63.

A conveyance by each of several tenants in common of land, by a separate deed, of all the right and privilege which he has to flow any land belonging to him in part, lying in com-

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mon and undivided, will convey a right to flow the land to its whole extent, and is not limited to the extent which the land had been theretofore flowed under mutual license between the tenants. Howard v. Bates, 8 Met. 484.

A mortgagor of land cannot, by quitclaim deed, give a right to flow it which will bind the mortgagee. Ballard v. Ballard Vale Co. 5 Gray, 468.

The owner of land is not estopped to deny the authority of an agent, who is alleged to have granted an easement for the flowing of a portion of the land by a millpond, by the fact that the grantee is permitted to make improvements in reliance thereon, unless the owner had actual knowledge that the improvements were being made. Decorah Woolen Mill Co. v. Greer, 49 Iowa, 490.

When the right to maintain a pond by means of a dam is necessary to the enjoyment of the right to draw water from the pond, granted by a deed containing a provision that no rights, privileges, easements, or appurtenances not so hereinafter set forth shall pass by this indenture by any intendment or implication, it will pass as an ancillary or secondary easement to the right to draw water from the pond. St. Anthony Falls Water Power Co. v. Minneapolis, 41 Minn. 270, 43 N. W. 56.

The attempted grant by the father of a minor of an easement to overflow the minor's land by the back water of a milldam is no defense to an action for damages caused by such overflow, brought by a purchaser of the land, who acquired title from the minor after his coming of age, although the father may have exercised general acts of ownership of the land during his son's minority, where the title was at the time in the minor by deed duly recorded. Farmer v. McDonald, 59 Ga. 509.

The privilege of flowing adjoining lands held by a grantor for the benefit of its factory passed to the grantee, under a conveyance of the factory and dam with the privileges and appurtenances thereunto belonging. Smith v. Moodus Water Power Co. 35 Conn. 392.

The general question of how far flowage rights pass by a sale of the mill is not within the scope of this note having been treated in a note to Cox v. Howell, 58 L. R. A. 487.

Reservation.

A right to flow grantor's reserved privilege will not be obtained under a deed of "a full and perfect right to flow all lands belonging to us, situated" on a certain brook, "meaning, nevertheless, to convey no right of flowage which shall injure the privilege of" grantor's mill, although, under the rules of the Touchstone and other ancient books, the absolute grant would not be construed to be diminished by the reservation. Webster v. Holland, 58 Me. 168.

Under a deed conveying land adjoining a stream, which was subject to certain water privileges of the grantor's lower mills, a clause by which the grantor reserves the right of entering on said land, for the purpose of erecting a dam, and drawing water therefrom, does not amount to a technical reservation, but was introduced into the deed for the purpose of protecting the grantor on his covenant against encumbrances. Hickox v. Parmelee, 21 Conn. 87.

An exception in a grant of land bordering on a river, of a certain portion "which is reserved for the use and flowing of water for the mill" situated lower down on the river and owned by the grantor, is void for uncertainty, and cannot be regarded as having been practically located by reason, merely, that the purpose for which it is reserved is stated in the exception. Darling v. Crowell, 6 N. H. 421.

59 L. R. A.

A right of flowage is retained from a conveyance by way of exception, and not as a reservation, when the grantor, owning land on both sides of a river, conveys the land on one bank and keeps to himself the right of flowing it as an appurtenant milling privilege for the benefit of his remaining land on the opposite bank. Smith v. Furbish, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

A reservation in a grant of land of all the streams of water, and the right to erect mill dams and overflow land necessary for the mill ponds, is, in case the right has not been exercised, void for uncertainty if considered as an exception. Thompson v. Gregory, 4 Johns. 81, 4 Am. Dec. 255.

A reservation in a grant of land, of the streams of water and soil under them, with the right of erecting milldams and overflowing the land necessary for the mill ponds, will not, in case of a grant by the grantee of a portion of such land with a like reservation, inure to the benefit of the second grantee, so that he can overflow the lands of his grantor, even though he procures parol permission to do so from the original grantor, since the right can only pass from the original grantor by deed. *Ibid.*

Where a grantor of a mill privilege makes certain reservations from the grant for the benefit of his mills below, including one as to the height of the water in the pond, it will not inure to the benefit of a subsequent purchaser from him of land situated further up the stream, so as to give him the right to cut through the bank of the stream and construct an artificial course to draw off of all water raised higher than the point designated. Judd v. Wells, 12 Met. 504.

When a right to flow and reflow land is reserved in a deed of it, and the right to maintain a wing dam is essential to the enjoyment of the right to flow the land, although a reservation is to be construed more strictly than a grant, nevertheless the reservation will include the right to maintain the wing dam. St. Anthony Falls Water Power Co. v. Minneapolis, 41 Minn. 270, 43 N. W. 56.

A grant of land subject to be covered by the waters of a mill pond due to a dam at a particular point 6 feet high from low-water mark on a stream flowing through the grantor's farm conveys a right in perpetuity to flood such lands by means of a dam at the designated place, 2 yards above the bed of the stream as it was when the deed was made. Mower v. Hutchinson, 9 Vt. 242.

The reservation of the right to build a dam across a river from the grantor's premises situated on one bank, against any point of the grantee's land on the other bank, together with rights of flowage over the grantee's land, does not confer upon the grantee any right to flow the land of his grantor on the other side of the river. Smith v. Furbish, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

Validity.

A contract by a proposed homesteader of government land to convey a portion of it to a mill owner for dam and flowage purposes is against public policy, and will not be enforced in favor of such owner, who, together with one to whom he had sold a half interest in the mill, occupied the contracted land for a term less than the prescriptive period, where the homesteader died before his title became complete, and the land was patented to his widow, who conveyed it to third parties. Carley v. Gitchell, 105 Mich. 38, 62 N. W. 1003.

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2. *Object.*

Special purpose.

The grant of a right to raise water at a spring for use at a tannery does not give a right to erect a dam below the spring in such a way as to collect water from other sources, and flow the grantor's land with a pond. Merrill v. Calkins, 74 N. Y. 1, Affirming 10 Hun, 495.

A conveyance, with full covenants of warranty, of the right of flowing or raising the waters of a pond over the grantor's land for the purpose of creating a storage reservoir, conveys an easement with which the grantor cannot interfere by raising the grade of the land. Watuppa Reservoir Co. v. Mackenzie, 132 Mass. 71.

An instrument "demising and leasing" the right to flow a tract of land for the use of a sawmill for an annual rental, and providing for a forfeiture upon the grantee's failure to flow it for one year, the grantor covenanting that the grantee shall use the premises as long as he sees fit to use them for such purpose, is not a lease from year to year, but is a grant by deed of an easement appendant to the mill. Tuttle v. Harry, 56 Conn. 194, 14 Atl. 209.

Under a conveyance by the owner of land on which is a mill, of premises higher up the stream, reserving all mines and minerals, and all the creeks, kills, runs, and streams of water upon the premises granted, the reservation will be absolute, and not confined to the use of water for mines, etc., and will continue the right of flowage by a mill pond on the lower property existing at the time of the conveyance. French v. Carhart, 1 N. Y. 96.

A grant of a right to conduct water from a river to a factory through a ditch on land of the grantor will not include the right of damming back the water to make a reservoir on the grantor's land to facilitate the flow of the water through the ditch. Estes v. Wells, 9 Cush. 487.

A grant of an easement for flowage resulting upon raising a dam of specified height, to remain good so long as the grantee occupies the mill site, is not exhausted by the building of one dam; but the grantee has the right to keep up and maintain a dam, and, if necessary to do so, to erect a second dam to the specified height. Hall v. Turner, 111 N. C. 180, 15 S. E. 1037.

Lower privilege.

Where a mill owner grants the right to construct a dam below his mill which shall raise the water to a specified height, it will be presumed that the restriction in raising the water is made for the purpose of preserving the power of the mill owner above, and that no right is conferred by the grant which would authorize the grantee to raise the water so as to back it against the wheel of the mill owner and thereby destroy his power. Miller v. Shenandoah Pulp Co. 38 W. Va. 558, 18 S. E. 740.

The grant of water privileges below established mills will be so construed as to preserve the water power of such mills undisturbed, unless a contrary intent plainly appears from a reasonable construction of the instrument conveying the grant. Hence, where a mill owner grants the right to erect dams above and below the mill, and it appears that had it not been for the preservation of the power of the grantor the lower dam would have been sufficient to supply power to the grantee, the grant will be construed as not conferring upon the grantee the right to construct the lower dam to such a height as will destroy the power of the grantor above. *Ibid.*

As all anterior and contemporaneous stipulations are merged in a written instrument, a deed conveying the right to construct a dam, but providing that it shall not be of a height that will injure the grantor's mill by backing water upon it, cannot be explained, varied, or annulled by representations or stipulations of the grantor permitting the erection of a dam of greater height. Gooch v. Conner, 8 Mo. 391.

Persons in possession of sawmill property under an agreement by the owners thereof for a conveyance of it with the water privileges and appurtenances thereunto belonging have the right to tighten and raise the dam connected therewith to the extent necessary to the enjoyment of the mill privileges, even though a race conveying water to their grantors' gristmill on the same stream be thereby stopped up to the injury of such grantors. Brugger v. Butler, 6 Or. 459.

A devise of a portion of a tract of land to one, and of another portion lower down the stream to another, "together with the privilege of the stream," will not give the latter a right to flow the upper land by a dam higher than that maintained by the grantor, although a limitation is expressed in the devise of the privilege that it shall not be used so as to injure mills lower down the stream. Davis v. Wilson, 6 Cush. 203.

A grantee of the right to erect a dam and flow lands provided a higher privilege is not injured thereby is not restricted to the erection of one dam so long as he does not injure the mill of the upper proprietor. Buts v. Ihrie, 1 Rawle, 218.

The reservation in a grant of land of a right to mine coal and other minerals from under the surface will include the right to make a pond on the surface to run the mining machinery, although an express reservation is made of the right of sinking air shafts, while no mention is made of the right to make the pond. Wardell v. Watson, 93 Mo. 107, 5 S. W. 605.

Boom privileges.

Under a grant by the owner and occupant of a farm bordering a river, to one who did not appear to have any booms or boom privilliges elsewhere on the river, or to be engaged in any business connected therewith, of the use and enjoyment of the stream for log-booming purposes in so far as the grantor had the right, and, incidentally, authority to erect piers, construct booms, drive piling, or do whatever else might be necessary and proper for the booming of logs in the river or on the shores, including the right to attach booms to the banks, for the sum of $50,—a corporation taking through mesne conveyances at a long time thereafter may not overflow the whole farm, destroying it by log jams caused by assorting works some distance below. Rasicot v. Little Falls Improv. & Nav. Co. 65 Minn. 543, 68 N. W. 212.

Flowage privileges generally.

A grant of the right to flow lands below a certain point limits the right to that point. Pray v. Great Falls Mfg. Co. 38 N. H. 442.

A written agreement permitting the erection of a dam and conferring a perpetual right of flowage upon payment of damages, but containing no clause of forfeiture on default, is an absolute sale and right of immediate and perpetual possession in consideration of a fu-

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sible to lay the foundation of adverse user on behalf of the grantee against the one under whom his grantor held, or his assignee. Pitts v. Wilder, 1 N. Y. 525.

Nonuse of a water course for a time will not be treated as an abandonment of the right to use it, so that relative rights of drainage of dominant and servient estates are not altered by the construction of a canal under powers of eminent domain, which has suspended their exercise. Gordon v. Pennsylvania R. Co. (Pa.) 6 Rep. 727.

A prescriptive right to overflow the lands of another by back water from a dam can be acquired only by an actual uninterrupted enjoyment, under claim of right, for the statutory period, to the knowledge of the owner of the premises, such as to occasion damage and give him a right of action. Grigsby v. Clear Lake Waterworks Co. 40 Cal. 396.

To establish a prescriptive right to flow lands the acts which constitute adverse user must be of such a nature as to injure the landowner, and give him a right of action therefor. Turner v. Hart, 71 Mich. 128, 38 N. W. 800.

A prescriptive right to flowage without the payment of damages cannot be established unless injury or damage has been caused thereby. Simpson v. Bowden, 33 Me. 549.

Merely maintaining a dam on one's own land, without thereby raising the water above, will not create a prescriptive right to flow another's land; it is only the uninterrupted flowing of the lands for the statutory period that will create such right. *Re* Minnetonka Lake Improv. Co. 56 Minn. 513, 58 N. W. 295.

A prescriptive right to raise the water of a pond from May to October so far as can be done without injuring the grass of meadows above the dam is not established by a habit for more than thirty years of nailing flashboards on the dam for short periods between May and October, when the rise of water did not hurt the grass, and by a single instance of refusing at such time to draw the water off at the request of the injured property owner. Pierce v. Travers, 97 Mass. 306.

A grant of a flowage easement will not be presumed from the fact that the water has adversely and continuously been maintained at a certain depth in the basin but because for a period of twenty-one years before suit brought the dam has been openly, continuously, and uninterruptedly maintained under a claim of right, the breast wall or structure of which was at all times during that period of the same height, whilst the owner and possessor of the lands was under no disability to resist the use. Gehman v. Erdman, 105 Pa. 371.

A prescriptive right to maintain a dam uninterrupted by user for twenty years, which backs water upon and renders powerless a mill wheel, is not prevented from vesting by proof that no grant was ever made, nor the right to use denied, nor the use protested against; but, to escape the servitude, the servient owner must go further, and show that the dominant right was obstructed or interfered with by some overt act; or that the right claimed was one that could not have been granted or acquired from incapacity legally to convey or take; or that it was exercised under permission or license, or was so secretly or physically used as to remain unknown. Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605.

An act of the legislature under which a dam is erected, authorizing its construction in such a manner as not to interfere with the operation of a mill on the stream above the dam, may constitute color of title upon which to found an adverse possession of the right to flow back water upon that mill. Close v. Samm, 27 Iowa, 503.

A grantee of a mill site from a corporation whose franchises are subsequently forfeited at the suit of the attorney general will hold the rights granted adversely to the grantors of the corporation from the date of the judgment of ouster, so that continuance for the prescriptive period will ripen into title. Campbell v. Talbot, 132 Mass. 174.

User must be adverse.

The flowing of land of another must have been adverse to ripen into a right by the lapse of time. Hart v. Vose, 19 Wend. 365.

A plea of adverse possession to an action for flowing lands must show, not only that the possession was peaceable and continuous, but that it was adverse. Colvin v. Burnet, 17 Wend. 564.

A perscriptive right to maintain a milldam which overflows the land of another cannot be acquired unless the use and enjoyment was adverse and hostile from its inception, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the overflowed land, and while he was not legally disabled from asserting his right and resisting such adverse claim; but the land need not have been overflowed continuously for the entire period. The suspension of the overflow during low water or while making repairs, etc., would not be such an interruption as to effect the mill owner's rights. Lane v. Miller, 27 Ind. 534.

Acquiescence in the erection of a milldam and the use of a mill on the part of the owner of land, and its operation and the exercise of the uninterrupted, adverse enjoyment on the part of the mill owner of the privilege to overflow the land of such owner above the milldam for a period of thirty years, constitute a bar to a bill in equity by such landowner to enjoin the rebuilding of a portion of the dam which was carried away. Ballard v. Struckman, 123 Ill. 636, 14 N. E. 682.

The owners of land who suffered the adverse use thereof by the backing of water thereon from a milldam constructed with their knowledge at the expenditure of a large sum of money, and continuously maintained for a period of twenty-four years, without having their damages paid or ascertained, cannot, after such a lapse of time, maintain a bill in chancery to enjoin the rebuilding and repair of a part of the dam carried away by a flood, on the ground either that their damages have never been paid, or because the health of those in the neighborhood will be injuriously affected thereby, it not appearing that their health has been or will be affected, by reason of the dam. Vail v. Mix, 74 Ill. 127.

User must be continuous.

To raise the presumption of a grant of the right to overflow neighboring lands from the maintenance for over fifteen years of a mill pond, the adverse use must have been uninterrupted; and, when it appears that such use was at times suspended,—once by invasion of the public enemy, and at other times by the action of the public health authorities,—during which time the land was enjoyed by the owner, the user has not ripened into title. Shumway v. Simons, 1 Vt. 53.

While acts of user, to constitute a prescriptive right to flow land by means of a dam, need not be unintermittent, they must be of such a nature and frequency as to give notice to the land

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owner that the right is being claimed against him. It is not enough that the dam owner exercised the right as often as he chose. Gilford v. Winnipiseogee Lake Co. 52 N. H. 262.

So, the mere maintenance of a dam for twenty years without thereby raising the water on the plaintiff's land often enough to give notice that the dam owner claims the right to flow it would not give him a prescriptive right to flow the land as high as it could be flowed by means of the dam. *Ibid.*

Flooding the land of an adjoining owner with water on only two or three previous occasions does not establish in a railroad company a prescriptive right to overflow such land,—especially as, on one of these occasions, the owner made complaint to the agents of the company, thereby rebutting the presumption of a grant. Ohio & M. R. Co. v. Wachter, 23 Ill. App. 415.

But the requirement of continuance of the user does not require that it shall be maintained during every moment of the time. It is sufficient if it is as continuous as the nature of the use admits, and such as to indicate an assertion of the right to maintain it.

A presumption of grant of a flowage easement is not defeated because of occasional lowering of the water by drouth or while repairs were being made. Gerenger v. Summers, 24 N. C. (2 Ired. L.) 229.

A prescriptive right to overflow lands by the construction of a millidam is shown, although during the prescriptive period a sawmill was removed, and a year elapsed before a clover mill was worked by the water. McKechnie v. McKeyes, 10 U. C. Q. B. 37.

A party is not deprived of a prescriptive easement to maintain water at a certain height by means of a dam which has existed for the prescriptive period, by the mere fact that he occasionally let off the water out of the outlet, that not being such an interruption of his enjoyment of the easement as to break such continuity. Alcorn v. Sadler, 71 Miss. 634, 14 So. 444.

Occupation and use of a right of flowage or pondage, in order to create a prescriptive right, must be continuous and uninterrupted, but need not be constant in the sense of a daily occupancy or use. Such use is necessarily irregular, dependent upon the season and rain fall, and it is sufficient if it is resorted to without interruption whenever necessary in the operation of the power. Cornwell Mfg. Co. v. Swift, 89 Mich. 503, 50 N. W. 1001.

A prescriptive right to flow land without the payment of damages therefor is acquired when the land has been flowed by the dam twenty years consecutively,—that is, at some portion of the year for twenty years, doing damage to it to some appreciable extent. Augusta v. Moulton, 75 Me. 284.

Fluctuation in the height of the water, caused either by extraordinary, or by extreme or unusual, drouths, or by excessive drafts upon the water for the use of the mill occasionally, will not affect or impair the prescriptive right to flow land with back water from the dam to the usual height acquired during ordinary seasons by the uninterrupted use for ten consecutive years. Johnson v. Boorman, 63 Wis. 268, 22 N. W. 514.

A dam owner, who for twenty years claims and exercises the right to raise the water as high as his dam will raise it when there is sufficient water to flow it, acquires a right to the extent of his claim, which is not affected by the fact that upon reconstruction of the dam it was maintained for a few months at a slightly decreased height when it was later brought up to the height of the former dam. Norway Plains Co. v. Bradley, 52 N. H. 86.

If it clearly appears that the dam breast, through a period of twenty-one years prior to the time of the complaint, has been in fact unchanged, variations in the depth of the water, during the continuance, after that, of the structure at the same height, may be fairly attributed to the varying condition of the stream, or the evidence thereof to a difference of opinion as to what is the ordinary stage of the water. McGeorge v. Hoffman, 133 Pa. 381, 19 Atl. 413.

Maintaining a millidam at a uniform height for twenty consecutive years without any claim of damages therefor gives the owner a prescriptive right to maintain the water as high as the dam will raise it, although it has not been kept at that height during all the time. Ray v. Fletcher, 12 Cush. 200.

A prescriptive right of flowage may be obtained notwithstanding that during that same time the same lands have been subject to an easement of a canal for shipping lumber, and thereby the mills operated by the power generated by said flowage have had to be shut down at times. Davis v. Brigham, 29 Me. 391.

Effect of owner's consent.

The foundation of a prescriptive right lies in the use being adverse: so that if it began under a license, and the nature of the use never changed, no prescriptive right is made out.

A right by prescription to overflow an owner's land by the waters of a millidam cannot be acquired when based in the origin, upon the permission or verbal consent of the owner of the overflowed land. Lane v. Miller, 27 Ind. 534.

But, after the enjoyment of an easement of overflowing the lands of another for twenty years, the person submitting to it must, in order to defeat its continuance, show that it was by license or permission; and the owner of the easement is not compelled to prove an express claim of right to characterize the user as adverse. Hammond v. Zehner, 21 N. Y. 118, Affirming 23 Barb. 473.

And enjoyment of a right to flow land under a lease from one who has previously parted with the title is sufficient color of title to ripen into a prescriptive right. Wilklow v. Lane, 37 Barb. 244.

License on the part of the landowner must, however, be distinguished from acquiescence on his part. The former is evidence that the one claiming the flowage right did not possess it in the absence of the license, while the latter is evidence that he did.

Although the construction of a dam may have been permitted by one riparian owner, such fact did not affect the adverse character of its use as against another owner who did not consent to it, and a prescriptive right to maintain it may be acquired against the nonassenting owner. Lynn v. Thomson, 17 S. C. 129.

To acquire by prescription the right to obstruct a water course and thereby flow adjoining land, the use must not only be adverse, continuous, and uninterrupted, but must be with the acquiescence of the owner of the land flowed. Bunten v. Chicago, R. I. & P. R. Co. 50 Mo. App. 414.

One who has for over ten years, with the knowledge and assent of an adjoining landowner, been permitted to maintain and continue a flow of water in a reservoir on the other's lands by means of a certain dam, acquires a prescriptive easement, and may enjoin an in-

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gone. For it has been held that, after a sale of land without reserving the right of flowage to which it is then subjected, the grantor can only enjoy the statutory right of flowage by payment of damages. Preble v. Reed, 17 Me. 169.

So the conveyance by a mill owner of land a part of which is flowed by his pond, without express reservation of the right to maintain the pond, will annul the right. Burr v. Mills, 21 Wend. 290.

So, a state grant of land containing a mill site will give the grantee a right to flow adjoining land subsequently granted by the state to a third person only as the right is expressly given, although the latter grant refers to a map showing the land flowed to the extent and in the manner claimed. Colvin v. Burnet, 2 Hill, 620.

But grantor's reservation of a right to flow the land conveyed as a milling privilege, appurtenant to a mill situated on the grantor's adjoining land, which he retains, is limited to a right to flow to the same extent, only, to which the premises were flowed at the time of the conveyance; and one who succeeds the grantor in his remaining property and its appurtenant water rights is not authorized to increase the height of the dam so as to extend his right of flowage. Watson v. Bartlett, 62 N. H. 447.

And the right of one owning an estate, on which, from time immemorial, there has existed a mill, pond, and dam, to overflow its lands, is not extinguished or impaired, in respect of the premises conveyed, by his deed of a parcel of it, nowhere bounded by the pond or stream, containing a general warranty against encumbrances and no reservation whatever; but such right passes to the subsequent grantee of the mill site. Harwood v. Benton, 32 Vt. 724.

One having the right to pond a given tract may enter for the purpose of removing accumulations which interfere with that right. Holden v. Chandler, 61 Vt. 291, 18 Atl. 310.

A grant of dam and flowage rights on another's land confers, as incidental thereto, the right to enter on the land to repair and cleanse it. Frailey v. Waters, 7 Pa. 221; Fountain v. Perth Amboy, 60 N. J. L. 410, 38 Atl. 676.

The application of this principle has had an effect upon the question of the grantor's liability on the covenants in his deed. In one case it was held that it is not a breach of covenant against encumbrances that the grantor had, prior to the conveyance and for more than twenty years, flowed the premises conveyed by means of a dam built upon his remaining land. Kidder v. George, 18 N. H. 511.

And a covenant for quiet enjoyment of a parcel of land, across which flowed a brook, is not broken by raising the level of the brook, from which no damage was sustained. Ingram v. Morecraft, 33 Beav. 49.

In an action to recover instalments due on the purchase money of a water power concerning which, by the instrument under seal conveying it, it was covenanted that the corporation from whom the seller derived title should fulfil its covenant not to allow the construction of a dam at a point below that which would raise the water above the ordinary stage and injure the value of the hydraulic power, a valid counterclaim cannot be based on the breach of such covenant because of a dam which at the time of the purchase was known to have been constructed by the United States government, which had succeeded to the rights of the corporation. Doty v. Lawson, 14 Fed. 892.

A purchaser of riparian lands subjected to flowage represented by grantor to be illegal takes the risk thereof if he takes no covenant against it. Krause v. Reigel, 2 Whart. 385.

But a right of flowage in favor of a third person, and not created by the grantor and visible when the estate is divided, is such an "encumbrance" as to render the maker of a warranty deed liable for the damage caused thereby with interest from the date of said deed. Harrington v. Bean, 89 Me. 470, 36 Atl. 986.

And the measure of damages in a breach of covenant in a warranty deed by reason of right of flowage is the difference between the actual value at the date of sale and the value at that date if said right did not exist, with interest from said date. *Ibid.*

Under such circumstances, also, a covenant of seisin is broken at the date of the deed, so far as the land is encumbered with flowage rights. Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426.

Rights transferable.

Conveyance of a dam and an appurtenant right to raise water in a flume to a prescribed height "to them [the grantees] and their heirs and assigns forever" confers transferable rights upon the grantees, and their successor gets the same right to raise and use the prescribed quantity of water. Peaslee v. Tower, 62 N. H. 434.

A right reserved by a grantor to flow the grantee's premises as a milling privilege appurtenant to land retained by him becomes attached to such land as an easement in perpetuity without any mention by the grantor of his heirs or assigns. Smith v. Furbish, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

A reservation of a right of flowage to a mill owner who sells a portion of his property, part of which is flowed land, creates an easement in favor of the mill; and a conveyance of such mill property, together with "all the mill privileges which I own," includes such reserved right of flowage, without words specially describing the easement, in the deed. Watson v. Bartlett, 62 N. H. 447.

The right of flowage, conferred by a conveyance of land, together with the privilege of damming a river passing through it, does not pass in a subsequent grant of the land by implication, so as to permit a subsequent grantee to cast back water upon the upper mill, when neither the mill, nor the dam, had been erected at the time of his grant. Decorah Woolen Mill Co. v. Greer, 49 Iowa, 490.

But a deed granting a right to flow land, wtihout words of inheritance, gives only a life estate. Temple v. Morse, 178 Mass. 336, 59 N. E. 845.

So, a grant of a privilege of backing water on grantor's land, as much as grantee may think necessary, by a certain dam, with a stipulation that grantor shall never claim any other or greater damages for backing said waters than what is then agreed upon, confers a purely personal privilege in the grantee, and the dam he erects is a monument of his exercise of the grant, which cannot subsequently be increased by his representatives. Hogg v. Bailey, 5 Pa. Super. Ct. 426.

In Hall v. Turner, 110 N. C. 292, 14 S. E. 791, however, it has been held that a grant of a flowage right to continue so long as the grantee shall keep up his mill creates an easement which descends with the land to grantee's heirs, who have, in equity, a base, qualified, or determinable fee, as it cannot be presumed that the grantee would have erected his works on the strength of a mere personal right.

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4. Extent.

Fixing height.

When land is conveyed by a description rendering the boundaries uncertain, but which includes a millidam and the pond behind it, without limiting the height of the dam or the area of its lake, the law limits and controls the enjoyment of the grant to a dam of such height and a pond of such extent as will afford a reasonable use of the privilege; and when a dam high enough to well serve the purposes of the mill to which it is appurtenant, has been constructed, there is a practical location of the boundaries of the mill pond, so that a right of action is afforded the successor of the grantor to the adjoining lands, whose lands are flooded by the widening of the pond due to the building of a new and higher dam. Hull v. Fuller, 4 Vt. 199.

The extent of a flowage easement will be established by natural objects, if possible. Such a determination will not be altered by the results of instrumental leveling. Brown v. Bush, 45 Pa. 61.

And a grant of a right to maintain a dam and flow the water so high as will answer, and not impair or obstruct the water wheel of the grantor above, may be made certain by parol evidence of the height of dam which will answer the requirements of the grant. Dryden v. Jepherson, 18 Pick. 385.

In an action for the abatement of a dam to such an extent that it will not interfere with a prior water power, a true height at which it should be allowed shall be determined, rather by experiment, than by theoretical conclusions drawn from surveys by engineers. Decorah Woolen Mill Co. v. Greer, 58 Iowa, 86, 12 N. W. 126.

A grant of flowage rights to a certain line refers to the ordinary condition of the stream. Thatcher v. Baker, 109 Pa. 22.

Where one who has granted the right to carry water from an upper mill through a tail race over his land grants to a lower owner the right to flow his land in such a manner as not to obstruct or interfere with the right of the upper mill owner, "meaning and intending to grant the liberty to flow the land by a dam of sufficient height to flow back the river to the tail race," he will convey no right to flow higher than the mouth of the tail race, although it might be flowed higher than that without interfering with the rights of the upper owner. Riley v. Parks, 11 Met. 424.

Where a deed conveying land on a stream with mill privileges contains a prohibition to raise the water by the erection of a dam so high as to overflow the springs along the creek bank, if the waters of the springs in the place where they issued from the ground at the date of the deed are flowed over or impeded by the erection of a dam by the grantee, there is a violation of the restriction contained in the deed; and it seems that, in such a case, where a spring boils up from the bottom of a creek, it is overflowed by that creek notwithstanding its waters may issue with such force as to rise above the level of the creek. Salado College v. Davis, 47 Tex. 131.

A grant of a water privilege lying on the stream between two mills of the grantor, "commencing at a certain permanent rock," thence running to the lower dam, reserving therefrom the right of taking water from the upper dam to ourselves, will give no right of flowing the land higher than the rock mentioned. Crittenden v. Field, 8 Gray, 621.

A grant by an owner of a mill privilege above, contained in a deed of quitclaim of his interest in a privilege on the same stream below to his co-owner of the lower privilege, of "a right to raise the water of the Annaquetucket river to the height of a hole in the rock at the junction of said river with a river running from the Aaron Southwick lot," does not authorize the grantee of the lower privilege to raise the water of the river at his dam below to the height of the hole in the rock, but only to raise the water of the river to the height of the hole at the junction of the rivers above, where the rock is situated. Hiscox v. Sanford, 4 R. I. 55.

And evidence that the water at the rock was above the mark referred to when the grant was made will not be admitted to show that the right was given the grantee to raise the water at the dam above the height of the mark in the rock. Parol evidence cannot be admitted to supersede the language of a written instrument, to supply a defect in it, or to add other words. And in such a case, the acts of the parties to the deed, immediately after and subsequent to the grant, in keeping the water at the dam at the height of the hole in the rock, will not be admitted for the purpose of showing the practical construction of the grant by the parties, as the language in the deed is not ambiguous, and the intent of the parties can be ascertained therefrom. *Ibid.*

Where, in reducing to writing an agreement by which a right was to be conveyed to maintain a dam to the height of a certain mark, a license was inserted of the right to raise the water to the height of that mark, such license will not operate as a limitation of the grant, although by raising the dam to that height the water is sometimes raised above it. Salmon Falls Mfg. Co. v. Portsmouth Co. 46 N. H. 249.

The designation of a high-water mark in a conveyance of a mill privilege does not authorize the maintenance of the dam to that height; but the dam must be maintained so that the water will not rise above that height during ordinary states of the stream. Brady v. Blackinton, 113 Mass. 236.

When, in a grant of a flowage easement it is provided that the water shall not be backed onto certain cultivated lands of grantor, the dam cannot be erected to such a height as to destroy those lands by sobbing. Cagle v. Parker, 97 N. C. 271, 2 S. E. 76.

The grantee of flowage rights up to a certain line is not required to keep the whole dam at the water level, if there are waste ways enough to carry off the water under all ordinary circumstances. Thatcher v. Baker, 109 Pa. 22.

A grant of the privilege of flowing a tract of land up to a specified ash tree intends that the grantee's right of flowage shall be bounded by a line across the river at the ash tree, and does not entitle him to raise the water in perpendicular height up to the body of the tree. Wilder v. Clough, 35 N. H. 359.

No right is given to flow lands of the grantor above the distance specifically called for as the extent of the line up a creek in a deed describing the land as part of a certain quarter section beginning at a designated point "far enough up the bank to raise a 9-foot head" at a designated mill, and thence up the bottom lands "100 rods," to include all the bottom lands on both sides of the creek within the designated bounds; as the reference to the distance sufficient to raise such head is merely descriptive, and intended, in connection with other descriptions therein, to fix a definite starting point. Conts v. Taft, 12 Wis. 388.

A contract stipulating that a mill owner, after making certain specified alterations in an existing dam, may "then keep the water at the height the dam will raise it," fixes the full

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right of that dam, and gives no right to erect a new one of the same height as the older one, if it in fact raises the water higher than that one did. Brown v. Collum, 112 Ga. 68, 37 S. E. 91.

The height of a dam, where there was no stipulation about it in the grant, is not the only or the accurate test of the extent of a flowage right. A more certain one is the distance the water is set back. Lacy v. Arnett, 33 Pa. 169.

A hole in a rock, drilled by the grantee nineteen years after a deed had been made giving a right to flow land to the height of a hole in a certain described rock, which was not at that time drilled, cannot be made the limitation to which the flowage may be maintained. White v. Bliss, 8 Cush. 510.

A clause in a deed by which the owner of a dam having the right to maintain flashboards thereon to the height of 2 feet acquires the right to add 1 foot during certain months of the year, that "such flashboards shall not be renewed, replaced, or repaired" during the specified months when the right to maintain the additional foot does not exist, does not take away the right to do the acts necessary to maintain to the height of 2 feet. Amoskeag Mfg. Co. v. Shirley, 69 N. H. 269, 39 Atl. 976.

And where a mill owner acquires a right by a grant to maintain flash boards supported by pins not less than 4 feet apart, and, by a subsequent grant, acquires the privilege of maintaining the boards at an increased height without any restrictions as to means of maintaining them, he may use such reasonable means as will render the grant effective, notwithstanding the former restrictions. Amoskeag Mfg. Co. v. Shirley, 70 N. H. 577, 49 Atl. 90.

A clause in a will devising a mill and water privilege, and devising, also, the right "at all times to raise the water in the pond until the surface of it shall reach a certain mark," will limit the right to raise the water to that mark, although the right had been exercised by the testator of raising it beyond that point. Denton v. Leddell, 23 N. J. Eq. 64, Affirmed in 24 N. J. Eq. 507.

In a grant of the privilege to flow land, where the height to which the grantee may raise his dam is indicated by tree marks of a specified height and above the dam, no two of which are on the same level, the marks will be considered as points or levels from which to measure downward the number of inches specified to the point or line beyond which the water cannot be raised. Heffelman v. Otsego Water-Power Co. 78 Mich. 121, 43 N. W. 1096.

A deed granting the right to flow so much of the grantor's land as would be flowed by raising a milldam to the height of 12 feet will not be canceled on the ground of fraudulent representations, although the flowage covered 75 acres instead of 30, as expected, where the grantor's agent inspected the premises before the execution of the conveyance, and the grantee did nothing to mislead him. Sanford v. Nyman, 28 Mich. 326.

Practical construction.

The rights of a mill owner to flow another's land under an ancient grant will be determined by the grant, if possible; and, if they cannot, then by the extent of his occupation and enjoyment. Meyer v. Horst, 106 Pa. 552.

A grant of the right to build a dam on land of the grantor is exhausted with the completion of the dam, so that it cannot subsequently be increased in height so as to flow more land. Goodrich v. Longley, 4 Gray, 379.

A flowage agreement, made ninety years ago, will be regarded in equity as executed, and the rights acquired thereby will be measured by the observed extent of the actual performance. Lau v. Mumma, 43 Pa. 267.

A practical construction and establishment of the rights of the parties under a reservation of a right to flow land adjoining a mill is accomplished when the owners of the flowage rights maintain conditions *in statu quo* for more than sixty-seven years, and acquiesce in the occupation and enjoyment of his land by the owner of the flowed land, up to the line of flowage, for the same period. Watson v. Bartlett, 62 N. H. 447.

A deed from an adjoining proprietor to an owner of a milldam of "the right of way for a mill race, with ground sufficient for abutments to a dam across" such stream, does not authorize the acts of a subsequent grantee in raising the height of the dam above that at which it stood when the conveyance was executed, so as to injure such land by back water. Schelble v. Law, 65 Ind. 332.

Where an ancient grant to erect a mill and dam is without limitation as to height, it will be construed with reference to the conduct of the grantee, and he will not be permitted to increase the height of the dam after the lapse of a long period, to the prejudice of intervening purchasers of land above the dam. Davidson v. Fowler, 1 Root, 358; Barret v. Hosmer, 1 Root, 271.

A conveyance by a landowner of the entire possession of a creek flowing through his land for the purpose of securing to the grantee the entire water privilege as far as the same is required for a mill then being erected by him, with permission to erect a new mill and to cut a race through his land to supply water thereto, does not give such grantee the right, as against a subsequent purchaser of the land, to overflow such land by raising the height of the dam above that at which it was erected and maintained for a long period of time. Toney v. Johnson, 26 Ind. 382.

d. *License.*

As indicated above, I. c, 1, the right to flow the land of another is of such a character as to require a deed to make it permanent, but temporary rights may be acquired by license, and some courts have applied the erroneous doctrine of executed licenses so as to uphold permanent rights originating in parol.

It has been said that a parol license to flow lands by the erection of a dam is void. —— v. Deberry, 2 N. C. (1 Hayw.) 248.

But that must be considered as meaning that it is good only until revoked, and will give no rights which can be asserted against the licensor. There can be no doubt that the license is effectual for the purpose given until it is revoked.

A grantee of a right to flow lands to the top of a stake may avail himself of a license to flow 2 inches above the top of the stake until revocation. Thatcher v. Baker, 109 Pa. 22.

An agreement to take a certain annual compensation for injuries caused by flowage is not an agreement for a sale of land within the statute of frauds. Short v. Woodward, 13 Gray, 86.

There can also be no doubt that a parol license to flow lands by a milldam may be revoked at pleasure. Calhoun v. Palmer, 8 Gratt. 88.

Unless it was given for a valuable consideration, and has been so far executed that equity will protect the licensee.

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A flowage license is extinguished by a foreclosure sale under a pre-existing mortgage. Brown v. Spalding, 1 Pittsb. 361.

In a suit for damages for the flowing of lands with backwater from a milldam, it was held that a parol license to flow justified the flowage until revoked, and that the commencement of the suit revoked the license; and damages might be recovered for flowage after the suit was commenced and for future flowage, but not for that which occurred before that time. Lockhart v. Geir, 54 Wis. 133, 11 N. W. 245.

It is a good defense to an action by one landowner against an adjoining landowner for obstructing a water course so as to prevent the escape of the waters collected therein by a system of drainage constructed by the former to drain his land, that the obstruction complained of was of an artificial outlet to ponds of water on the former's land, made by him under a parol license, which license was granted without consideration, and was afterwards revoked, and the outlet was filled up, but not so as to obstruct the natural flow from said pond, in the absence of allegations that any act was done, or money expended, on the faith of the license, which would prevent the revocation. Clauser v. Jones, 100 Ind. 123.

A dam constructed under a parol license to flow the licensor's premises, by the licensee, on his own land for the benefit of both, can be removed by the licensor after he revokes the license, and he may claim a right to enter upon the licensee's premises and remove the obstruction. Woodbury v. Parshley, 7 N. H. 237, 26 Am. Dec. 739.

If a valuable consideration was given for the license, and it has been acted upon so that the contract may be regarded as executed, equity will protect the licensee.

After a flowage license given for a valuable consideration has been acted upon, it is binding as against a subsequent purchaser of the land for a valuable consideration, although at the time of sale the old dam had fallen down and had not yet been rebuilt. Campbell v. McCoy, 31 Pa. 263.

A parol sale by a grantee of the right to flow land operates as a license, and is a good defense in an action of trespass on the case brought by the owners of the land flowed. Millerd v. Reeves, 1 Mich. 107.

An agreement entered into between a landowner and a railroad company, by which the former agreed to dismiss his suit for damages for the flooding of his land if the latter would build a new bridge over a natural stream so as to abate the nuisance in the future, is binding upon such landowner where the railroad company has performed its part of the agreement, and he cannot evade the same by amending his declaration and seeking to recover upon new grounds, all, however, growing out of the original act complained of. Peoria & P. Union R. Co. v. Barton, 38 Ill. App. 469.

No right to maintain a dam at an increased height is acquired by the consent to such increase, of those in possession of lands overflowed, under a contract for the purchase thereof conditioned upon the making of certain payments, and subject to forfeiture for nonpayment, and subsequently rescinded for the default of the purchaser, which will entitle a grantee of the owner of the dam to an injunction against the enforcement of a judgment obtained by the owner of the land overflowed, prior to the making of the contract of sale, restraining the maintenance of the dam above a height lower than such increase, and requiring its abatement to such lower height. Palmer v. Moore, 18 Kan. 68.

Under a reservation in a deed of land of all the timber thereon suitable for sawing, and of the right to flow the land for a pond while necessary for the manufacture of the timber on the lands, the right to overflow the land will continue for such reasonable time as may be necessary for the manufacture of the timber after removal, and the right is not extinguished by mere delay in its exercise. Gregg v. Birdsall, 53 Barb. 402.

A corporation does not acquire a perpetual easement to overflow land under an oral license from the owner, by virtue of a provision in its charter authorizing it to enter upon and take possession of any land necessary to the erection of slack-water navigation in a river, said land to be paid for at such prices as might be agreed upon with the owner, where it has failed to pay such owner the sum agreed upon when the license was given. Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083.

As indicated above, some of the courts have applied the erroneous doctrine of executed license so as to prevent a revocation in case expense has been incurred in reliance upon it.

A landowner cannot enjoin the rebuilding and repairing of a milldam as it was before being washed away by a flood, on the ground that the back water therefrom overflows such owner's land, where the same had been overflowed continuously to the same extent for the preceding fifty years under a license from the grantor of the present owner upon the faith of which the mill and dam were erected at a large expense, and of which the present owner had notice when he purchased. Ogle v. Dill, 55 Ind. 130.

The latter decision turned upon the permanency of the use.

A parol grant of an easement in land, permanent in nature, for the backing of water thereon by the construction of a milldam and mill, will be sustained in equity, although such grant is an interest in land required by the statute of frauds to be in writing, where the grantee, in reliance thereon, has gone into possession and expended large amounts of money in making improvements. Cook v. Pridgen, 45 Ga. 331, 12 Am. Rep. 582.

A dam which has existed about thirty years under an agreement that the person maintaining it may raise the water to a certain height will not be abated by injunction, where it is not clearly shown that the water was raised higher than was agreed upon. Cobb v. Slimmer, 45 Mich. 176, 7 N. W. 806.

The latter case seems to indicate an idea that long enjoyment, based on the license, will ripen into a right, but this is not the rule, as will be seen *infra*, I. e.

One who licenses a railroad to construct an embankment across a stream flowing through his property cannot permit the road to pass into possession of a third person without knowledge of the license, and then revoke it as against the purchaser. Harrelson v. Kansas City & A. R. Co. 151 Mo. 482, 52 S. W. 368.

A parol license to construct a dam may be shown by the affidavits of a former owner of the mill and dam that they were erected by him more than twenty-five years previous in pursuance of an agreement between him and the then owner of plaintiff's lands. Winham v. McGuire, 51 Ga. 578.

One wishing to construct a dam across a water course, who agrees with another, about to enjoin its construction, that if the latter will permit its completion he may remove it

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on giving notice to the former in time to permit him to close a ditch through his plantation, if, in the high-water season, his land should be overflowed in consequence of the dam, cannot recover damages on account of its removal if the latter shows that it did subject the land to overflow, and that the ditch was actually closed at the time. Egan v. Russ, 39 La. Ann. 967, 3 So. 85.

The fact that an upper proprietor was present as a laborer, and assisted a lower owner in constructing a dam, is not conclusive evidence of a license so as to prevent his maintaining an action for the flooding of his lands; but the question is for the jury, in connection with other circumstances of the case,—particularly such circumstances as tend to show that the upper proprietor was not aware of the effect of the dam. Smith v. Scott, 1 Kerr (N. B.) 1.

Where verbal permission was given to flood lands or dams not exceeding a prescribed height, and a dam was constructed at a less height than the maximum fixed by the license, the licensee cannot subsequently, in the absence of fraud on the part of the licensor, raise the dam to the maximum height, notwithstanding his original expenditure of money in erecting the dam in reliance upon the license. Hendry v. English, 18 Grant Ch. (U. C.) 119.

A license to flow another's land without payment of damages will be held to refer to such flowage only as was caused by the dam then erected or contemplated. Preble v. Reed, 17 Me. 169.

The right to maintain a milldam overflowing the lands of a railroad company is not lost by delay on the part of a transferee of the license in rebuilding on the destruction thereof, where the evidence shows that such delay was not due to laches on his part, but to his inability to secure a mechanic who could do the work at once. Southwestern R. Co. v. Mitchell, 69 Ga. 114.

The condition annexed to a license to flow land is subsequent, and not precedent, where it consists of an agreement to protect a well on the premises overflowed, or to pay for all damages that may be caused thereby. Jones v. Loomis, 19 Mo. App. 234.

A purchaser of milling property, who, himself, obtained a license from a railroad company to continue the mill and dam which had been constructed by his vendor under a license from a superintendent of the company, partly upon and overflowing the company's land, has a right of action against the railroad for maliciously and without probable cause bringing a bill in equity for injunction restraining the rebuilding of the dam after its destruction by a flood, where he suffered special damage by being temporarily deprived of the use of his property by an interlocutory injunction granted therein. Mitchell v. Southwestern R. Co. 75 Ga. 398.

One tenant in common has no right to grant a right to flow the land by a mill pond, which will bind his cotenant. Hutchinson v. Chase, 39 Me. 508, 63 Am. Dec. 645.

But permission by tenants in common for the erection of a dam which will flow the common estate will bar an action by either individual for injuries to his separate property, where the grantors are not described as tenants in common, nor is it stated that the land on which it is to operate is held in common. Francis v. Boston & R. Mill Corp. 4 Pick. 365.

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c. *Prescriptive rights.*

1. *Right may be acquired by prescription.*

There is no dispute of the fact that flowage rights may be acquired by prescription. The different periods mentioned in the decisions are for the most part fixed by local statutes.

The right to dam water back on upper riparian property may be acquired by adverse possession. Eastman v. Amoskeag Mfg. Co. 47 N. H. 71; Johnson v. Boorman, 63 Wis. 268, 22 N. W. 514; Gerenger v. Summers, 24 N. C. (2 Ired. L.) 229.

And the right to flow back water acquired by prescription is as absolute as any other right. Hulme v. Shreve, 4 N. J. Eq. 116.

Permitting water to be thrown back by a dam upon one's land for twenty years will raise the presumption of a grant of the right to do so. Carlisle v. Cooper, 19 N. J. Eq. 256; Hurlbut v. Leonard, Brayton (Vt.) 201.

Adverse and exclusive enjoyment of a flowage privilege for twenty years is presumptive, but not conclusive, proof of a grant. Field v. Brown, 24 Gratt. 74.

The owner of a dam may acquire by prescription the right to maintain flashboards which raise the water much higher than it would be raised by the dam. Ludlow Mfg. Co. v. Indian Orchard Co. 177 Mass. 61, 58 N. E. 181.

The right to erect a dam that will set the water back into a lake and its tributaries, and thereby overflow intermediate lands belonging to others, is one that may be acquired by prescription. Hall v. State, 72 App. Div. 360, 77 N. Y. Supp. 282.

But a right to flow water back on an upper mill right cannot be acquired by use for less than the period required to gain rights by prescription, although the upper one is not in use at the time the dam is erected. King v. Tiffany, 9 Conn. 162.

The maintenance of a dam for forty years raises the presumption of a grant which entitles the owner of the dam to maintain it, although he may cease to use it for mill purposes. Vickery v. Providence, 17 R. I. 651, 24 Atl. 148.

A statute providing that no action for the recovery of damages for the flowing of lands shall be maintained after ten years does not bar the remedy only, but secures to the person, who has had a quiet and uninterrupted use for the prescribed period, a prescriptive right thereto. Johnson v. Boorman, 63 Wis. 268, 22 N. W. 514.

In Minnesota, to acquire a right by prescription to overflow the lands of another by back water from a dam would require twenty years' uninterrupted, adverse user or enjoyment. Mueller v. Fruen, 36 Minn. 273, 30 N. W. 866.

Occupying land by flowing it with water for twenty years affords a presumption of a grant of the use of it in that particular manner, and for the damages sustained thereafter no action lies. Baldwin v. Calkins, 10 Wend. 167.

Rights in mill property used by a person for a period of forty years cannot be subjected to restraint, except on the ground that it is a nuisance. Rochester v. Erickson, 46 Barb. 92.

One who has for twenty years maintained a dam at the outlet of a lake acquires a prescriptive right to set back the waters of the lake to the height that the dam would set them back. Paine Lumber Co. v. United States, 55 Fed. 854.

If one suffers his land to be flowed by a mill owner, and acquiesces in an adverse claim for more than twenty years, this adverse enjoy-

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ment by lapse of time will ripen into a perfect title. Munroe v. Gates, 48 Me. 463.

When lands have been adversely flowed by an obstruction which has existed in a stream long enough to entitle it to remain till the owner chooses to remove it, it is immaterial to inquire whether it was a natural or an artificial deposit. Brown v. Bush, 45 Pa. 61.

Where a road across a navigable river is taken possession of and used as a dam for more than twenty years with the knowledge of riparian owners on the stream, no action can be maintained for injuries thereby caused to land of such owners. Borden v. Vincent, 24 Pick. 301.

One who for over twenty years, without objection or interruption, maintains a dam in a highway in such a manner as not to interfere with the public use, acquires a right by prescription to flow the land of a third person situated above on the stream. Perley v. Hilton, 55 N. H. 444.

The continuous flowage of land for fifteen years by the maintenance of a dam is sufficient notice to the landowners of an adverse and hostile claim of ownership. Shearer v. Middleton, 88 Mich. 621, 50 N. W. 737.

Maintenance of a dam and use of the waters by the mill owner and his predecessors in title for over sixty years under a claim of right and adversely to any claim of right by any other party confers a valid right by adverse possession, upon the mill owner. *Re* Clark, 21 N. Y. S. R. 711, 4 N. Y. Supp. 259.

One who for over fifteen years has maintained a dam of a height sufficient to flow the lands of another acquires title to the lands flowed by prescription, so far as the right to flow is concerned, as fully as if the right were conveyed by deed. Williams v. Barber, 104 Mich. 31, 62 N. W. 155.

A prescriptive right of flowage has its existence in an uninterrupted user for at least twenty-one years, acquiesced in by the party having the right. Jessup v. Loucks, 55 Pa. 350.

A grant of a flowage easement will be presumed to the extent which has been enjoyed over twenty-one years, and flowage damages can then be recovered for only an excess. Lau v. Mumma, 43 Pa. 267.

When from time immemorial a stone row has flowed the land of another, the owner of the land on which it is situated may clear it out, and may raise his dam so as to cause the same amount of flowage. Brown v. Bush, 45 Pa. 61.

A mill owner obtains a prescriptive easement to flow another's land by user, with the knowledge and consent of the owners of the land, for more than sixty years; but such user conveys no title to the soil. Costello v. Harris, 162 Pa. 397, 29 Atl. 874.

A grant of a flowage easement cannot be presumed from adverse possession for a period less than twenty years. Since Ingraham v. Hough, 46 N. C. (1 Jones L.) 39, this has been the settled law in North Carolina. Griffin v. Foster, 53 N. C. (8 Jones L.) 337.

The continuous overflowing for twenty years of lands, covered by back water of a dam, by a canal proprietor, gives him and his grantees an easement of flowage, but not the fee in the land overflowed. Indianapolis Water Co. v. Kingan, 155 Ind. 476, 58 N. E. 715.

An adverse use for twenty years under the claim of a right to keep water in a dam at its full height, at the pleasure of the owner, whenever there was enough water to fill it, will not fail to confer a good title by prescription merely because of indefiniteness in the claim. Winnipiseogee Lake Co. v. Young, 40 N. H. 420.

One may not remove or reduce a milldam and flume on his own land, the effect of which is to overflow his surrounding low lands, after a lower mill owner and his predecessor in title have enjoyed an uninterrupted use thereof long enough to acquire a right by prescription; and this, notwithstanding such mill owner lately applied for and received from the landowner permission to maintain the dam only so long as it caused no injury to the latter. Perrin v. Garfield, 37 Vt. 304.

In Eastman v. Amoskeag Mfg. Co. 44 N. H. 143, 82 Am. Dec. 201, the court said that an adverse right to flow land will be gained when the flowage is continued for twenty years, openly, visibly, without interruption, and adversely to everyone claiming the land flowed during that time; and, with regard to the user being adverse, it would not make any difference whether the man who owned the flowed land continued to own it during the twenty years, or whether it had changed hands every year during that time.

In a suit for alleged unlawful flowage, when it is established that the acknowledged flowage has been enjoyed twenty years, the extent of the flowage to which the defendant is entitled by the lay of his land is immaterial. Columbus Power Co. v. City Mills Co. 114 Ga. 558, 40 S. E. 800.

It seems that in Texas the uninterrupted enjoyment, for ten years, of the use of a dam whereby water is backed upon the land of riparian proprietors, would give a right by prescription to maintain the dam, ever afterwards, at the height at which it had been kept throughout the period of the ten years. Haas v. Choussard, 17 Tex. 588.

In an action against a railroad company for flooding plaintiff's land by the maintenance of an improperly constructed bridge a verdict for the plaintiff will be set aside, where the bridge had been maintained without complaint for twelve years before suit was brought, and the land had been long subject to overflow by reason of a dam some distance below, and the plaintiff's premises had formerly been protected by riprapping, which had since been neglected. Hodge v. Lehigh Valley R. Co. 56 Fed. 195.

The old doctrine with regard to the first appropriation of rights on the stream has recently been applied in a Kentucky case, the court holding that a mill owner, who has acquired the right to the use of a stream for mill purposes by previous occupancy, has the right, as against a subsequent mill owner, to continue his dam at the same height it was erected and used prior to the building of such subsequent mill. Tye v. Catching, 78 Ky. 463.

The right to flow another's mill privilege is obtained by erecting a dam at a time when said privilege is temporarily unused owing to an abatement of the dam as a nuisance to the owner of a third privilege flowed thereby. Lincoln v. Chadbourne, 56 Me. 197.

2. *What necessary to give right.*

Certain things are necessary to perfect a prescriptive right. The flowage must be under a claim of right, open, notorious, and adverse to the true owner; and it must be continuous, and of such a character as to interfere with the rights of the one against whom it is claimed.

A grant of an absolute right to flow lands by one in possession and claiming to hold by contract under another, to one who knows the extent of the claim of his grantor, is not admis-

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sible to lay the foundation of adverse user on behalf of the grantee against the one under whom his grantor held, or his assignee. Pitts v. Wilder, 1 N. Y. 525.

Nonuse of a water course for a time will not be treated as an abandonment of the right to use it, so that relative rights of drainage of dominant and servient estates are not altered by the construction of a canal under powers of eminent domain, which has suspended their exercise. Gordon v. Pennsylvania R. Co. (Pa.) 6 Rep. 727.

A prescriptive right to overflow the lands of another by back water from a dam can be acquired only by an actual uninterrupted enjoyment, under claim of right, for the statutory period, to the knowledge of the owner of the premises, such as to occasion damage and give him a right of action. Grigsby v. Clear Lake Waterworks Co. 40 Cal. 396.

To establish a prescriptive right to flow lands the acts which constitute adverse user must be of such a nature as to injure the landowner, and give him a right of action therefor. Turner v. Hart, 71 Mich. 128, 38 N. W. 890.

A prescriptive right to flowage without the payment of damages cannot be established unless injury or damage has been caused thereby. Simpson v. Bowden, 33 Me. 549.

Merely maintaining a dam on one's own land, without thereby raising the water above, will not create a prescriptive right to flow another's land; it is only the uninterrupted flowing of the lands for the statutory period that will create such right. *Re* Minnetonka Lake Improv. Co. 56 Minn. 513, 58 N. W. 295.

A prescriptive right to raise the water of a pond from May to October so far as can be done without injuring the grass of meadows above the dam is not established by a habit for more than thirty years of nailing flashboards on the dam for short periods between May and October, when the rise of water did not hurt the grass, and by a single instance of refusing at such time to draw the water off at the request of the injured property owner. Pierce v. Travers, 97 Mass. 306.

A grant of a flowage easement will not be presumed from the fact that the water has adversely and continuously been maintained at a certain depth in the basin but because for a period of twenty-one years before suit brought the dam has been openly, continuously, and uninterruptedly maintained under a claim of right, the breast wall or structure of which was at all times during that period of the same height, whilst the owner and possessor of the lands was under no disability to resist the use. Gehman v. Erdman, 105 Pa. 371.

A prescriptive right to maintain a dam uninterrupted by user for twenty years, which backs water upon and renders powerless a mill wheel, is not prevented from vesting by proof that no grant was ever made, nor the right to use denied, nor the use protested against; but, to escape the servitude, the servient owner must go further, and show that the dominant right was obstructed or interfered with by some overt act; or that the right claimed was one that could not have been granted or acquired from incapacity legally to convey or take; or that it was exercised under permission or license, or was so secretly or physically used as to remain unknown. Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605.

An act of the legislature under which a dam is erected, authorizing its construction in such a manner as not to interfere with the operation of a mill on the stream above the dam, may constitute color of title upon which to found an adverse possession of the right to flow back water upon that mill. Close v. Samm, 27 Iowa, 503.

A grantee of a mill site from a corporation whose franchises are subsequently forfeited at the suit of the attorney general will hold the rights granted adversely to the grantors of the corporation from the date of the judgment of ouster, so that continuance for the prescriptive period will ripen into title. Campbell v. Talbot, 132 Mass. 174.

User must be adverse.

The flowing of land of another must have been adverse to ripen into a right by the lapse of time. Hart v. Vose, 19 Wend. 365.

A plea of adverse possession to an action for flowing lands must show, not only that the possession was peaceable and continuous, but that it was adverse. Colvin v. Burnet, 17 Wend. 564.

A perscriptive right to maintain a milldam which overflows the land of another cannot be acquired unless the use and enjoyment was adverse and hostile from its inception, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the overflowed land, and while he was not legally disabled from asserting his right and resisting such adverse claim; but the land need not have been overflowed continuously for the entire period. The suspension of the overflow during low water or while making repairs, etc., would not be such an interruption as to effect the mill owner's rights. Lane v. Miller, 27 Ind. 534.

Acquiescence in the erection of a milldam and the use of a mill on the part of the owner of land, and its operation and the exercise of the uninterrupted, adverse enjoyment on the part of the mill owner of the privilege to overflow the land of such owner above the milldam for a period of thirty years, constitute a bar to a bill in equity by such landowner to enjoin the rebuilding of a portion of the dam which was carried away. Ballard v. Struckman, 123 Ill. 636, 14 N. E. 682.

The owners of land who suffered the adverse use thereof by the backing of water thereon from a milldam constructed with their knowledge at the expenditure of a large sum of money, and continuously maintained for a period of twenty-four years, without having their damages paid or ascertained, cannot, after such a lapse of time, maintain a bill in chancery to enjoin the rebuilding and repair of a part of the dam carried away by a flood, on the ground either that their damages have never been paid, or because the health of those in the neighborhood will be injuriously affected thereby, it not appearing that their health has been or will be affected, by reason of the dam. Vail v. Mix, 74 Ill. 127.

User must be continuous.

To raise the presumption of a grant of the right to overflow neighboring lands from the maintenance for over fifteen years of a mill pond, the adverse use must have been uninterrupted; and, when it appears that such use was at times suspended,—once by invasion of the public enemy, and at other times by the action of the public health authorities,—during which time the land was enjoyed by the owner, the user has not ripened into title. Shumway v. Simons, 1 Vt. 53.

While acts of user, to constitute a prescriptive right to flow land by means of a dam, need not be unintermittent, they must be of such a nature and frequency as to give notice to the land

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owner that the right is being claimed against him. It is not enough that the dam owner exercised the right as often as he chose. Gilford v. Winnipiseogee Lake Co. 52 N. H. 262.

So, the mere maintenance of a dam for twenty years without thereby raising the water on the plaintiff's land often enough to give notice that the dam owner claims the right to flow it would not give him a prescriptive right to flow the land as high as it could be flowed by means of the dam. *Ibid.*

Flooding the land of an adjoining owner with water on only two or three previous occasions does not establish in a railroad company a prescriptive right to overflow such land,—especially as, on one of these occasions, the owner made complaint to the agents of the company, thereby rebutting the presumption of a grant. Ohio & M. R. Co. v. Wachter, 23 Ill. App. 415.

But the requirement of continuance of the user does not require that it shall be maintained during every moment of the time. It is sufficient if it is as continuous as the nature of the use admits, and such as to indicate an assertion of the right to maintain it.

A presumption of grant of a flowage easement is not defeated because of occasional lowering of the water by drouth or while repairs were being made. Gerenger v. Summers, 24 N. C. (2 Ired. L.) 229.

A prescriptive right to overflow lands by the construction of a milldam is shown, although during the prescriptive period a sawmill was removed, and a year elapsed before a clover mill was worked by the water. McKechnie v. McKeyes, 10 U. C. Q. B. 37.

A party is not deprived of a prescriptive easement to maintain water at a certain height by means of a dam which has existed for the prescriptive period, by the mere fact that he occasionally let off the water out of the outlet, that not being such an interruption of his enjoyment of the easement as to break such continuity. Alcorn v. Sadler, 71 Miss. 634, 14 So. 444.

Occupation and use of a right of flowage or pondage, in order to create a prescriptive right, must be continuous and uninterrupted, but need not be constant in the sense of a daily occupancy or use. Such use is necessarily irregular, dependent upon the season and rain fall, and it is sufficient if it is resorted to without interruption whenever necessary in the operation of the power. Cornwell Mfg. Co. v. Swift, 89 Mich. 503, 50 N. W. 1001.

A prescriptive right to flow land without the payment of damages therefor is acquired when the land has been flowed by the dam twenty years consecutively,—that is, at some portion of the year for twenty years, doing damage to it to some appreciable extent. Augusta v. Moulton, 75 Me. 284.

Fluctuation in the height of the water, caused either by extraordinary, or by extreme or unusual, drouths, or by excessive drafts upon the water for the use of the mill occasionally, will not affect or impair the prescriptive right to flow land with back water from the dam to the usual height acquired during ordinary seasons by the uninterrupted use for ten consecutive years. Johnson v. Boorman, 63 Wis. 268, 22 N. W. 514.

A dam owner, who for twenty years claims and exercises the right to raise the water as high as his dam will raise it when there is sufficient water to flow it, acquires a right to the extent of his claim, which is not affected by the fact that upon reconstruction of the dam it was maintained for a few months at a slightly decreased height when it was later brought up to the height of the former dam. Norway Plains Co. v. Bradley, 52 N. H. 86.

If it clearly appears that the dam breast, through a period of twenty-one years prior to the time of the complaint, has been in fact unchanged, variations in the depth of the water, during the continuance, after that, of the structure at the same height, may be fairly attributed to the varying condition of the stream, or the evidence thereof to a difference of opinion as to what is the ordinary stage of the water. McGeorge v. Hoffman, 133 Pa. 381, 19 Atl. 413.

Maintaining a milldam at a uniform height for twenty consecutive years without any claim of damages therefor gives the owner a prescriptive right to maintain the water as high as the dam will raise it, although it has not been kept at that height during all the time. Ray v. Fletcher, 12 Cush. 200.

A prescriptive right of flowage may be obtained notwithstanding that during that same time the same lands have been subject to an easement of a canal for shipping lumber, and thereby the mills operated by the power generated by said flowage have had to be shut down at times. Davis v. Brigham, 29 Me. 391.

Effect of owner's consent.

The foundation of a prescriptive right lies in the use being adverse: so that if it began under a license, and the nature of the use never changed, no prescriptive right is made out.

A right by prescription to overflow an owner's land by the waters of a milldam cannot be acquired when based in the origin, upon the permission or verbal consent of the owner of the overflowed land. Lane v. Miller, 27 Ind. 534.

But, after the enjoyment of an easement of overflowing the lands of another for twenty years, the person submitting to it must, in order to defeat its continuance, show that it was by license or permission; and the owner of the easement is not compelled to prove an express claim of right to characterize the user as adverse. Hammond v. Zehner, 21 N. Y. 118, Affirming 23 Barb. 473.

And enjoyment of a right to flow land under a lease from one who has previously parted with the title is sufficient color of title to ripen into a prescriptive right. Wilklow v. Lane, 37 Barb. 244.

License on the part of the landowner must, however, be distinguished from acquiescence on his part. The former is evidence that the one claiming the flowage right did not possess it in the absence of the license, while the latter is evidence that he did.

Although the construction of a dam may have been permitted by one riparian owner, such fact did not affect the adverse character of its use as against another owner who did not consent to it, and a prescriptive right to maintain it may be acquired against the nonassenting owner. Lynn v. Thomson, 17 S. C. 129.

To acquire by prescription the right to obstruct a water course and thereby flow adjoining land, the use must not only be adverse, continuous, and uninterrupted, but must be with the acquiescence of the owner of the land flowed. Bunten v. Chicago, R. I. & P. R. Co. 30 Mo. App. 414.

One who has for over ten years, with the knowledge and assent of an adjoining landowner, been permitted to maintain and continue a flow of water in a reservoir on the other's lands by means of a certain dam, acquires a prescriptive easement, and may enjoin an in-

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terference therewith by the other. Alcorn v. Sadler, 71 Miss. 634, 14 So. 444.

A grant of the right to flow another's land by a milldam will be presumed after more than twenty years' acquiescence by the owner. Wilson v. Wilson, 15 N. C. (4 Dev. L.) 154.

Invasion of rights necessary.

The maintenance of a dam for twenty years will not give a right to raise the water higher than the level at which it had been maintained during that time. Russell v. Scott, 9 Cow. 279.

Flowage of land for the statutory period, and not a mere maintenance of a dam and pond at the same height for such period, is requisite for the establishment of a right of flowage by prescription. Murray v. Scribner, 70 Wis. 228, 35 N. W. 311.

In a suit for flowage damages, the validity of a defense of prescriptive right is not to be determined by ascertaining how long the dam has been in existence or by the claim the party makes during the period of prescription. The question is not how high the dam is, but whether the water has been held the requisite period so high as to affect the land flowed as injuriously as it does at the time of said suit. Charnley v. Shawano Water Power & River Improv. Co. 109 Wis. 563, 53 L. R. A. 895, 85 N. W. 507.

The existence of a dam is not notice to a landowner of a claim to flow his property to the height of the dam so as to confer a prescriptive right; but the flowage must be kept up during the prescriptive period without controversy and so frequently, and for such a length of time, that the landlord may understand from observation the extent of the right claimed. Griffin v. Bartlett, 55 N. H. 119.

The construction of a dam and the pending back of the waters of a stream for a period sufficient to establish a prescriptive right give no greater privilege than that which the party so doing has exercised during that time; and where, for several years, the water was penned back only to a small extent, and only during two or three months of the year, and at a time when the water was high and from which no injury was inflicted upon the lower owners, the prescriptive right acquired is limited to the use made of the water during those years. McKechnie v. McKeyes, 10 U. C. Q. B. 87.

The extent of land subjected to a flowage easement by prescription is determined by the land actually flooded, and not by the height of the dam. If a certain right has been acquired with a leaky dam, no right is thereby acquired to repair it and thereby increase the flowage. Mertz v. Dorney, 25 Pa. 519.

Boards that are necessarily used on a dam in seasons of low water so as to increase the water in the pond without overflowing the lands above and used at intervals only, cannot gain the right to keep the dam at the height which they raise it if that will make the level of the water upon the upper lands higher than maintained for the period of twenty years. Carlisle v. Cooper, 19 N. J. Eq. 256.

The extent of the right to flow land of another, acquired by adverse user, is not determined by the height of the dam, but is commensurate with the actual enjoyment of the easement as evidenced by the height to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription. Carlisle v. Cooper, 21 N. J. Eq. 576.

The period requisite to presume a grant to maintain a dam raising the water of a stream to a particular height does not begin to run while the dam is in the course of erection, during which the water is kept raised by a temporary dam, but begins to run only when the permanent dam is so far completed as to answer the purpose for which it was intended. Branch v. Doane, 17 Conn. 402.

The maintenance of a dam at a certain height for twenty years will not give the right to raise the water to the top of the dam, to the injury of upper proprietors, if it has not been maintained at that height during that period. Stiles v. Hooker, 7 Cow. 266.

Maintaining flashboards on a dam only at times of low water for twenty years, so as not to flow the water back upon the land of an upper proprietor, will not give a right to maintain such boards at all times of the year, when the effect may be to flood the upper land at times of high water. Marcly v. Shults, 29 N. Y. 346.

Prescription as the foundation of the right of a mill owner to overflow the land of another depends, not upon the height of the dam, but upon the height of the water, as, until the water is raised so as to inflict damage, no right of action exists therefor, and not until then does any prescription begin to run. Ellington v. Bennett, 59 Ga. 286.

No easement is acquired to overflow the lands of another by the maintenance of a dam and pond at the same height and head for the required statutory period which will defeat an action for damages therefrom, where the flowage has not existed for such period, but has gradually come about by accumulations and obstructions in the stream caused by the maintenance of such dam. Murray v. Scribner, 74 Wis. 602, 43 N. W. 549.

The length of time for which a dam has been built is immaterial to the question of a prescriptive right to flow land which the dam has not set back water upon for so long a time as it has been maintained, as the statute of limitations does not begin to run upon the claim of the landowner until the flowing of his lands. Smith v. Russ, 17 Wis. 228, 84 Am. Dec. 739.

A prescriptive right to overflow lands by a milldam can be acquired only by an actual overflowing thereof to the same height for the statutory period, and not by merely maintaining at the same height for such period a dam which might, but did not, usually or constantly keep the water at a certain height because of the condition of the dam or the machinery or manner of use of the water. Sabine v. Johnson, 35 Wis. 185.

But in the face of all those decisions it has recently been held by the Georgia court that it is not necessary to maintain a dam at a certain place, of a certain height, and with certain privileges for the full term of twenty years without any change in order to obtain a prescriptive right to maintain it, but the rule is that the capacity of the dam from its height is the measure of the easement and the party has a right to repair his dam and build a better, though not a higher, one. Whelchel v. Gainesville & D. Electric R. Co. (Ga.) 42 S. E. 776.

The possession must have been against one capable of granting the right.

So, as a grant by a vicar of a right to pen back the water of a stream so that it injured the vicarage house will not bind his successor; therefore, existence of the obstruction for twenty years will not justify its continuance, although it may amount to evidence of an ancient grant, when the time of its construction does not appear. Wall v. Nixon, 3 Smith, 316.

Where state land has been subjected to flowage, the term of adverse possession to estab-

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fish a right of flowage will begin to run from the date of sale by the state, and not before. Kinsell v. Daggett, 11 Me. 309.

The right to overflow lands by a dam may be acquired by user thereof for twenty years, although during a part of that period the lands were owned by the state, under a statute of limitations providing that the limitations prescribed shall apply to actions in the name or for the benefit of the state in the same manner as to actions by private persons, where such period expired before the amendment thereof by later statutes providing respectively that no title by adverse possession, prescription, or user can be acquired against the state, and that such title can be acquired only by forty years' adverse possession, prescription, or user. Scheuber v. Held, 47 Wis. 340, 2 N. W. 770.

Certain presumptions will be indulged in aid of the right.

Flowing land of another, if long continued, will be presumed to be adverse. Chalk v. McAlily, 11 Rich. L. 153.

The enjoyment of an easement to send water back upon the land of the upper proprietor is presumed to be adverse until something appears to rebut the presumption. Perrin v. Garfield, 37 Vt. 304.

All formal consideration of the adverseness of possession is precluded in a suit to establish right to flowage rights by adverse possession where that is done without the exhibition of any grant or license from the owner of the lands. Davis v. Brigham, 29 Me. 391.

While it is doubtful if the fact that premises have been flooded by a dam for about one hundred years makes a technical adverse possession, still it is possession sufficient to give the plaintiff the benefit of any presumption which may be indulged in to supply defects. Dosoris Pond Co. v. Campbell, 25 App. Div. 179, 50 N. Y. Supp. 819.

So, in a hearing on a petition for an injunction restraining the reconstruction of a milldam, it is material that the petitioner and those under whom he claims have submitted to the grievance of a milldam for forty years, and he, himself, bought his land twenty-five years previously, when he must have calculated the value and inconvenience of the mill, and its attendant consequences. Atty. Gen. *ex rel.* Eason v. Perkins, 17 N. C. (2 Dev. Eq.) 38.

Where a lower mill owner claims a prescriptive flowage easement, but his enjoyment is interrupted by alteration of the marks of an upper owner, in the absence of allegation or proof to the contrary, such trespass, as against the lower owner, will be assumed to have been committed before his occupancy had ripened into right. Henley v. Wilson, 77 N. C. 216.

An answer to an action for flowing land, which sets up prescription for an easement during twenty years without showing that it was adverse will be sufficient to allow evidence of adverse use if issue is taken on it instead of the filing of a demurrer. White v. Spencer, 14 N. Y. 247.

Change of persons or use.

A right of flowage by prescription cannot be established when the party claiming it fails to show that the occupation was by himself or some grantor for more than fourteen years, although there may be evidence that the dam causing the flowage had existed more than twenty years. Benson v. Soule, 32 Me. 39.

Possession of mill property and water privileges by successive grantees under their deeds for at least nine years previous to the burning of the mill, together with proof of possession after the burning of the mill and of possession by their predecessors in title, which altogether amounts to twenty years', is sufficient to establish a prescriptive title, both by prescription of seven years under color of title, and, also, by twenty years' adverse possession under the statute. Cook v. Winter, 68 Ga. 259.

The occupation of a flowage privilege acquiesced in for twenty years by the different succeeding owners of the land out of which the privilege is claimed, though there should be twenty of them, and no one of them had been owner of the land more than one year, will raise a presumption in favor of the right to enjoy it, just as strong and conclusive as if but one of them had been the owner of the land during the whole of the twenty years. M'Kellip v. M'Ilhenny, 4 Watts, 317, 28 Am. Dec. 711.

A right of flowage may be obtained by prescription, even though during the prescribed twenty years the location of the dam has been changed to another but on the same mill site, as right by prescription should be regulated by such a construction as a grant would receive, it being founded upon a presumption of grant. Stackpole v. Curtis, 32 Me. 383.

Repairing or rebuilding operations during a time when a dam owner is unavoidably prevented from exercising flowage rights is evidence of his intention to maintain that flowage, and will not interfere with his acquisition of flowage rights through adverse possession for twenty years. Wood v. Kelley, 30 Me. 47.

A prescriptive right to flowage will be determined by the use of water flowed to a certain height and continued for a certain time during each season for the working of the mills to the damage of the lands, and not by whether or not there was more than one dam, or by whom the different dams were erected. Davis v. Brigham, 29 Me. 391.

If for ten years prior to the commencement of the suit the milldam and water have been kept up and maintained at the same height, and no greater damage has been occasioned by reason of the dam and backwater caused by it after the dam was rebuilt than before, then the plaintiff may not recover for the injury, in view of Wis. Laws 1862, chap. 184, barring an action for the recovery of damages for the flowing of lands by a milldam after ten years. Janssen v. Lammers, 29 Wis. 88.

Although there be changes made in a dam to facilitate the running of lumber, with the consent of the parties in possession and without interrupting their occupancy, there is not an interruption of the adverse use of the land on which the dam stands affecting the running of the statute of limitations. Pioneer Wood Pulp Co. v. Chandos, 78 Wis. 526, 47 N. W. 661.

But a continuous use, by the aid of three successive dams, of a stream for propelling machinery, cannot give a prescriptive right to throw back waters on the lands of upper proprietors, where the last dam only has, for less than the statutory period, caused a refluence upon such land. Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731.

3. *Extent of right.*

When a right to flow upper lands rests in prescription only, its extent is measured by the actual enjoyment of the easement, not by the height of the dam maintained but not kept full, nor by the claims of the mill owner not translated into actual use. Horner v. Stillwell, 35 N. J. L. 307.

While the height and capacity of a dam are

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a common instrument wherewith to measure the extent of a water right, other monuments may be and often are adopted. Town v. Faulkner, 56 N. H. 255.

The height of a dam is not the measure of a right to flow lands, but the actual extent of the flowage. Griffin v. Bartlett, 55 N. H. 119.

Flashboards constitute a part of the dam, and measure the height to which the water may be raised. Amoskeag Mfg. Co. v. Worcester, 60 N. H. 522.

The presumption of a grant arising from long-continued use of another's land for flowage applies to the land occupied, and not to the dam. McGeorge v. Hoffman, 133 Pa. 381, 19 Atl. 413.

It is the height of the water as ordinarily kept in the dam when kept in repair as dams are kept for profitable and economical use, that will fix the height acquired by prescription. Carlisle v. Cooper, 19 N. J. Eq. 256.

The amount of flowage which a mill owner may claim by prescription is that ordinarily resulting when the dam is in good condition, unaffected by the changes of the seasons or the occasional leakage of the dam. Voter v. Hobbs, 69 Me. 19.

A prescriptive right to maintain a pond will extend to the height of water which the dam is capable of maintaining when tight. Jackson v. Harrington, 2 Allen, 242.

The right acquired by penning back water of a stream for twenty years is limited by the character of the user, and the dam cannot be subsequently raised so as to pen back the water at a greater height. McNab v. Adamson, 6 U. C. Q. B. 100.

One who has acquired a prescriptive right to flow the land of another is not entitled, in the operation of an additional mill by improved machinery, to flow the land in a different manner or for a longer period than he had previously done, although in so doing he does not raise the water above the height of the ancient dam. Griffin v. Bartlett, 55 N. H. 119.

A mill owner cannot increase the burden of his flowage easement obtained by prescription on the land of an upper owner, except by being liable for damages for any increased burden imposed within twenty years, for *tantum præscriptum quantum possessum* limits his rights. Powell v. Lash, 64 N. C. 456.

Where flashboards have been maintained on a lower dam for more than twenty years, being removed on complaint of the upper mill owner, only sufficiently to prevent interference with the upper mill wheel, a prescriptive right to maintain them has been acquired, limited only by its non-injury to the upper mill. Hall v. Augsbury, 46 N. Y. 622.

The adverse flowing of land during the months from October to June will not give a prescriptive right to flow from June to October. Griffin v. Bartlett, 55 N. H. 119.

When premises above a dam are continuously overflowed during three months of the year for the purpose of floating logs, although during other months the land is not overflowed, the user after fifteen years will ripen into an easement by adverse possession for those months. Swan v. Munch, 65 Minn. 500, 35 L. R. A. 743, 67 N. W. 1022.

One having a prescriptive right to maintain a milldam at a given height has no right to raise that height to the injury of the property of others. Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394.

An easement to overflow the land of another by maintaining a milldam at a certain height cannot be acquired by prescription unless maintained at that height for the entire period of 59 L. R. A.

twenty years, although the dam may have been in existence at a lower level for that period. Postlethwaite v. Payne, 8 Ind. 104.

One who has acquired a prescriptive right to maintain a dam and flow the lands of another will be enjoined from raising the water to a greater height than that at which it has been maintained during the prescriptive period. A. P. Cook Co. v. Beard, 108 Mich. 17, 65 N. W. 518.

There may be such continuity in the use of flashboards that they, in effect, are parts of the permanent structure of the dam, and by such user a right to flow by a permanent dam, to the height of the flashboards, may be acquired. Carlisle v. Cooper, 21 N. J. Eq. 576.

Where the practice in the use of a dam and its appendages during the period of acquiring a prescriptive right to flow upper lands has been to control the height of the water in the pond in times of high water by removing the gates and permitting the water to flow off, the mode of user qualifies the right which has been acquired by prescription. *Ibid.*

The prescriptive right of a railroad company to maintain its embankment over a natural stream as originally constructed gives it no right to increase the height of such embankment, thereby preventing the natural flow of water in a natural direction, and claim such increased height as a prescriptive right, until the full term has run from the time of such increased height to give a prescriptive right. Ohio & M. R. Co. v. Elliott, 34 Ill. App. 589.

A prescriptive right to raise water in a stream to a certain stage is no defense to an action for damages to land resulting from the overflow caused by raising the water above such stage. Tucker v. Salem Flouring Mills Co. 13 Or. 28, 7 Pac. 53, 15 Or. 581, 16 Pac. 426.

A prescriptive right gained by constructing a weir and penning back the water of a stream is no greater than the user; and where, during the time of acquiring such prescriptive right, no injury is inflicted upon other riparian owners, the prescription cannot be continued after it floods or injures adjoining lands. O'Brien v. Enright, Ir. Rep. 1 C. L. 718.

A prescriptive right to flowage without payment of damages will not exist where the damages thereby occasioned commenced within twenty years, although the dam may have existed for a longer period. Burleigh v. Lumbert, 34 Me. 322.

But a milldam which has been maintained for over sixty years, and stands upon the land of the defendant, who has acquired the right to flow adjoining lands, will not be abated, although the overflow in times of high water extends beyond his right; but the defendant ought to be permitted to hold and enjoy his property until it is taken away by the verdict of a jury or in some statutory proceeding, since the rights of the complainant can be enforced at law as well as in equity. Ronayne v. Loranger, 66 Mich. 373, 33 N. W. 840.

And it has been held that the right to maintain a dam, acquired by prescription, may be enjoyed, although new and increased injuries result from its enjoyment, unless such injuries are caused by increasing the height of the dam. Lynn v. Thomson, 17 S. C. 129.

4. *Prevention and loss of right.*

An adverse holding which would eventually ripen into a prescriptive right to flow lands may be interrupted in other ways than by bringing suit. Shearer v. Middleton, 88 Mich. 621, 50 N. W. 737.

But a mere assertion that land is being sub-

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jected to unlawful flowage will not interfere with the running of the prescriptive period, no alteration having been made in the dam during those years. McGeorge v. Hoffman, 133 Pa. 381, 19 Atl. 413.

A prescriptive right of flowage cannot be presumed when the owner of the servient estate continually resisted the exercise of the right. Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 180.

Adverse and exclusive possession of a right of flowage for twenty years does not prove conclusively a presumptive grant, as the time should be taken as evidence and not as a bar. That the claim of right was contested may be shown to rebut the grant. Nichols v. Aylor, 7 Leigh, 546.

In Haag v. Delorme, 80 Wis. 591, it is said that the interruption of the flowing of land in order to prevent the acquisition of the privilege by prescription may be by disseisin, or fraud, or any other means, although a merely temporary or accidental interruption because of dry weather, washing out of the dam, necessity for repairs, and the like will not stop the running of the prescription if there be no intent to abandon the easement.

When a person has, by numerous suits for damages and for abatement, challenged the right of the owner of a dam to flow the other lands, the use and enjoyment of the land for purposes of flowage may not be considered adverse, exclusive, and uninterrupted, so as to create a right under the statute of limitations. Cobb v. Smith, 38 Wis. 21.

One sued for injuring a mill by means of a dam which penned back the water on the wheel is not entitled to have the jury instructed that the mill owner cannot complain because the dam, as originally built, has existed for more than twenty years, when it appears that within that time it had not been peaceably acquiesced in, but that aggrieved parties had actually broken it down. Trenton Water Power Co. v. Raff, 36 N. J. L. 335.

A prescriptive right to maintain flashboards on a milldam cannot be acquired when they are taken down whenever complained of by an upper mill owner. Sumner v. Tileston, 7 Pick. 198.

The flooding by a mill owner of an adjoining owner's land is not under an adverse right which ultimately ripens into title by prescription, when it is shown that at the request of the injured one he had the water in the dam drawn down and offered to buy the right of flowing, for this amounts to an interruption of any adverse use, and an acknowledgment of superior right. Willey v. Hunter, 57 Vt. 479.

Mere nonuser of the right to flow land, gained by prescription, will not raise a presumption of the abandonment of the easement. Polson v. Ingram, 22 S. C. 541.

A prescriptive right to flow land with a mill pond is not lost by nonuser for less than the prescriptive period. Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45.

A prescriptive right, acquired by uninterrupted adverse user for the requisite time, to overflow lands by a milldam, cannot be lost by any words or acknowledgment of the mill owner to the contrary, for the presumed grant has all the force and validity of an actual one. Weed v. Keenan, 60 Vt. 74, 13 Atl. 804.

Whether or not a right to flow lands acquired by prescription has been abandoned by nonuser does not depend upon the length of the nonuser, but is a question of fact to be determined from the surrounding circumstances. Parkins v. Dunham, 3 Strobh. L. 224.

The prescriptive right to flow land for the purpose of creating power for the operation of a mill is not extinguished by the owner of the servient tenement gathering timber from the land flowed, unless such act is inconsistent with the easement so as to constitute an adverse user. Polson v. Ingram, 22 S. C. 541.

The mere failure to exercise the right, acquired by prescription, to flow lands, during which time the owner of the servient estate cultivated them, does not set in operation the statute of limitations against the easement, as such possession for the purpose of cultivation was not inconsistent with it. Parkins v. Dunham, 3 Strobh. L. 224.

After a mill owner has acquired by prescription an easement of flowage, no cessation in the use of it will extinguish it, unless the cessation be continued uninterruptedly for the full period of twenty years, or it be commenced or continued under such circumstances as to evince, unmistakably, an intention of the mill owner to abandon the right, and as to also render a subsequent resumption of it by him, clearly inequitable to the owner of the servient tenement. McConnell v. American Bronze Powder Mfg. Co. 41 N. J. Eq. 447, 5 Atl. 785.

A dam owner will lose all his claim to existing prescriptive flowage rights by entering into a contract with the other riparian owners to maintain his dam at a specified height, and thus be exempt from liability for substantial damages for flowage caused by his dam; and the covenants of his contract will not be held dependent on his pre-existing rights. Stinson v. Gardiner, 33 Me. 94.

A right to maintain a dam of sufficient height to set back the water into a lake, being acquired by prescription, is not lost by six years' nonuser, as the mere suspension of the exercise of a right is not sufficient to establish an intention to abandon it. Hall v. State, 72 App. Div. 360, 77 N. Y. Supp. 282.

When one's predecessor in title has acquired by a fifteen-years' uninterrupted adverse use a prescriptive right to maintain a dam and flume upon another's premises, he does not lose it by subsequently asking and receiving a license from the landowner. Perrin v. Garfield, 37 Vt. 304.

The admission of a mortgagor in possession that he does not hold the right to dam water back on adjoining property adversely is binding on the mortgagee. Betts v. Davenport, 3 Conn. 286.

In an action against a riparian proprietor by another riparian proprietor for damages which have resulted from the backing of water upon the land of the plaintiff, by means of a dam which the defendant claims a right by prescription to maintain, the defendant has the burden of proving that his right by prescription has not been lost by the adverse possession of the plaintiff and those under whom he claims. It seems that the rule would not be the same in a case where the defendant claimed the right to maintain the dam by virtue of an express grant. Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

f. Abandonment of rights.

As to abandonment of prescriptive rights, see *supra*, I. e, 4.

The question whether or not a flowage right acquired by grant can be lost by nonuser admits of some nice distinctions. Mere nonuser is not sufficient to defeat this right, but nonuser accompanied by adverse user on the part of the owner of the servient tenement will accomplish that result.

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An easement created by grant of the right to raise a dam and check the water running through land so as to flow it will be lost by the uninterrupted adverse use and occupation by the landowner, free from the exercise of the easement, for the prescriptive period under a claim of title. Chandler v. Jamaica Pond Aqueduct Corp. 125 Mass. 544.

But nonuser for twenty-one years of a flowage easement will not necessarily raise a presumption of its extinguishment, unless there has been, *ad interim*, some act done by the owner of the soil adverse to the existence of the right. Buckholder v. Sigler, 7 Watts & S. 154.

A deed of a right to overflow the land of the grantor is not a mere revocable license, but is an easement which nothing short of an abandonment for twenty years, or a reconveyance, would cause to revert to such grantor. Patterson v. Sweet, 3 Ill. App. 550.

A right to flood adjoining land by a mill pond, when created by express grant, and not arising from prescription, is not lost or impaired by nonuser or suspension. Mower v. Hutchinson, 9 Vt. 242.

The owner of a privilege to flow lands of another does not lose such right by adverse user on the part of its grantor, such user consisting in the lessor's exclusively using the land in the pasturing of his cattle, as such use is not inconsistent with the privilege granted. Smith v. Moodus Water Power Co. 35 Conn. 392.

The right to maintain a dam of a certain height is lost where it was lowered 2 feet and kept in that state for thirty-eight years; and it cannot be restored to the former height as against an upper mill proprietor, who, during such period, has acquired a right to use the water without back flowing, which would result from an increased height of the dam. Hazard v. Robinson, 3 Mason, 272, Fed. Cas. No. 6,281.

The right of flowage will be lost when, by reason of the removal of the artificial barriers, the water has receded, and the land, thus disencumbered, remains in the exclusive adverse possession of the owner thereof for a period of twenty years. Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167.

The right to keep up a pond and flow land is extinguished by the construction of a mill further up the stream and on part of the land flowed by the pond, which rendered it necessary to let the water out of the pond in order to operate the upper mill, the pond not being again raised except occasionally for the purpose of flowing rice, both of the mills being thereafter operated by means of water conducted through artificial canals until the destruction of the upper mill, when the mill owner attempted to again raise the pond for the purpose of operating the lower mill. Taylor v. Hampton, 4 McCord L. 96, 17 Am. Dec. 710.

Although a grant to erect a dam is without limitation as to height, the grantee will not be permitted to raise its height years after its erection, during which other mills have been erected on the stream above, but will be considered to have lost such right by nonuser. Sherwood v. Burr, 4 Day, 244, 4 Am. Dec. 211.

The right to an easement to back water upon the lands of another by the erection of a milldam may be lost by abandonment or forfeited by nonuser; but the forfeiture will not be incurred unless the nonuser be for a period sufficient to raise a presumption of a release or abandonment. Winham v. McGuire, 51 Ga. 578

The privilege appurtenant to one mill, of maintaining a dam to a height injurious to an upper mill, is extinguished by unity of possession, where such privilege was disused before the unity of possession, and not revived during it. Hazard v. Robinson, 3 Mason, 272, Fed. Cas. No. 6,281.

That a mill owner has lowered the outlet of his pond so that he can in dry seasons draw the water lower than before, whereby meadow lands formerly flooded have been drained so that hay can be gathered thereon, does not deprive him of the right to flow such lands in wet seasons, where the height of the dam has not been lowered, and for over fifty years he has exercised the right of holding back the water to the height of the dam. Bucklin v. Truell, 54 N. H. 122.

A partition by tenants in common of property on which there had been a mill privilege, but the dam of which was taken down, by an instrument which provides that neither the grantor nor his heirs, nor any person claiming from or under him or them, shall have any right or title to the aforesaid premises or their appurtenances or to any part or parcel thereof, will extinguish the right of flowage. Hamilton v. Farrar, 128 Mass. 492.

The liability of the owner of a new millidam, erected in place of an old one at no greater height than was permitted in the original grant, for obstructing the wheels of a mill above by back water from such new dam, based upon the acquisition, by such upper mill owner, by adverse enjoyment on his part and nonuser of the privilege of maintaining his dam at the full height on the part of such lower dam owner for a period of twenty years, of the right not to have the wheels of his mill obstructed by back water more than they have been at any time during such period of twenty years, depends upon whether or not the new dam raises the water higher than the old dam had done at any time within twenty years before the erection of the new one, and, if so, whether that raising invades the rights acquired by such adverse enjoyment and nonuser: and does not depend upon the mere fact that such wheels are actually more obstructed since the new dam was built than at any time during the preceding twenty years. Manier v. Myers, 6 B. Mon. 132.

So far as a mill owner has a right to a certain easement of flowage by his dam, a mere change of the location of the bulkhead is not an abandonment of the easement. Keller v. Stoltz, 71 Pa. 356.

Possession for seven years of land subject to overflow from the backwater of a millidam without its having been overflowed to the full capacity of the dam on account of the defective condition thereof does not relieve the land of such servitude in the absence of anything to show an intention on the part of the mill owner to abandon his right to use such dam to its full capacity. Maguire v. Baker, 57 Ga. 109.

Where the owner of a mill, having the right, as against the owner of an up-stream privilege, to the uninterrupted flow of a stream of water for the purpose of operating the mill, purchases, together with a third person, the up-stream privilege, no such unity of title is created as will merge and extinguish all former or special rights or privileges appurtenant to the mill; and the court expressed the opinion that, had the owner of the mill become the sole owner of the up-stream privilege, it would not have extinguished his former rights,—at

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most it would only have suspended them. Tucker v. Jewett, 11 Conn. 311.

g. Right as against public.

1. *In general.*

So far as the class of wrongs noticed here are regarded as nuisances, see the next succeeding subdivision.

A settler on public land, by erecting a mill thereon, acquires no right to flow water back on other public land without an express grant of the right from the government. Wilcoxon v. McGhee, 12 Ill. 381, 54 Am. Dec. 409.

Under a statute permitting a municipal corporation to prevent the encroachment upon the bed of a river flowing through its limits, it may prohibit such encroachment regardless of the question whether it retards the flow of water through the arches of a bridge erected by the city, or not. Rochester v. Osborn, 5 Lans. 37.

Riparian owners should not be permitted to obstruct the channel of a river running through a populous city, which is subject to sudden and extraordinary additions to its average volume of water. Rochester v. Erickson, 46 Barb. 92.

A right of flowage over a public highway cannot be obtained under a grant from the owner of the land upon which the highway runs. Monmouth v. Gardiner, 35 Me. 247.

A mill owner whose pond overflowed a highway may be liable for the cost of an embankment erected along the edge of the pond to protect the highway. Andover v. Sutton, 12 Met. 182.

But a mill owner is not liable for damage by overflowing a highway erected across lands on which he had already acquired prescriptive flowage rights, as it is not his duty to see that the road is so constructed as to stop the water without damage to itself. Augusta v. Moulton, 75 Me. 284.

The obstruction of a public road by the backing of water from a milldam is not an indictable misdemeanor unless done wilfully, under a statute making it a misdemeanor to obstruct a public road by a fence, bar, or other impediment, or wilfully to injure or obstruct any public road in any way, as "other impediment" means impediments *ejusdem generis*, and the offense is therefore governed by the latter provision. Prim v. State, 36 Ala. 244.

The state cannot maintain an action for wrongfully flooding a highway unless it proves that the *locus in quo* was a public highway. State v. Hendrickson, 80 Minn. 352, 83 N. W. 153.

One convicted of maintaining a nuisance by obstructing a culvert over a water course, whereby a highway is overflowed, and discharged under a so-called suspension of sentence on condition that he pay the costs, clear and keep unobstructed the culvert, and do whatever else may be necessary to abate the nuisance, cannot afterwards be rearrested and sentenced to imprisonment. State v. Addy, 43 N. J. L. 113, 39 Am. Rep. 547.

A prescriptive right cannot be acquired to flood a public highway by a milldam so as to render the way unsafe and impose expense on the municipality to keep it in repair. Charlotte v. Pembroke Iron Works, 82 Me. 391, 8 L. R. A. 828, 19 Atl. 902.

One who has obstructed a water course which, though often dry, formed a conduit of running as well as surface water, so that a highway crossed by it is made impassable in parts for an adjoining owner, may be compelled by mandatory injunction, even before final hearing, if the proofs warrant, to restore the ancient conditions. Schneitzius v. Bailey (N. J. Eq.) 13 Atl. 247.

A landowner is not justified in building a permanent dam across the channel of a natural water course flowing through his farm whereby the water is set back and a highway flooded, although the township authorities have constructed a ditch along the highway which brings to the water course, and casts upon the farm, water which would not naturally reach it. Tittabawassee Twp. Highway Comrs. v. Sperling, 120 Mich. 493, 79 N. W. 693.

A dam which causes periodical freshets because of a resulting ice gorge, to the damage of municipal highways, constitutes a continuing nuisance, the total abatement of which may be ordered, and a rebuilding prevented by equity, although the damage results from the growth of the city towards the pre-existing dam. New Castle City v. Raney, 6 Pa. Co. Ct. 87.

A township may maintain an action against railroad companies which maintain a bridge with insufficient openings, whereby an ice jam is caused, leading to the destruction of an upper township bridge. Ft. Covington v. United States & C. R. Co. 8 App. Div. 223, 40 N. Y. Supp. 313.

Legislative authority to a corporation to maintain "such dams across the A river as they should deem necessary and proper for the carrying on of their said works" will not authorize the corporation to cause such a flowage by means of its dam and flashboards as to carry off a bridge maintained by a town as a public highway, and will not free it from liability to the town for the damage done. Hooksett v. Amoskeag Mfg. Co. 44 N. H. 105.

A town maintaining a bridge across a river, when it is carried off and destroyed by an unusual quantity of ice from water thrown back by a dam, may recover from the owners of the dam for any actual damage suffered by the town through the loss of the bridge. *Ibid.*

Compelling a mill owner to lower the water in his mill pond in order that a municipality bound by by-law to maintain a highway bridge may make needed repairs thereto is not a taking of private property for public use so that compensation must be made. And, if the municipality selects a favorable season for doing the work,—when it can be done quickly, and the mill owner is less busy; if it adopts well-laid and adequate plans, and prosecutes its work diligently; and lowers the pond no more than is necessary,—it is not liable in damages. East Montpelier v. Wheelock, 70 Vt. 391, 41 Atl. 432.

Mill owners who obstruct a ford constituting part of a public highway by the construction of a dam and the backing of water so as to render it impassable, and continue such obstruction with knowledge of its effect on the highway, and, on notification by the overseer, send an insolent answer and continue the obstruction in defiance of his order, are guilty of wilfully obstructing a public highway within the meaning of the statute making such an obstruction a misdemeanor. State v. Raypholtz, 32 Kan. 450, 4 Pac. 851.

An action for damage from flooding a ford by a canal corporation cannot be supported except by one who has suffered some special damage thereby. Zimmerman v. Union Canal Co. 1 Watts & S. 346.

A private action for the abatement of a dam which causes water to flow back over, and render impassable, a ford constituting a public highway may be maintained by a landowner

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specially injured by the cutting off thereby of the only means of access to his premises. Venard v. Cross, 8 Kan. 248.

It is no defense to an action by a supervisor for the obstruction of a ford in a public road by the raising of a millidam so as to deepen the water thereat and render the crossing more difficult, to the inconvenience and injury of others, that the machinery of the mill required such change in order to secure the necessary power for its propulsion. Bisher v. Richards, 9 Ohio St. 495.

Under a charter empowering a water company to alter the course or bed of existing highways, with the approval of the selectmen of the town, whenever it becomes necessary or convenient to do so in the construction and maintenance of its dam across a river, and empowering it to condemn lands for that purpose, it becomes, by implication, the duty of the company to do so whenever the waters of the river raised by the dam or ice formed thereon flow upon existing highways to such an extent as to form an obstruction to public travel; and it matters not that the configuration of the shore and the contracted space of the river combine with the pond in the production of such overflow. State v. Ousatonic Water Co. 51 Conn. 137.

Where water overflows a highway by reason of defendant's dam, thereby causing expense for repairs, but no imminent danger of irreparable injury, equity will not grant relief, as the statutory remedy giving damages and process of abatement should be invoked. Rockland v. Rockland Water Co. 86 Me. 55, 29 Atl. 935.

Equity will restrain the depositing of cinders, slag, etc., along the banks of a navigable stream by the riparian proprietor, on the complaint of a municipal corporation, when it appears that its streets will be flooded thereby. Scranton v. Scranton Steel Co. 154 Pa. 171, 26 Atl. 1.

But a mandatory injunction will not be granted to compel a riparian proprietor to remove cinders, slag, etc., deposited along the banks of a navigable river, upon the prayer of a municipal corporation, when the evidence is slight and unsatisfactory that the water is thrown thereby upon the public streets. *Ibid.*

An injunction will not be granted at the suit of a city to restrain a railroad company from erecting an embankment for its tracks upon an island forming part of its right of way, on the ground that its substitution for an existing trestle would substantially add to the height of the waters in flood time, where the probability of such danger is not clearly shown. Lake Erie & W. R. Co. v. Fremont, 34 C. C. A. 625, 92 Fed. 721.

Where a railroad company by the negligent construction of its roadbed causes a highway to be overflowed, and by reason thereof children are prevented from going to school on foot as they had been accustomed to do, and the father of the children employs his horses in conveying them to school, he is entitled to recover against the company the children's share of the school fund for the period during which the highway was overflowed, it appearing that he would have lost such share of the fund had his children not attended school, if that share is less than the value of the horse feed which he alleged as damages; but, if greater, he may recover the value of the feed. Sabine & E. T. R. Co. v. Johnson, 65 Tex. 389.

A town compelled to build a new road because of the washing away of a former road leading by the falls of a river, through the

construction of a dam by a corporation acting under a charter conferring upon it the exclusive privilege of locking the falls in the river, but prohibiting it from obstructing the road in any way, cannot recover damages from the corporation for the flowage and obstruction of the road, but only for expenses incurred in repairing and making the road passable, when it appears that the overflowing was only temporary, and could not be avoided in accomplishing the objects of the charter. Lebanon v. Olcott, 1 N. H. 339.

The owner of a dam who causes backwater to fill a ravine across which runs a public highway is not responsible for the drowning of mules in such ravine by reason of the want of repair of a causeway built across it at the time of the construction of the dam, and which made a better highway at that point than existed prior thereto, where the public have used it for some years as part of the highway, and it has been maintained and repaired for a time by the overseer of highways of the road district; since it is the duty of the public, and not of the dam owner, to maintain it. Wallace v. Evans, 43 Kan. 509, 8 L. R. A. 52, 23 Pac. 596.

2. *Nuisance.*

See also cases cited under next preceding subdivision.

As has been noticed under I. a, *supra*, the backing of water upon an upper proprietor is regarded as a nuisance to him. But, in addition to that, the creation of a pond, even on one's own property, may constitute a public nuisance which will entitle the public authorities to take steps to abate, or will authorize an action on the part of an individual who is specially injured by it.

It seems that a lost grant from the state will not be presumed in support of any claim of right to continue a public nuisance, and this not merely where the nuisance is deleterious to health, but also where it obstructs a highway or navigable river. Folsom v. Freeborn, 13 R. I. 200.

A public nuisance created by a millidam and pond is one which affects all who reside in the neighborhood and pass by it. Coalter v. Hunter, 4 Rand. (Va.) 58, 15 Am. Dec. 726.

To maintain a public prosecution for a nuisance in damming up and stagnating the waters of a creek, whereby the air is corrupted and infected and sends forth noisome and unwholesome smells, it is essential to allege and prove that the obstruction placed in the creek produced the stagnation of the waters and corrupted the air in or near a public highway, or in some other place in which the public have a special interest. Com. v. Webb, 6 Rand. (Va.) 726.

It is said that to constitute a public nuisance the act done or duty omitted must affect injuriously some thing or right in which the community as a body politic have a common interest, and the facts producing this injury and connecting it with such special public right or interest must be alleged and proved. *Ibid.*

A nuisance created by the construction of a dam is a public one where the noxious and unwholesome nature of the waters collected injures the community in general, and not merely some particular persons. State v. Rankin, 3 S. C. N. S. 438, 10 Am. Rep. 737.

A pond in a city is a public nuisance, where foul and malarious exhalations arise from stagnant water and from the sides and bed of the

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pond as the water is drawn off, and are intensified by the accumulation of filth, which no public vigilance can keep out of the stream, and which the dam retains and holds. Yonkers Bd. of Health v. Copcutt, 140 N. Y. 12, 23 L. R. A. 465, 35 N. E. 443.

And the fact that a dam was made when the water was clean will not prevent its abatement as a nuisance when, by the growth of population, the water has become polluted so as to be a menace to public health. *Ibid.*

It is no defense to an indictment for a nuisance created by a milldam that the defendant is in possession of the premises as agent for others, although that fact might be considered as a circumstance to mitigate or reduce a fine or other punishment when discretionary. State v. Bell, 5 Port. (Ala.) 365.

A state has the right to authorize the erection of dams as feeders for a canal, although the same may be a nuisance to persons living in the vicinity. Butler v. State, 6 Ind. 165.

An indictment for creating or maintaining a nuisance cannot be sustained against canal trustees for erecting a feeder dam as part of a canal, under authority of law, and without any act of wantonness on their part, although such dam may in fact be a nuisance,—especially where one of the trustees is appointed by, and represents, the state. *Ibid.*

So, a person cannot recover damages against a city acting under charter authority for rendering impassable, by the erection of a dam below it, a ford across a navigable river, the right to use which depends on the mere acquiescence of the state. Austin v. Hall (Tex. Civ. App.) 58 S. W. 479.

No length of time can legalize a public nuisance created by the construction of a dam causing the water to stagnate to the public injury. State v. Rankin, 3 S. C. N. S. 438, 16 Am. Rep. 737.

The commonwealth, as well as individuals, may prosecute an indictment against the owner of a milldam for keeping up and continuing such dam, if the same, by the stagnation of the waters occasioned thereby, annoys the health of the neighborhood, notwithstanding such mill and dam are erected in pursuance of a statute requiring a jury to inquire, among other things, whether, in their opinion, the health of the neighborhood would be annoyed by the stagnation of the waters, and, if it appears that such would be the case, the court is expressly prohibited from giving leave to build such mill and dam, where, by a later section of the same act, it is provided that such inquest of the jurors and opinion of the court shall not bar any prosecution or action which any person would have had in law had such act never been passed, other than for such injuries as were actually foreseen and estimated by the said jury. Com. v. Clarke, 1 A. K. Marsh. 323.

The erection and maintenance of a milldam, overflowing much ground and rendering the atmosphere impure and the neighborhood unhealthy, is a nuisance, rendering its owner liable thereby to indictment at common law; and such owner is not exempt therefrom by virtue of a special act of the legislature authorizing him to erect the dam in question without being subject to the penalty of another act of legislature, requiring owners of mills to cut down and remove the standing or decayed timber therein, and making an omission so to do an indictable offense. State v. Gaines, 3 Humph. 39.

A dam is not subject to abatement as a public nuisance unless it clearly appears that a nuisance exists in which the dam is chargeable, and that its removal is necessary to suppress the nuisance. That the stream is fouled by sewage affords no prima facie ground for abating the dam, where it is not shown but that the nuisance would remain after the removal of the structure, and possibly in a more offensive state. Shepard v. People, 40 Mich. 487.

One constructing a dam upon his own land, and thereby creating a pond thereon in a lawful manner, is not liable for the acts of others, which, without his aid, so affect the dam and pond as to render it a public nuisance. State v. Rankin, 3 S. C. N. S. 438, 16 Am. Rep. 737.

One who maintains a dam whereby no greater nuisance is created than would have existed without it is not liable to criminal prosecution for the maintenance of a nuisance. Beach v. People, 11 Mich. 106.

In a prosecution for maintaining a dam alleged to be a nuisance, an inquiry whether the stream as dammed is as healthy to the neighborhood as it would be if the mill pond were drawn down, the river channel ditched, the water drained from the low lands and those lands converted into a meadow, is not an admissible test of nuisance. *Ibid.*

A general statute authorizing the destruction of a public nuisance by the boards of health of cities, and further providing for the appointment of such boards in cities, does not authorize the abatement of a dam as a public nuisance by a board of health appointed under the charter of a particular city. Shepard v. People, 40 Mich. 487.

The attorney general is not authorized, except in unusual cases, to proceed as relator for the state at his own instance, and by information in chancery sue a private person to abate a milldam on the ground of its being hurtful to health. As a general rule, the public must prosecute in such a case, if at all, at the common law, and afford the defendant an opportunity to have the question decided by a jury. Atty. Gen. v. Hane, 50 Mich. 447, 15 N. W. 549.

Enjoyment for any long lapse of time cannot be set up as a bar to the abatement of a dam which constitutes a public nuisance. State v. Holman, 104 N. C. 861, 10 S. E. 758.

A milldam is abatable as a public nuisance when it is the direct and proximate cause,—the *causa causans*. *Ibid.*

Equity will perpetually restrain the erection of a milldam when it appears that a nuisance would probably result. In this case a jury had disagreed on the point as to whether a nuisance would result, but the court held that the interests of the whole state were represented by the relators, since the injury would be at the capital city, and therefore that the individual interests must yield to those of the many. Atty. Gen. *ex rel.* Citizens of Raleigh v. Hunter, 16 N. C. (1 Dev. Eq.) 12.

A court of equity will not order the removal of a milldam on the ground that it is a nuisance, producing sickness and rendering the neighborhood nearby permanently unhealthy, where there is conflicting testimony as to whether or not the overflow from such dam caused the sickness claimed, and that a removal thereof would relieve such sickness, or that the cause of such sickness might not be otherwise removed; but in such cases courts of equity will refuse to interfere until the right is established, and the nuisance is made manifest by the verdict of a jury at law. Lassater v. Garrett, 4 Baxt. 368.

Equity will not order the abatement as a

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nuisance of an ancient and valuable dam when the testimony upon which its quality as a nuisance depends is conflicting. It must then be proceeded against by indictment or suit at common law. New Castle v. Raney, 130 Pa. 546, 6 L. R. A. 737, 18 Atl. 1066.

In an action to abate a milldam as a nuisance, it is the duty of the court to make the order of abatement whenever the interest and happiness of individuals or the community may require such nuisance to be abated in whole or in part. Maxwell v. Boyne, 36 Ind. 120.

Equity will not restrain the erection of a water mill required for public convenience merely because it will affect the health of a single family or of a few individuals, and when full compensation can be made for injury caused by the flowage. Daughtry v. Warren, 85 N. C. 136.

A statutory prohibition of the erection of any dam whereby the health of the neighbors shall be annoyed does not apply if the jury find the health of the neighbors will be less or as little annoyed as in the erection of any dam, as it is uncertain that any such "annoyance" will follow. Smith v. Waddill, 11 Leigh, 532.

The owner of a milldam across a stream not subject to interstate navigation at that point, although capable of use for small boats, is not subject to prosecution for erecting or maintaining a public nuisance, nor is the dam subject to abatement, although the health of the neighborhood may be impaired thereby and other injuries result to the neighbors, where the dam was erected in pursuance of legislative authority. Neaderhouser v. State, 28 Ind. 257.

If the act of a person contributes essentially to the creation of the nuisance, as by the erection of a dam which renders the water stagnant, or produces its overflow, so as to cause it to gather in pools or eddies and become stagnant, or by raising it, so as to cause the decay of vegetable matter upon the banks of a stream, whereby unwholesome gases are developed, he is liable, even though natural causes combine with his act to produce the result. Ft. Worth & D. C. R. Co. v. Scott, 2 Tex. App. Civ. Cas. (Willson) § 140, p. 137.

The widow and children of the deceased owner of a milldam, erected and maintained by him for more than twenty years, and which becomes their property by descent, cannot be convicted of maintaining a public nuisance under a statute providing that "whoever builds, erects, continues, or keeps up any dam or other obstruction to any stream of water, and thereby produces stagnant water which is manifestly injurious to the public health and safety, shall be fined," etc., where the evidence shows that no suit of any kind had been brought against the decedent in relation to the dam, and fails to show that the widow and children, or either of them, have done any act in relation to, or in connection with, the dam since his death. Bruce v. State, 87 Ind. 450.

An indictment for maintaining a milldam as a common nuisance is defective and insufficient as not locating the dam with sufficient certainty, where it is described as "a certain milldam in, about, and across a certain stream of water in said county, called Elkland river." Wood v. State, 5 Ind. 433.

In a prosecution for a public nuisance in the erection and maintenance of a milldam across a stream, proof of possession of the dam in connection with a mill, under a claim of right through successive grantees from the original builder of the dam, who constructed the same under a legislative grant, is competent as showing a sufficient title thereto as against all persons except the owners of the banks against which the dam abuts, although no title by deed is shown. Neaderhouser v. State, 28 Ind. 257.

The legislature has the power to pass an act directing the removal of milldams on the ground that they are detrimental to the health of the surrounding country, upon providing just compensation. Miller v. Craig, 11 N. J. Eq. 175.

A municipal corporation having power to abate nuisances and to do all acts necessary for the preservation of health or suppression of disease may maintain an action to enjoin the maintenance of a pond in such a way as to constitute a public nuisance, although the pond is maintained in violation of an ordinance, for which penalties might be recovered. Pine City v. Munch, 42 Minn. 342, 6 L. R. A. 763, 44 N. W. 197.

That a municipal corporation has maintained a bridge abutment in the channel of a river in such a way as to interfere with the natural current of the stream and render the foundations of a building in the stream, which would otherwise be a nuisance, of no effect upon the current, will not prevent it from maintaining an action to enjoin the continuance of the foundation after it removes the bridge abutment. Rochester v. Erickson, 46 Barb. 92.

The maintenance of a dam causing an accumulation of decomposing vegetable and animal matter is a public nuisance and punishable as such, although the board of water commissioners having control of the pond failed in the performance of its duty, and neglected to clean it. People v. Pelton, 36 App. Div. 450, 55 N. Y. Supp. 815.

If a dam injuriously affects public health, it can be abated, although when first erected no person lived near it,—especially if located in a stream which may be navigable. Queen v. Brewster, 8 U. C. C. P. 208.

It is no defense to an indictment for maintaining a dam in such a way that it constitutes a public nuisance, that when built no one lived on the margin of the stream, no matter how long established, as there is no such thing as a right, prescriptive or otherwise, to maintain a public nuisance. Douglass v. State, 4 Wis. 387.

A simple request to abate is sufficient as to a nuisance caused by a milldam, and it is not necessary that the one maintaining the dam should be requested to abate the nuisance "by lowering or taking down the dam." Middlebrooks v. Mayne, 96 Ga. 449, 23 S. E. 398.

A partial obstruction of a public highway by the backing of water upon a ford forming part thereof is an abatable nuisance. Dimmett v. Eskridge, 6 Munf. 308.

Overflowing a highway by the construction of a milldam across a creek is an obstruction to the same amounting to a common nuisance. State v. Phipps, 4 Ind. 515.

But to constitute the damming of a water course so as to turn the water upon a highway a public nuisance, it must be shown that the traveling public are to some extent, at least, impeded, hindered, or obstructed in the use of the highway for the purpose of traveling over it. State v. Smith, 54 Vt. 403.

That the owner of a milldam across a creek acquired the right to overflow the land of individuals by condemnation proceedings is no defense to an indictment for a common nuisance in overflowing a public highway. State v. Phipps, 4 Ind. 515.

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A prescriptive right to overflow a highway by a milldam acquired by twenty years' user is no defense to an indictment against the milldam owner for erecting and maintaining a common nuisance. *Ibid.*

An action may be maintained for the continuance of a nuisance consisting in the flooding of a highway, although a recovery for the damage done by the original construction of the dam is barred. New Salem v. Eagle Mill Co. 138 Mass. 8.

Action by individual.

If an individual is specially injured by a nuisance which also affects, or may affect, the public, the general rule is that he may maintain an action for its abatement or for damages.

A landowner specially injured by a nuisance created by the backing of water by a dam flooding his land may recover damages therefor. Grigsby v. Clear Lake Waterworks Co. 40 Cal. 396.

If one lives within the sphere of operation of a nuisance caused by a milldam about to be erected or commenced, affecting health, and the injurious consequences are not merely possible, but, to a reasonable degree, certain, he is entitled to preventive relief, even though the public would be likewise affected. DeVaughn v. Minor, 77 Ga. 809, 1 S. E. 433.

Although the obstruction of a stream be considered a public nuisance, yet, one whose water power is injured by the obstruction setting back the water upon it suffers a special damage entitling him to maintain an action. Welton v. Martin, 7 Mo. 307.

The proposed construction of a pond close to the dwelling of an adjoining owner will be restrained where it is reasonably certain from the surrounding circumstances that it cannot be so constructed, supplied with water, and used that it will not generate disease germs and be seriously deleterious to the occupants of the adjoining premises. Holke v. Herman, 87 Mo. App. 125.

But the court will not restrain the construction of a proposed pond where nothing more than discomfort is anticipated from it, unless it appears that such results are inevitable or will necessarily ensue; but where danger to health or life is threatened, a reasonable certainty of such results is sufficient. *Ibid.*

So, an injunction will not be granted to restrain the maintenance of a milldam as detrimental to the health of the complainant and his family, where the milldam is used in connection with a lawful business, and it does not clearly appear that health is endangered thereby. Thomas v. Calhoun, 58 Miss. 80.

So, equity will not restrain the erection of a water mill when alleged damage to health and property is not proved, and plaintiffs are not without redress should injury occur, the public benefit to come from the mill being certain. Wilder v. Strickland, 55 N. C. (2 Jones Eq.) 386.

So, an injunction will not be granted to restrain a nuisance which it is alleged will be created by the reconstruction of a milldam ponding and rendering stagnant the waters of a stream, which will affect the health of an adjoining landowner and his family, where the evidence fails clearly to show that the previous dam was necessarily the cause of similar sickness, or that the new dam will cause such injury as is apprehended. Esson v. Wattier, 25 Or. 7, 34 Pac. 756.

Whether or not an action for damages for the erection of a dam is barred by the statute 59 L. R. A.

of limitations does not affect the right of the upper owner, whose lands are overflowed by backwater from the dam, to maintain an action to abate the dam as an existing nuisance, if the right to maintain it has not been perfected. Mueller v. Fruen, 36 Minn. 273, 30 N. W. 806.

An action on the case lies against a milldam owner for a nuisance created thereby affecting the health of an individual and his family, although the neighborhood generally suffered much sickness and disease from the same cause. Story v. Hammond, 4 Ohio, 376.

A milldam creating a mill pond in which the water is at times lowered, exposing decaying vegetable matter, causing disease in the neighborhood and in the family of complainant, while a public nuisance is also a private nuisance as to complainant. Richards v. Daugherty, 133 Ala. 560, 31 So. 934.

Where the evidence shows that ponds sought to be removed produce malaria in complainant's family, although it may appear that other causes also tend to that result, this does not relieve the owner of the ponds of the duty so to use his property as not to injure others. *Ibid.*

Although the right to obstruct a water course has been acquired by prescription, if the obstruction causes damage to other riparian owners by creating pools of stagnant and putrid water, or in any manner causing such annoyance as seriously to interfere with the comfortable enjoyment of their property not directly affected by the obstruction, or if such obstruction has a tendency to cause sickness in the families of such owners or those in the immediate neighborhood, it is a nuisance of which they may complain. The right to a nuisance cannot be acquired by prescription. Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

A bill to enjoin the erection of a milldam may be maintained by an adjacent landowner where the health of himself and family will be endangered thereby, and especially where he will sustain a special injury to his lands and timber. Whitfield v. Rogers, 26 Miss. 84, 59 Am. Dec. 244.

Equity will enjoin the rebuilding of a dam at the suit of one who has established, in the action for damages to health, that it constitutes a private nuisance, if it is not shown that the rebuilding of the dam will not renew the nuisance. Miller v. Trueheart, 4 Leigh, 569.

Plaintiff in an action for damages alleged to be caused by sickness occasioned by the damming up of a stream of water by the embankment of a railroad company is entitled to recover the value of drugs used, if it is proved that the pond caused the sickness. Central R. & Bkg. Co. v. Wood, 51 Ga. 515.

The sickness of plaintiff's family, being properly set forth in the petition as due to the negligent and improper construction of a dam, is a proper element of damage. Brown v. Chicago & A. R. Co. 80 Mo. 457.

A stockholder in a corporation has a right to complain of a nuisance created by it in the maintenance of its mill pond to his injury. Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397, Affirming 34 Hun, 341.

It does not follow, as a consequence of the recovery of damages for injury to an owner's property and to himself and his family by the overflow of his premises from a milldam across a stream below, that the nuisance shall therefore be abated; but it is discretionary with the court whether a removal of the dam shall be ordered upon the evidence adduced on the trial. Cromwell v. Lowe, 14 Ind. 234.

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If the nuisance has been authorized by the state, a suit by an adjoining owner for damages is not the proper remedy. While the state cannot authorize the creation of a nuisance without compensating persons affected thereby, the remedy is under eminent domain proceedings, or by injunction on the ground of illegality of the statute.

So, one owning land near a pond created by the dam of a canal company is not entitled to recover from it for injuries caused by impure and noxious evaporation which renders his property no longer inhabitable. Union Canal Co. v. O'Brien, 4 Rawle, 359.

But in one case it was held that equity will not restrain a riparian proprietor from erecting a dam and flowing his own land for the public convenience when any injurious effects will be confined to a private individual, whose interest must necessarily give way to that of the many, unless he can make it manifestly appear that so great a difference exists between his injury and the public convenience as bears no comparison, and the erection will be followed by irreparable mischief. Atty. Gen. *ex rel.* Bradsher v. Lea, 38 N. C. (3 Ired. Eq.) 301.

b. *Title to land flowed.*

The owner of the outlet of a natural pond may maintain a dam and use the water flowing from the pond as an incident to his ownership; but he does not thereby acquire the fee to the bed of the lake, or to the adjoining lands flowed by the dam. Cocheco Mfg. Co. v. Strafford, 51 N. H. 455.

A fee-simple title to land cannot be acquired by overflowing the same by a millidam and using the water therefrom for more than twenty years, the most that can be acquired being an easement. Terre Haute & I. R. Co. v. Zehner, 15 Ind. App. 273, 42 N. E. 756.

So a deed of a piece of land "together with the mill privilege, sawmill, and erections belonging to the same; and also the pond or flowage above the said mill," conveys no right to the soil of the mill pond, but only an easement to dam the water and overflow the land for the purpose of the mill below. Herbertson v. Cunningham, 1 Pugsley (N. B.) 235.

The overflowing of land by an act not done on it, but by stopping a water course below, on one's own land, is not an ouster of the owner from the land overflowed. However long continued, it affords of itself only a presumption of a grant of the easement, and not of the conveyance of the land. Den *ex dem.* Green v. Harman, 15 N. C. (4 Dev. L.) 158.

The use of water in a mill pond is not such possession of the land covered thereby as to vest a prescriptive title thereto, since the user does not own the water, but merely the right to its use and to the accumulation and flow for the desired purposes; and therefore, not possessing the water which covers and occupies the land, he cannot be strictly said to possess the soil beneath it. Bartholomew v. Edwards, 1 Houst. (Del.) 17.

No length of time in the enjoyment of a flowage easement can invest the mill owner with the ownership of the land covered by water. Den *ex dem.* Everett v. Dockery, 52 N. C. (7 Jones L.) 390.

In Finley v. Hershey, 41 Iowa, 389, a dam across a stream making an artificial pond was held not to defeat the riparian owner's right to the use and improvement of the water.

The easement acquired by the grantee of flowage does not entitle him, as against the owner of the fee, to maintain on the shore a

notice forbidding fishing in the pond. Sullings v. Carter, 105 Mich. 392, 63 N. W. 411.

A riparian owner's right of fishery, is not devested or extinguished by any legislative act condemning the land to the use of another for mill purposes, unless the words of the grant conferring the authority to construct the dam plainly indicate that such was the intention of the legislature. Holyoke Water-Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133.

But one who consents to the flowing of his land by means of a dam in consideration of the right to use the pond so created as a highway and for fishing and boating purposes, and thereafter releases all easements and rights therein except the privilege of using a limited supply of water from the pond for milling purposes, thereby loses the right to fish in any part of the pond, even that portion of it over his own lands. Sidwell v. Greig, 32 App. Div. 212, 40 N. Y. Supp. 968, 53 N. Y. Supp. 1115.

One who acquires the right to flow lands to secure a water supply for milling purposes is entitled to overflow the land and use the water to supply his mill, but does not acquire absolute ownership of the water, nor is he entitled to gather the ice formed thereon. Bigelow v. Shaw, 65 Mich. 341, 32 N. W. 800.

One who owns lands subject to a right of flowage for mill purposes may harvest the ice formed thereon, provided he does not thereby appreciably diminish the height of water at the milldam of the mill owner. *Ibid.*

A grant by a riparian owner on an inland and nonnavigable lake, to the proprietor of a mill situated at the outlet, of the right to flow his lands by the maintenance of a dam of a specified height, does not affect the grantor's right to remove ice forming on the lake in a reasonable manner and so as not to materially diminish the volume of water in the lake. Hazleton v. Webster, 20 App. Div. 177, 46 N. Y. Supp. 922.

Where one has acquired the right to flow lands for mill purposes, the owner of the soil is entitled to cut ice formed on the pond only to such an extent as will not interfere with or injure the plaintiff in his right to the use of the water for his mill. Howe v. Andrews, 62 Conn. 398, 26 Atl. 394.

The right of a riparian owner to take ice from the stream which flows over his land is not a purpose recognized by law for which a person's land can be appropriated by another, but is a privilege attached to the land; and, when his land is flowed by a mill owner, the ice thereon is the property of the landowner, although the right only became profitable because of the flowage. Stevens v. Kelley, 78 Me. 445, 57 Am. Rep. 813, 6 Atl. 868.

A mill owner on an unnavigable stream is liable for damage from unjustifiably opening his gates and thus interfering with the right of the landowner to gather the ice that may form on the pond, as in altering his head of water he must have due regard to the rights of others both above and below the dam. *Ibid.*

An injunction will not be granted at the suit of a mill owner who received the mill together with the water right in the river, to restrain an upper owner who owns the land under the mill pond from taking ice from the river, when it is not shown that the taking of the ice materially reduced the flow of water through plaintiff's mill. Lathrop v. Haley, 81 Iowa, 649, 47 N. W. 878.

Ownership of the "water privileges belonging to" a millidam, and the rightful maintenance of the dam at his own expense, does not authorize such owner to enter upon the land

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of another and take the ice formed over such land in the waters of the dam. Julien v. Woodsmall, 82 Ind. 568.

One by merely backing the waters of a non-navigable stream does not gain a right to enter and take the ice formed in such back water over the land of another. *Ibid.*

An easement to pond water on the land of another, or to use it as a waterway for surplus water from a canal, does not vest in its owner the right to gather the ice which forms on the pond, but that right is in the owner of the fee. Brookville & M. Hydraulic Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 580.

An easement to flow another's land does not confer any title to the ice that may form thereon. The riparian owner has the same right to it as before the erection of the dam, so far as he does not diminish the head of water at the dam. Searle v. Gardner (Pa.) 12 Cent. Rep. 420, 13 Atl. 835.

A mill owner, who has the right to flow the lands of another with his pond for mill purposes only, does not own the ice which forms upon the water over such other person's land, but the latter may remove it if he can do so without injuring the mill owner. Dodge v. Berry, 26 Hun, 246.

But the grantee of the right to overflow lands by means of a dam, without limitation as to the use to which the waters may be applied, may remove the ice from over such land if he needs the water in its congealed form. Myer v. Whitaker, 55 How. Pr. 376.

And after a water company has condemned the bed of a stream for a storage reservoir and the right to the water flowing in the stream for a municipal water supply, the former owner of the property, who retains title to the adjacent lands, is not entitled to the ice formed on the pond. Wright v. Woodcock, 86 Me. 113, 25 L. R. A. 499, 20 Atl. 953.

And it has also been held that the owners of the water of a mill pond own the ice formed upon it, and the riparian proprietors have no right, as owners of the soil, to remove it. Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462.

But in a subsequent case it was held that, since the ice on a mill pond belongs to the owner of the soil, and not to the owner of the right to flow, a statute making applicable to one desiring to build a dam to create an ice pond the provisions of the statute regulating the proceedings for assessing the damages for flowage for mill purposes will not give a right to the ice on the pond so created. Geer v. Rockwell, 65 Conn. 316, 32 Atl. 924.

The owner of ice upon a stream cannot recover damages from the owner of a dam who permits the water to escape through his dam to such an extent that the ice is injured, if such escape is necessary to give the owners of mills lower down the stream the natural flow of the water. Stevens v. Kelley, 78 Me. 445, 57 Am. Rep. 813, 6 Atl. 868.

But if the owner of a mill and the dam subservient thereto wantonly and unnecessarily draws the water from, or lowers the water in, the pond, and by so doing injures or destroys the ice privileges of the owner of land bordering on the pond, he thereby renders himself liable in damages to such owner. Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717.

The lessee of a mill and of a water power and rights of flowage appurtenant, but who is not a riparian owner on the pond, nor the owner in fee of the bed thereof, cannot maintain trespass against one who goes on the pond when frozen, places timbers thereon, and cuts and removes ice therefrom, where his right of flowage is not interfered with, or his water supply lessened. Reysen v. Roate, 92 Wis. 543, 66 N. W. 599.

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II. *Who are liable.*

a. *Public generally.*

See also *supra*, I. b, 2.

A municipal corporation is liable for casting water on abutting owners. Rhodes v. Cleveland, 10 Ohio, 159, 36 Am. Dec. 82.

A municipal corporation is liable for the flooding of an owner's land caused by its act in wrongfully obstructing a water course. Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135.

But a recovery for injuries to an owner's land upon the ground that the authorities of a municipal corporation had obstructed or interfered with a natural water course cannot be had upon allegations in the complaint of an obstruction to, or interference with, the flow of the surface water. *Ibid.*

One who purchases land and improves the same on the line of an artificial water way constructed by a municipal corporation has a right to rely upon that corporation to perform its duty of keeping such artificial water way in repair and condition to carry all the waters that may flow therein from usual and ordinary causes, and may recover for damage received by the negligent flooding of his land by waters from such water way. Willson v. Boise City (Idaho) 55 Pac. 887.

Commissioners of highways may not obstruct a natural water course to the injury of an adjoining landowner, nor authorize another to do so; and, while they may, of course, drain roads, nevertheless, in doing so they must take care that the water is not diverted from the general course of natural drainage, and that such courses are maintained free and open. Younggreen v. Shelton, 101 Ill. App. 89.

The fact that a plaintiff's cellar is not constructed the number of feet above mean low water required by Stat. 1892, chap. 419, § 31, will not prevent his recovery of damages occasioned by the overflow of water from a tidal lake into his cellar caused by the city stopping its outlet through a tunnel into the sea, as plaintiff's violation of the statute cannot be said, as a matter of law, to have contributed to the injury. If the entrance of the water into the cellar had been by percolation, however, such violation of the statute must have been held, as matter of law, to have contributed to the injury. Biggio v. Boston, 179 Mass. 356, 60 N. E. 938.

A town is liable for the resulting damage, where its commissioner of highways places an obstruction in a ditch alongside the road, the immediate effect of which is to interfere with the waters of a creek, and to precipitate them in times of freshet upon the adjoining private lands. Ashberry v. West Seneca, 33 N. Y. S. R. 431, 11 N. Y. Supp. 306.

A city which, in the construction of a sewer, intersects a natural stream, but fails to provide any egress for the water, whereby it is dammed up and overflows private property, is liable for the damages caused thereby. Donohue v. New York, 3 Daly, 65.

A municipal corporation is liable for injuries to lands overflowed by its act in filling up the mouth of a small stream that usually discharged its waters in a canal so as to dam up the water and flow it back on the adjacent land. Chicago v. Huenerbein, 85 Ill. 594, 28 Am. Rep. 626.

A landowner who sustains damage by reason

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of the filling up of an unnavigable water course by the police jury and the carrying of a road across it, may recover the actual damage suffered; but the parish authorities will not be compelled to remove the obstruction where the road is of great convenience to the inhabitants of the vicinity. Lalanne v. Savoy, 29 La. Ann. 516.

A person whose lands are flooded, caused by the penning back of the water of a river, by the trustees of the navigation, is entitled to compensation under a statute authorizing compensation for injuries occasioned by reason of the navigation, although the trustees acted skilfully in holding back the water, and did it during the time of a flood for the purpose of protecting the lower lock and the riparian proprietors, as the damages are caused by the navigation in the meaning of the statute. Reg. v. Delamere, 13 Week. Rep. 757.

A municipal corporation obstructing a water course is not liable for damages barred by a statute of limitations. Herring v. District of Columbia, 2 Mackey, 87.

A village is not responsible for the acts of its common council, vested with the powers of a board of health, as well as authorized to appoint one, which, upon the recommendation of the board of health, raised the waters of a lake, whereby the lands of a property owner were flooded. A municipality is not liable for the acts of misfeasance or nonfeasance of its board of health; nor is it responsible for acts of its own officers done under the authority of a general statute in the attempt to perform a public service not distinctly local or corporate. Murray v. Grass Lake, 125 Mich. 2, 83 N. W. 995.

A municipal corporation empowered to obstruct a water course across a highway cannot be questioned by the courts as to motives from which it acted. Philadelphia v. Randolph, 4 Watts & S. 514, 39 Am. Dec. 102.

No liability is imposed upon a city for damages to land overflowed by backwater of a creek obstructed by the caving in of a defective drain constructed by private individuals in an embankment on their own land, because such drain was planned by the city engineer, since such act was out of the line of his duty. Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884.

Grading street.

In grading a street a municipality has no authority to dam up a water course, although the flow of the water is not continuous and permanent, and is liable to adjoining owners for the injury inflicted. Rose v. St. Charles, 49 Mo. 509.

A change of highway grade, whereby a water course is obstructed, will be presumed to have been made by direction of the public authorities,—especially after fifteen years of acquiescence and use of the highway as graded. Schlag v. Jones, 181 Pa. 62, 18 Atl. 1072.

There is no presumption that a lot owner has been compensated for the expense of filling his premises with earth by the appraisers selected to ascertain his damages resulting from the grading of an adjoining highway, which filling is rendered necessary by the negligent damming of a small stream of water so as to cause a stagnant pond on the property and create a nuisance. Lasbury v. McCague, 56 Neb. 220, 76 N. W. 862.

A city is liable for damages caused by the overflowing of lands by backwater by reason of the negligent grading of a highway without providing proper and sufficient culverts to permit the water of a river, which in the time of flood is accustomed to pass therefrom to another river over low lands lying between them, to follow its natural and accustomed course. Spelman v. Portage, 41 Wis. 144.

In an action against a municipal corporation for so negligently constructing and repairing its streets and sewers that a stream of water flowing across an owner's premises was obstructed so as to overflow the same filling his cellar with water and thereby destroying the same, the measure of damages is the fair rental value of the premises, or such part as the owner had been deprived of by reason of the water, and compensation in damages for the permanent diminution in value of the premises, if any. South Bend v. Paxon, 67 Ind. 228.

A city is liable to an action by the owner of land flooded by backwater, to abate the obstruction as a nuisance and to recover damages, if, by the erection of an embankment in the grading of a street, it obstructs the channel of a natural water course without taking the necessary precautions for the escape of the water flowing therein. Richardson v. Eureka, 96 Cal. 443, 31 Pac. 458.

Under a constitutional provision that private property shall not be taken or damaged for public use except on due compensation, and under a statute authorizing payment from the county treasury of damages resulting from the construction of causeways, the county is liable to a landowner whose property is flooded by the erection of a causeway in which no openings were left for the escape of the water. Rainey v. Hinds County, 78 Miss. 308, 28 So. 875.

Mere failure of the commissioners of a newly created county to remove obstructions placed by the commissioners of another county, of which the territory originally formed a part, in a stream at a point where it crosses a highway, does not constitute a continuance of the nuisance which will render them liable for damages to a mill and dam by backwater, in the absence of any duty to remove imposed by law, or notice by the mill owner to remove and refusal so to do. Walter v. Wicomico County, 35 Md. 385.

So, county commissioners are not liable for consequential damages to a mill and dam by backwater occasioned by obstructions placed by commissioners of another county, of which the territory originally formed a part, in the stream at a point below the premises, where it crosses a highway, where the obstructions were reasonably necessary improvements, useful and beneficial to the highway, and constructed with ordinary care and skill, and continued and used with like ordinary skill and care and without malice, in such a manner as was necessary to keep such highway in good order and condition for public use. *Ibid.* It being alleged that the water was accustomed to flow over the public highway at the point where the obstructions were placed, the court remarked that this, even if proved, would not strengthen the plaintiff's case, since, if it subjected the public to inconvenience and injury, it would itself be a nuisance for which no right by prescription or otherwise can exist.

Minn. Special Laws 1881, chap. 73, subchap. 8, § 8, providing that no action shall be maintained on account of any injuries received by means of any defect in the condition of any bridge, street, sidewalk, or thoroughfare, unless commenced within one year, is not applicable to a cause of action for damages by the overflow of land caused by the obstruction of a water course in raising the grade of a city street. Pye v. Mankato, 38 Minn. 536, 38 N. W. 621.

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Culverts.

A municipal corporation is liable for the overflow of an owner's premises as a result of the negligent construction, under its authority, of a culvert in a street for the passage of the waters of a brook. Ross v. Madison, 1 Ind. 281, 48 Am. Dec. 361.

A municipal corporation is liable for the flooding of an owner's land caused by the insufficiency of a culvert built by it under the embankment of a street across a ravine which is the channel of a natural water course, the waters of which have been greatly increased by the discharge therein of drainage from city sewers; and the fact that the land was below city grade does not absolve it from liability. Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86.

A town legally bound to build and keep in repair its highways, which constructs a sufficient conduit under a road across a natural stream, is liable to a landowner injured by the back flow when the culvert has become choked by fallen earth in consequence of the raising of the street grade from time to time. Haynes v. Burlington, 38 Vt. 350.

A municipal corporation is liable for the injury caused by the obstruction of a natural water course through a culvert under a highway. Parker v. Lowell, 11 Gray, 353.

A duty of highway supervisors to provide drainage, sufficient causeways, etc., to keep the roadbed passable for the traveling public is not exclusive of the rights of the owners of abutting property in the construction of highway ditches and drains; and covered natural water courses crossing a public highway cannot, by neglect or design, be converted into dams to the injury of the neighboring lands, because the road is not injured thereby. Hutchinson v. Clay Twp. 14 Pa. Super. Ct. 546.

A municipal corporation and land company, which, by their concurrent wrongdoings in the construction by the former of an insufficient culvert and drain through an embankment placed across a creek in the grading of a street, and the continuance of such drain by the latter across its land, and permitting that portion to become broken down, cause injury to a third person by the backing of water on his premises, are jointly and severally liable; and the injured person may maintain an action against either or both of them for the entire damage done. Kansas City v. Slangstrom, 58 Kan. 431, 36 Pac. 706.

A municipal corporation is bound, at its peril, to keep the screen of a catch basin which it has constructed to carry a water course flowing in a ravine across which it has carried a street on a culvert, into the culvert, open and unobstructed. Voligny v. Stillwater Water Co. 73 Minn. 181, 75 N. W. 1132.

A municipal corporation which constructs a road over a natural water course is not absolutely bound to provide adequate means for carrying all the water which will flow in the stream. Its duty is performed if it employs competent engineers, and they, in the exercise of honest judgment, construct a culvert of such capacity as they are reasonably justified in believing is sufficient. Taubert v. St. Paul, 68 Minn. 519, 71 N. W. 664.

But a municipal corporation is not liable in damages for injury to lands in a time of flood by reason of the insufficiency of a highway bridge resulting from an honest mistake of judgment made by a public officer in the fair discharge of his duty. Shieb v. Collier Twp. (Pa.) 11 Atl. 366.

A municipal corporation, in the erection of a culvert over a natural stream, is not bound to anticipate such an extraordinary flood as ordinarily careful and thoughtful men, and ordinarily skilful engineers, would reasonably believe never to occur. Madison v. Ross, 3 Ind. 236, 54 Am. Dec. 481.

Although a municipal corporation, in constructing a culvert or sewer for the passage of the waters of a water course, is bound to make provision for such freshets, taking the past history of the water course into consideration, as may be reasonably expected to occur, even though their occurrence be at irregular and indefinite intervals of time; but freshets of extraordinary character need not be anticipated. Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86.

A statute imposing a liability upon a town for damages resulting "to any person, his team or carriage," through defects in the highway while using it as such, will not authorise an action against the town by an individual for damages caused by the overflowing of his cellar through the stoppage of a culvert in the highway. Ball v. Winchester, 32 N. H. 435.

Under a statute imposing a liability of municipalities for injuries suffered through any defect or want of repair of the way, no liability exists for the setting back on private property of the water of a stream by the insufficiency of the culvert through which a brook runs under the highway; nor is there any liability for such injury at common law, where the water was set back because of an obstruction placed in the culvert by a third person. Peck v. Ellsworth, 36 Me. 393.

A municipality is not relieved from liability for constructing a culvert over a stream, of insufficient dimensions to carry off the water, by a charter provision authorising it to change the channel of water courses and to wall them up and cover them over, as such provision does not authorize acts disturbing vested rights. Young v. Kansas, 27 Mo. App. 101.

A town is not liable for the flooding of lands due to the negligence of its highway commissioner in providing an insufficient culvert in the embankment of the highway to carry off the water, since, by Laws 1890, chap. 568, § 16, its liability is limited to damages sustained by reason of any defect in its highways or bridges existing because of the neglect of the commissioner of highways. Barber v. New Scotland, 88 Hun, 522, 34 N. Y. Supp. 968.

A city is not liable for damages sustained by reason of an insufficient culvert under a highway which had been included in a railroad right of way, and therefore to be maintained by the railroad company. Lander v. Bath, 85 Me. 141, 26 Atl. 1091.

A municipal corporation is not liable for damages sustained by a person from backwater on his premises caused by an insufficient culvert constructed over a natural stream by a railroad company for its own use and as a part of its roadbed, the right of way for which was granted by the municipal corporation along a public street. Stackhouse v. Lafayette, 26 Ind. 17, 89 Am. Dec. 450.

A city which, in grading a street, places in an embankment across a creek a culvert which, although too small, would have afforded a sufficient escape for the waters thereof to prevent injury to nearby lands, is not, because the city authorities permit an adjacent owner to join a drain from an embankment on his land to that constructed by the city, responsible for damages to land overflowed by backwater of the creek due solely to the damming up of the creek by the obstruction of such private drain. Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884.

When a town constructs under a road across

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a natural stream a sufficient culvert, and a railroad company owning lands next below builds another conduit joining onto the first, and in course of time both sluiceways become obstructed, to the injury of an upper proprietor, the town is not liable for so much of the damage as is due to the obstruction of the private runway. Haynes v. Burlington, 38 Vt. 350.

In determining the dimensions of a culvert at a point where a street crosses a natural water course, a municipality acts ministerially, and not judicially, and it is liable for injuries resulting from the culvert being of insufficient dimensions to carry off the water. Young v. Kansas, 27 Mo. App. 101.

In the absence of a statute imposing the liability, a town is not liable for damages occasioned by the acts of a surveyor of highways which result in the stoppage of a culvert in one of its public roads within the scope of his authority, which is derived from his being a public officer created by law, and not an agent of the town. Ball v. Winchester, 32 N. H. 435.

Towns made liable to fine upon indictment for neglecting to repair a highway can only be sued by a public prosecution upon an indictment or information, and are not liable in a private suit by an individual for an overflowing of his cellar caused by the negligent stoppage of a culvert in a public road of a town. *Ibid.*

Bridges.

A town is liable for injuries caused by the backing of water by a bridge erected by it in laying out a highway over a water course. Lawrence v. Fairhaven, 5 Gray, 110.

Where one's house and its contents are injured by an overflow the proximate cause of which is the building of a bridge across a stream by a city, which obstructs the natural flow of water, the city is liable. Austin v. Emanuel, 74 Tex. 621, 12 S. W. 318.

A town constructing a bridge in such an unskilful and negligent manner as to set back the water upon adjoining land is liable to the owner for the damage inflicted. Mootry v. Danbury, 45 Conn. 550, 29 Am. Rep. 703.

A municipal corporation will be liable for water dammed back by reason of the narrowing of the space for passage of the water in repairing a bridge, although the officers act in the honest exercise of their discretion. Perry v. Worcester, 6 Gray, 544, 66 Am. Dec. 431.

A municipal corporation in constructing a bridge across a stream for the accommodation of the public is bound to construct it with reasonable care and skill, providing water ways sufficiently capacious to accommodate the flow of the stream at all seasons of the year, and at all times of ordinary high water or freshets. Wheeler v. Worcester, 10 Allen, 591.

In determining the damage done to land by the construction by a county of the embankment and trestle of a bridge, under a constitutional provision denying the county's right to exercise the power of eminent domain without making compensation for the damage caused, there should be considered the arresting by such embankment of the flow of water from the river over such lands during freshets causing it to rise higher than it otherwise would and to flow around the end of an embankment towards the river, thus making a current from the land into the main channel of the river, which endangers the safety of buildings on the land. Smith v. Floyd County, 85 Ga. 420, 11 S. E. 850.

But a municipal corporation is not liable in an action of tort for obstructing the flow of water in a stream by the construction of a bridge, if the bridge is suitably constructed to let the water pass off with reasonable freedom at all times except in case of extraordinary freshets not occurring annually. The compensation for the injury done must be sought under the eminent domain acts. Sprague v. Worcester, 13 Gray, 193.

Adjacent counties constructing a public free bridge on the site of the former one across a river dividing the counties are not liable for damages resulting to a mill on such river by reason of the faulty manner in which the work is executed by a contractor, whose work it is not the duty of the county authorities to supervise, the contract therefor having been made pursuant to the statutory provisions. Smith v. Wilkes & M. Counties, 79 Ga. 125, 4 S. E. 20.

When a city has erected bridges and culverts in good faith in improving a water course, a riparian owner may not recover for an unforeseen and unexpected damage resulting notwithstanding the exercise of reasonable caution, prudence, and skill. Hoehl v. Muscatine, 57 Iowa, 444, 10 N. W. 830; Fulleam v. Muscatine, 57 Iowa, 457, 10 N. W. 837.

A riparian owner has no right of action against a city for constructing a bridge over a stream within the city limits, merely because he fears that it will interfere with the flow of water from his land. Swett v. Troy, 62 Barb. 630.

The trustees of a village are not liable for injuries to private property by water backed thereon by a cofferdam placed in the stream to permit the construction of a bridge across it, where they were guilty of no negligence, and the prosecution of the work was not unreasonably delayed, and where the Constitution makes no provision for payment for consequential injuries from the performance of public work. Atwater v. Canandaigua, 124 N. Y. 602, 27 N. E. 385, Affirming 56 Hun, 293, 9 N. Y. Supp. 557.

No action will lie against a municipal corporation for the increase of back water on a mill wheel by the construction of a new bridge upon an adopted plan which will make it safer and more convenient for the public use than was the old one; since the action will be for the mere consequential injuries arising from a proper exercise of the right of eminent domain. Ely v. Rochester, 26 Barb. 133.

Dams.

The covering of upper land by backwater from a dam constructed across a stream for storage purposes, by a municipality for providing municipal water supply under legislative authority, is a taking thereof within the constitutional prohibition, for which the owner is entitled to compensation. Baltimore v. Merryman, 86 Md. 584, 39 Atl. 98.

Riparian owners may recover damages from a municipal corporation for depriving them of the yearly damages received from a boom company by erecting a dam and flowing those lands under an act authorizing it to construct the dam for the benefit of its waterworks system, and making it liable for damages caused thereby. Barrett v. Bangor, 70 Me. 335.

A dam constructed by a municipal corporation as a part of its waterworks system under statutory authority to establish and maintain waterworks and to build dams to hold the water, etc., is a permanent structure, so that damages caused thereby to the land of an adjacent owner by flooding may be recovered in one suit as for the depreciation in value thereby caused. Pinckneyville v. Hutchings, 63 Ill. App. 137.

Flowage of land by a dam taken for a municipal water supply, to a greater extent than

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had been acquired in favor of the owner of the dam, will give the owner of the land flowed a right of action against the municipal corporation. Kenison v. Arlington, 144 Mass. 456, 11 N. E. 705.

A municipal corporation is liable to a landowner for the damages, present and prospective, to his land caused by the construction by it of a dam across a natural stream as a part of its waterworks system, thereby backing the water upon such owner's premises. Pinckneyville v. Hutchings, 63 Ill. App. 137.

The erection by a municipal corporation of a dam for city waterworks, under the statutory authority to establish and maintain a system of waterworks with power to continue the same perpetually is a permanent structure for which a riparian owner may recover all damages, past, present, and future, resulting to him by reason of its construction, even though such municipal corporation had only leased the site of the waterworks for a term of years. Centralia v. Wright, 156 Ill. 561, 41 N. E. 217, Affirming 58 Ill. App. 51.

A municipal corporation is liable for damages to land from overflow by backwater caused by the negligent maintenance of a dam for municipal water-supply purposes in such a manner as to permit the accumulation of *débris* above the dam, filling up the stream, even if it be conceded that it would not be liable for consequential damages from the mere act of constructing the dam and obstructing the current, under legislative authority. Baltimore v. Merryman, 86 Md. 584, 39 Atl. 98.

A board of levee commissioners, in the absence of public necessity, have no right to construct a levee whereby a natural water course is dammed and lands are flooded, before condemning the same or payment of damages therefor. Hughes v. Mississippi Levee Comrs. (Miss.) 27 So. 744.

If servants of a city, having authority by its charter to dam the waters of a river, perform the act in a negligent or unlawful manner so as to injure others, it may be held liable therefor. Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131.

A county may be restrained by a person to whom injury will result therefrom, from erecting a dam or levee across a natural stream, except in the lawful exercise of the right of eminent domain. Leflore County v. Cannon (Miss.) 33 So. 81.

Damaging an owner's land by overflow, caused by the construction by a highway supervisor, under authority of a statute, of a dam across a stream for the preservation of a highway, thereby diverting the waters of the stream from its natural channel, is a "taking" by the state within the meaning of the constitutional provision excepting the state, in the taking of private property, from the prepayment of compensation therefor. McOsker v. Burrell, 55 Ind. 425.

A provision in a statute authorizing a municipal corporation to erect a dam across a stream the title to the bed of which is in the state, that no property shall be taken, overflowed with water, or otherwise damaged, without compensation, will not apply to a ford which is used merely by acquiescence of the state. Austin v. Hall (Tex. Civ. App.) 58 S. W. 479.

An upper riparian owner is entitled to an injunction to restrain the maintenance of a dam in a stream by a municipality for waterworks purposes in such a manner as to back the water upon his premises to their injury, destroying his crops and stopping up his drains, and is not confined to an action at law for damages, in view of the permanent character of the obstruction, entailing continuous damage and necessitating frequent and continuous litigation. Fox v. Fostoria, 14 Ohio C. C. 471.

An upper riparian proprietor is not estopped from maintaining a suit for injuries, to restrain the maintenance of a dam in a stream by a municipality for waterworks purposes backing the water upon his lands to their injury, by mere silence during the construction thereof, at a large expense, of which he had knowledge, as the municipality has the legal right to construct the same if properly done, and he was not bound to interfere or object and was under no obligation to speak. *Ibid.*

A railroad company may recover for damages to its embankment by the setting back of water by means of a dam constructed by the state although it knew of the location of the flow line, and that work was being done in the construction of the dam. New York C. & H. R. R. Co. v. State, 37 App. Div. 57, 55 N. Y. Supp. 685.

The flooding of land by reflow from a dam built by the state on the property of another is a consequential injury; and damages therefor cannot be recovered without legislative provision. Delaware Division Canal Co. v. McKeen, 52 Pa. 117.

That decision is, however, contrary to the principles announced in I. b, 2, *supra*, particularly to the case of Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557.

Liability of officers.

A highway supervisor is not personally liable for injuries to an owner's land from overflow caused by the construction by him in his official capacity of a dam across a stream on land near a highway in the exercise of his statutory power to enter upon any land adjoining or near highways to construct such ditches, drains, dams, etc., that may be necessary for the proper construction, repair, or preservation of such highways, whereby the water of the stream was diverted from its original channel, in the absence of proof establishing the fact that he did not act in good faith, but without reasonable care, or corruptly or maliciously, where the statute provides the mode of assessing damages caused by such official acts. McOsker v. Burrell, 55 Ind. 425.

Public officers authorized to erect either a bridge or causeway across a water course are not liable for choosing the latter through a mere mistake of judgment, and not from malice toward one injured thereby. Yealy v. Fink, 43 Pa. 212, 82 Am. Dec. 556.

The contractor constructing, and two members of the board of supervisors, who not only participate in the proceedings, but sign, as *ex officio* directors of the levee district, the contract for the construction of a dam as part of the plan of a levee district in their county, are liable for damages to lands overflowed by flood waters retained thereby to a greater extent than they otherwise would have been, where part of such dam was constructed in another county under a statute giving them power to adopt plans for the protection of any levee district created under the act, in view of the other provisions of the act indicating such a limitation, the nature of the functions of supervisors, who are local officers, and the consequences which might follow from such a construction. But another member of such board, who merely participates in such proceedings, is held not liable, it appearing that one of the three voted against the petition and order, but

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not which one. Moulton v. Parks, 64 Cal. 166, 30 Pac. 613.

In Shaver v. Eldred, 38 Hun, 632, which was reversed in 114 N. Y. 236, 21 N. E. 411, it was held that, the dam having been raised by the superintendent of a waterworks company having the right to take water from it, the act was in violation of the statute providing that no person owning or employed in any hydraulic works should be employed as agent upon the canals; and the authority obtained by him did not absolve him from liability for the injuries caused by his act. The court of appeals held, on this point, that the superintendent was not within the terms of the statute, because the rights of the water company were superior to those of the state. And a ruling similar to that of the court of appeals was made in Wright v. Eldred, 46 Hun, 12.

b. *Corporations.*

A water company is liable for damages to land by the overflow thereof caused by the cutting of its ditch, constructed across and damming up ravines and gulches, so as to turn flood waters on such land, instead of cutting it so as to turn them into ravines and gulches, which would have prevented injury to the plaintiff's land. Turner v. Tuolumne County Water Co. 25 Cal. 397.

Where a canal company, in constructing a dam in a river, is not acting under a public franchise, it is liable for injuries inflicted upon adjoining landowners by causing the stream to overflow. Townes v. Augusta, 46 S. C. 15, 23 S. E. 984.

So long as a corporation maintains its dam under authority rightfully granted by the state, it will not be permitted to say that its dam is built somewhat higher than is absolutely necessary to carry out some of its corporate purposes. It must pay damages to the land actually overflowed. Charnley v. Shawano Water Power & River Improv. Co. 109 Wis. 563, 53 L. R. A. 895, 85 N. W. 507.

Stockholders of a corporation organized for the maintenance of a reservoir dam cannot be made individually liable for the injuries caused by the flowage therefrom in the absence of express statutory provision. Norton v. Hodges, 100 Mass. 241.

c. *One who has parted with property.*

That the owner of a dam has conveyed his interest does not prevent his liability for the injuries caused by flowage prior to the time of such conveyance. Bean v. Hinman, 33 Me. 480.

The grantor of premises upon which he has built a dam which unlawfully flows a neighbor's premises is not freed from liability for the damage caused by the flowage, by the fact that his grantee has adopted his unlawful act, and has also become liable for maintaining the dam. Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333.

Those who convey a dam which causes a nuisance by the flowing of lands are liable for the continuance thereof,—especially where they convey the premises with covenants of warranty. Lohmiller v. Indian Ford Water Power Co. 51 Wis. 683, 8 N. W. 601.

If one obstructs a water course on his own land to the injury of another, and then conveys the premises with warranty of the right to flow as far as had been theretofore necessary for the use of the mill, he remains liable to an action on the case for the damages occasioned by the continuance of the nuisance subsequent to the conveyance. Waggoner v. Jermaine, 3 Denio, 306, 45 Am. Dec. 474, limiting Blunt v. Aikin, 15 Wend. 522, 30 Am. Dec. 72.

The owner of a dam causing an unauthorized flowage, who parts with the possession of the dam and control of the water it raises by a conveyance of his interest in the dam, is not freed from liability for damages occurring after his conveyance of the dam as the original author of the nuisance,—especially where he has reserved certain rights to draw water from it and to repair when necessary. Curtice v. Thompson, 19 N. H. 471.

An owner of land who constructed a dam upon it and unlawfully flowed another's premises is liable for all the damage caused by the flowage, although he conveyed the premises prior to the commencement of the action. Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333.

One whose land is overflowed by the erection of a milldam will not be prevented from recovering judgment against the person originally erecting and owning the dam by the fact that such owner has conveyed it to another, where the conveyance was with the intention of hindering and delaying him in the recovery of his damages, as such conveyance as to him is fraudulent and void under the statute relating to conveyances fraudulent as to creditors. Purcell v. M'Callum, 18 N. C. (1 Dev. & B. L.) 221.

It is not necessary that the grantees of the right to draw and use water from the power created by a dam should be made parties to a suit against the proprietors by the owners of lands injured by overflow of backwater, for the abatement of the dam. Newell v. Smith, 26 Wis. 582.

A mill owner whose mill is injured by a dam erected and kept up without right may maintain an action against the person who erected it for injuries sustained after the wrongdoer has conveyed the dam to a third person. Prentiss v. Wood, 132 Mass. 486.

The fact that a railroad company has leased its road and appurtenances to another does not deprive one injured by a dam built by it of his right of action against such company, the dam being the primary and continuing cause of the injury complained of. Anderson v. Cincinnati Southern R. Co. 86 Ky. 44, 5 S. W. 49.

A statute providing that a person creating a nuisance by erecting a mill or dam shall not be liable for the continuance of the nuisance after a conveyance of the mill and dam applies only to a bona fide sale, and not to a feigned or fraudulent one. Purcell v. M'Callum, 18 N. C. (1 Dev. & B. L.) 221.

But in one case it was held that an action will not lie against the owner of a mill pond by an adjoining owner whose premises have been overflowed thereby where the mill pond had been leased to a third person who was in possession and no notice was given to the owner of the pond of the condition of the premises, prior to the commencement of the suit nor is it shown that he knew of its condition. Miller v. Church, 2 Thomp. & C. 259.

d. *Purchaser of property.*

One who purchases a dam is not liable for the injury caused by the backing of water on adjoining land of a third person merely because he continues the dam.

The mere continuance of a culvert and embankment by railway receivers is insufficient to charge the railway company with liability for the flooding and destruction of property in the absence of notice or knowledge that they constituted a nuisance. Central Trust Co. v. Wabash, St. L. & P. R. Co. 57 Fed. 441.

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The lessee of a railroad is not liable for the continuance of a nuisance created by its lessor in obstructing the flow of water in the absence of demand for its removal unless such lessee has increased the obstruction. De Laney v. Georgia, C. & N. R. Co. 58 S. C. 357, 36 S. E. 699.

A railroad company whose predecessor has constructed a bridge over a stream in such a way as to be a nuisance to adjoining property is not liable for injuries caused by it, in the absence of notice or knowledge of the existence of the nuisance; but it is not necessary to its liability that it should have received a request to abate the nuisance. Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co. 51 N. Y. 573, 10 Am. Rep. 646, Reversing 52 Barb. 390.

Where the owner of land by a parol license permits a railroad company to construct a dam across a stream, resulting in an overflow of his land, and permits such obstruction to continue until the bed of the stream fills up from disuse and disappears, without revoking the license, equity will not restrain the continuance of the obstruction as against an innocent purchaser of the railroad without notice or knowledge of the previous existence of the stream. Harrelson v. Kansas City & A. R. Co. 151 Mo. 482, 52 S. W. 368.

The owner of a milldam is only liable for injuries resulting from the backing of water on the land of an adjacent owner which occurred after he became the owner of the mill property. Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394.

Therefore, one whose land is overflowed by reason of a dam below in a stream may not recover from a purchaser from the builder of the dam when the whole injury was caused when the dam was built. Bizer v. Ottumwa Hydraulic Power Co. 70 Iowa, 145, 30 N. W. 172.

A mill owner is not liable for injuries to land further up the stream by the setting back of water by a sluiceway under a road which his predecessor in title had changed with the consent of the proper authorities for the benefit of the pond. Stetson v. E. Carver Co. 97 Mass. 402.

An agent who merely carries on a mill for the owner's benefit is not liable because its dam, a permanent structure, was maintained at too great a height to the injury of an upper mill owner. Levi L. Brown Paper Co. v. Dean, 123 Mass. 267.

The grantee of a railroad is not liable for injury to an owner's land from the depositing of coal slack thereon from the railroad, occasioned by the inadequacy of a culvert constructed by the former owner of the railroad, until notice to abate such nuisance is given. Wabash R. Co. v. Sanders, 47 Ill. App. 436.

A purchaser of premises is entitled to notice of, and request to abate, a nuisance created by a dam thereon at the time of his purchase, or by a dam subsequently constructed by him in place thereof, if the new structure does not cause an increased overflow, before an action to abate the same can be maintained; but if such new structure causes a greater overflow than the former one the rule is otherwise. Grigsby v. Clear Lake Waterworks Co. 40 Cal. 396.

The lessee of land will not be compelled to construct a tumbling bay for the discharge of the water of a river so as to prevent the overflow of plaintiff's land, where such construction would be a waste upon the estate of the lessor. Alder v. Savill, 5 Taunt. 454.

The grantee of premises with a dam constructed thereon by her grantor, is not liable for the overflow of adjoining premises caused by such dam, where she had no notice that the dam was a nuisance or had any injurious effect upon such adjoining premises and was never requested to remove it, such notice not being dispensed with by Cal. Code, § 3483, providing that every successive owner of property who neglects to abate a nuisance upon or in the use of property created by the former owner is liable therefor in the same manner as the one who first created it. Castle v. Smith (Cal.) 36 Pac. 859.

A grantee of railroad property, on which exists an embankment which is a nuisance in that it obstructs water during freshets to the damage of an upper riparian owner, is not responsible for such damage in the absence of notice of the nuisance, where the embankment is not obviously such. Orvis v. Elmira, C. & N. R. Co. 17 App. Div. 187, 45 N. Y. Supp. 367.

Cases may be found cited further down in this subdivision, however, which grant a recovery where the embankment is plainly a nuisance.

A riparian proprietor injured by the negligent construction of a railroad bridge cannot recover from a lessee thereof, as the injury did not result merely from the operation of the road. Kearney v. Central R. Co. 167 Pa. 362, 31 Atl. 637.

The alienee of land on which there was a milldam at the time of his purchase, which is alleged to be the cause of damages to land of another by the overflowing thereof by backwater therefrom, is not liable for such damages caused by his continuance of the nuisance, in the absence of a request to abate the same, made before the action was brought. Felker v. Calhoun, 64 Ga. 514.

A railroad company which has leased the road of another is not liable for the maintenance and continuance of an existing embankment whereby adjacent land is flooded, in the absence of notice of the damage already done and a request to remove the structure. Philadelphia & R. R. Co. v. Smith, 27 L. R. A. 131, 12 C. C. A. 384, 28 U. S. App. 134, 64 Fed. 679.

Notice to abate or remove a dam causing an overflow of adjoining lands is prerequisite to the bringing of an action by the injured owner against one who acquired the dam after it was built by another. Pierson v. Glean, 14 N. J. L. 36, 25 Am. Dec. 497.

Where the defendant's grantor erected the dam complained of, the mere fact that the defendant continued to use it does not make him the author of the injury so as to obviate the necessity of a request for its removal before an action will lie against the grantee. Johnson v. Lewis, 13 Conn. 303, 33 Am. Dec. 405.

A railroad company is not liable for damages from a nuisance created by an embankment across a water course with a culvert insufficient to carry all water which may reasonably be expected to flow therein, resulting in the overflow of land by backwater, where it did not construct the road, but operates it under a lease unless it is shown to have knowledge that it is maintaining a nuisance. Missouri P. R. Co. v. Webster, 3 Kan. App. 106, 42 Pac. 845.

The grantee of land upon which a dam is constructed which unlawfully flows another's premises is not liable for maintaining the nuisance until, upon request, he refuses to remove the dam, and thereby abate the nuisance. Woodman v. Tufts, 9 N. H. 88.

The grantee of premises upon which there is a dam built by the grantor which unlawfully

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flows a neighbor's land is not liable for the damage resulting from the flowage, until, upon request, he refuses to remove the dam. Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333.

There is a conflict of authority as to whether or not it is sufficient to charge the grantee as the author of the obstruction. In one case it was held that, in an action against a railroad company for damages alleged to arise from the erection of a roadbed across the outlet of a basin or pond so as to stop up the outlet and overflow the land at times, proof showing an erection of the nuisance complained of by another company and its continuance only by the defendant, is a variance which will prevent recovery. Southern R. Co. v. Cook, 106 Ga. 450, 32 S. E. 585.

While in another case it was held that a fatal variance is not caused in an action for construction of obstructions to a water way by evidence that the defendant merely continued the obstruction which had been erected by another. Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co. 3 Hun, 523.

Effect of knowledge.

Such purchaser may, however, become liable if he knowingly continues a nuisance.

The grantee of one obstructing a stream is liable for knowingly continuing the obstruction. Culver v. Chicago, R. I. & P. R. Co. 38 Mo. App. 130.

One who requires title from the builder of the dam will be liable for the injury done by its continuance after notice and request to abate it. Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91.

Where a railroad company constructs an embankment across a water course, thereby obstructing it, a lessee of the road is liable for damages resulting from a continuance of the obstruction. Kenney v. Kansas City, P. & G. R. Co. 74 Mo. App. 301.

An action may be commenced to recover damages resulting from a nuisance created by the construction of a dam causing the water to flow back on plaintiff's land without making a request to defendant to abate the nuisance although where the nuisance was created by a previous owner the defendant must have knowledge or notice of its existence before the action can be maintained. Pinney v. Berry, 61 Mo. 359.

A railroad company operating a railroad under a license from the owner is liable for failure to remove an obstruction to a water course created by the owner in constructing the roadbed on a solid embankment across the water course. Kenney v. Kansas City, P. & G. R. Co. 74 Mo. App. 301.

The one who continues the dam is as much liable as the one who erects it. Cobb v. Smith, 38 Wis. 21.

Case will lie against the feoffee of riparian land for the continuance of an unlawful flowage of higher lands by his grantor. Beswick v. Combdon, F. Moore, 353.

Damages may be recovered by a landowner whose land is overflowed by backwater from a mill caused by raising a dam, although the land was overflowed in the time of the mill owner's grantor, who had not acquired the right to cause such overflow, any time within ten years after the raising of the dam causing the overflow, the reason being that an action to recover the possession of the land could not be barred until ten years after its occupation. Sutliff v. Johnson, 17 Neb. 575, 24 N. W. 217.

The lessee of a mill and dam is liable for the continuance of a nuisance created by her lessor in constructing the dam so high that the water overflowed adjoining land; and a request to the lessor to abate is not necessary, such a request made to the lessee being sufficient. Brent v. Haddon, Cro. Jac. 555.

A person who rebuilds and maintains a dam originally built by another is liable without demand for injuries caused by setting back water on a highway. New Salem v. Eagle Mill Co. 138 Mass. 8.

The purchaser of a railroad is liable for damages caused by its maintenance of an embankment so negligently constructed as to dam back waters. Brown v. Carolina C. R. Co. 83 N. C. 128.

Repairing and preserving a railroad embankment do not make a lessee of the road liable for continuing it as a nuisance, in the absence of any notice or request from the person injured. Philadelphia & R. R. Co. v. Smith, 27 L. R. A. 131, 12 C. C. A. 384, 28 U. S. App. 134, 64 Fed. 679.

A tenant under a lease for nine hundred and ninety-nine years, is liable for injuries to upper riparian owners for maintaining the abutments of a bridge in the condition in which they were when the lease was granted, the effect of which is to cast the water back upon such land. Meyer v. Harris, 61 N. J. L. 83, 39 Atl. 690.

A trust company in possession of and managing a railroad as trustee or mortgagee under a contract with the company and others is liable for damages to land and crops from the maintenance of an insufficient culvert constructed by the railroad company in an embankment across a water course, where it had actual knowledge of the insufficiency thereof and of the damage likely to be occasioned thereby, express notice of such insufficiency and request to remedy it being unnecessary. Union Trust Co. v. Cuppy, 26 Kan. 754.

Effect of adding to nuisance.

He may also be liable if he adds to the nuisance.

In Snow v. Cowles, 22 N. H. 296, the court said that the right of a purchaser to use the dam he has purchased, to flow the land of others without liability till notice, is not to use it as such property is ordinarily used, but merely to flow the land as it was flowed before; he must not only continue the dam in the condition it was maintained by his predecessors, but also the flowing or diversion caused by it, as it was at the time of his purchase.

Although the grantee of a dam causing an unauthorized flowage is not liable for damages caused thereby if he allows things to remain in the actual state in which he found them at the date of the purchase until notified to remove the structures causing the injury, yet he will become liable for an unlawful flowage without previous complaint and notice to abate, when, after the purchase of a dam having flashboards upon it, he removes them and puts permanent timbers in their place. Carleton v. Redington, 21 N. H. 291.

The grantee of land having a dam thereon, who alters it by making it higher and tighter than the old dam, and thereby causes a greater flowage than he is entitled to, is the author, and not the adopter, merely, of a nuisance, and is not, therefore, entitled to notice of the injurious nature of the structure and a request for its removal, before becoming liable in an action for maintaining it. Curtice v. Thompson, 19 N. H. 471.

A railroad company is not excused from liability for the overflow of an owner's land because the earthworks and embankment of a cer-

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tain pond were constructed by its lessor prior to its possession, where the damage complained of was caused by changes made by the lessee since its possession so as to prevent a natural stream from draining its waters in their usual way and course. St. Louis, A. & T. H. R. Co. v. Ellis, 58 Ill. App. 110.

While the use by the grantee of a dam and its appurtenances in the manner used by the grantor will not render him liable to an action for such use without previous notice, yet, if flashboards used by the grantor were no part of the dam, and were only used occasionally, then the raising, by the grantee, of the water by means of them to a greater height than he had a right to raise it, to the injury of the plaintiff, would render him liable without such previous notice. Noyes v. Stillman, 24 Conn. 15.

The purchaser of a dam using flashboards upon it, thereby raising the water to a greater height than lawful for him to do, is not entitled, by reason of the previous use of the flashboards by his grantor, to a notice before the person injured can maintain an action, where the flashboards had been placed upon the dam by his grantor only for occasional use, as the state of the water might make them necessary or convenient, and not as part of the dam. Occum Co. v. A. & W. Sprague Mfg. Co. 34 Conn. 529.

Effect of notice.

The continuance becomes wilful as soon as it is continued with notice.

The purchaser of land containing a dam which overflows adjoining land is entitled to notice before action brought. Belyea v. Hamm, 2 Hannay (N. B.) 27.

Notice is necessary to one who purchases property with a dam on it which constitutes a nuisance to adjoining property, before an action will lie for the abatement of the nuisance. Thornton v. Smith, 11 Minn. 15, Gil. 1.

The alienee of property, who takes the same with a nuisance thereon created by a milldam, is entitled to notice to abate before being sued, except as to injuries caused by changes made by himself in the character of the nuisance as originally constructed. Middlebrooks v. Mayne, 96 Ga. 449, 23 S. E. 398.

A railroad company is not liable for maintaining a dam or reservoir which overflows adjacent land and is a nuisance, where the same was erected by its grantor, and it has committed no acts to increase the overflow or create a fresh nuisance, unless it is notified of such nuisance and requested to abate the same. Fenter v. Toledo, St. L. & K. C. R. Co. 29 Ill. App. 250.

A company purchasing a railroad after the building of a defective bridge over a natural stream is not liable for the overflow of an owner's land occasioned thereby without previous notice of its defective character or requests to make changes therein. Peoria & P. U. R. Co. v. Barton, 38 Ill. App. 469.

Notice is necessary to the continuer of a dam throwing water back on the upper proprietor before an action will lie against him for the maintenance of the nuisance. Hubbard v. Russell, 24 Barb. 404.

The grantee of a dam which constitutes a nuisance to the owner of a privilege flowed thereby is not responsible for the continuance thereof until request for its removal has been made and denied. Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91.

Notice to a grantee of a dam causing an unauthorized flowage, to abate the nuisance, may be conveyed by acts as well as words; and when he should have known from the conduct of the owner of the flowed land in removing flashboards from the dam that the latter denied his right to flow his land in that manner, and was unwilling that it should be done, and desired its abatement, he will be considered as having sufficient notice of the existence of the nuisance to be charged with its continuance. Carleton v. Redington, 21 N. H. 291.

Under a statute permitting a railroad corporation to succeed to the rights and duties of another as to the running of the road, and making it subject to all the legal obligations then resting upon the former corporation, it is responsible for the maintenance of a culvert under the railroad track in such a way that it will not dam back the water flowing in the stream. Penley v. Maine C. R. Co. 92 Me. 59, 42 Atl. 233.

A new corporation formed by the consolidation of two other corporations, one being the original owner of a railroad and the other its lessee, is subject to a provision in the charter of the former company imposing upon it a duty to leave all streams crossed by its roadway in such condition as not materially to destroy their usefulness and is, therefore, liable for injuries to the land of an owner from the overflow of water thereon from a stream, the flow of which is obstructed by the piling of a bridge across such stream, together with the piling of an old bridge which was not removed when the present bridge was built by the lessee company with a longer span, and which, since the consolidation, has been maintained and used by the new corporation; and in such case no notice or request to abate the nuisance is necessary before the bringing of the action. Chicago R. I. & P. R. Co. v. Moffitt, 75 Ill. 524.

The purchaser of an existing railroad may be shown to have notice of the consequences which will naturally follow from maintaining an existing culvert by its character and that of the stream and surrounding country together with common knowledge with which it is legally charged concerning rainfalls to which the particular country is subject. Southern R. Co. v. Plott, 131 Ala. 312, 31 So. 33.

The notice to abate the nuisance caused by a dam unlawfully flowing land, required to be given before bringing suit, by a grantee whose grantor acquiesced in the flowage, to the grantee of one who erected the dam, while not required to be in any particular form of words, must be so distinctly and definitely stated as to convey clearly the ground of the complaint, with a notice that he will no longer submit to the continuance of the cause of the injury. Woodman v. Tufts, 9 N. H. 88.

c. *Other persons.*

An injury caused to land by the throwing back of water by a dam is a tort for which all contributors are jointly interested, although the statute has provided a remedy for the recovery of the damages. Wilson v. Myers, 11 N. C. (4 Hawks) 73, 15 Am. Dec. 510.

Two riparian proprietors of opposite sides of a creek, each of whom constructs a dam from an island in midstream to his own shore, the joint effect of which is to cause an overflow of lands of an upper riparian owner, are properly joined as defendants in trespass on the case; and a verdict against one and excusing the other will be sustained. Wright v. Cooper, 1 Tyler (Vt.) 425.

When different acts of the same kind by independent lower riparian owners obstruct the flow of a natural stream, both contributing to

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injure an upper proprietor, the wrongdoers are not joint tort feasors, but each is liable only for such part of the damage as his own wrongful acts cause. Ames v. Dorset Marble Co. 64 Vt. 10, 23 Atl. 857.

Where one railroad company organizes another as a mere instrument to construct a section of its roadway, and such company in constructing such roadway builds a culvert or passageway for the water of a natural stream, over which the roadway leads, of insufficient capacity so as to obstruct the flow of the water and cause an overflow of adjacent lands, both companies will be liable to the owner of such lands for the injury thus caused. Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621.

In an action by the owner and operator of a cotton mill driven by water, against an owner of a mill on the same stream, to recover damages for the unlawful raising of a stream below, the facts that one of the defendants is the wife of the other, as well as the owner in fee of the land upon which the dam was unlawfully raised and that her husband was in possession of the land, do not, as a matter of law, disentitle the plaintiff to a verdict against both. Simmons v. Brown, 5 R. I. 299, 73 Am. Dec. 66.

One of several joint owners of a milldam may be sued separately for damages inflicted upon the land of upper owners by the maintenance of the dam. Low v. Mumford, 14 Johns. 426, 7 Am. Dec. 469.

A joint action cannot be maintained against the owners of two dams for the flowing of lands by the backwater therefrom, where they were constructed independently of each other and at different times in different channels of the same river. Lull v. Fox & W. Improv. Co. 19 Wis. 100.

The death of one of three persons sued for wrongfully throwing the water back on the wheels of an upper mill is no ground for abating the action. Sumner v. Tileston, 4 Pick. 308.

In an action for maintaining a continuing public nuisance, which consists of an embankment which causes an overflow of plaintiff's lands, a railroad company may be joined with the receiver of its property as defendant. St. Louis, A. & T. R. Co. v. Trigg, 63 Ark. 536, 40 S. W. 579.

A cause of action against two jointly for erecting a milldam cannot be joined with a cause of action against one of them for continuing it. Hines v. Jarrett, 26 S. C. 480, 2 S. E. 393.

A release by a landowner to one of several owners of a water privilege who join in raising the dam to the injury of such landowner will release all of the wrongdoers although it provides that it shall not affect any person interested in the dam except the one named. Delong v. Curtis, 35 Hun, 94.

A mill owner who is also the owner of a reservoir dam, is responsible for the flowage caused thereby, and that others may be benefited by the water saved thereby does not in the least relieve him from liability, though their dams and mill, be nearer the reservoir than his own. Dingley v. Gardiner, 73 Me. 63.

A *cestui que trust*, as well as the trustee, is liable for damages occasioned by the continuance of the flowage of land by a milldam, where their answer does not deny interest, but only that the dam was wrongfully maintained, and they claim to have the right to maintain the same as grantees and assigns of one of the contractors thereof. Cobb v. Smith, 38 Wis. 21.

Joint owners of a dam cannot acquire an adverse right to flow the individual land of one of them over which the pond extends. Wilder v. Clough, 55 N. H. 359.

One joint tenant may sue the other for flowing the lands belonging to the joint estate for the exclusive benefit of his mill, as such exclusive appropriation amounts to an ouster. Jones v. Weathersbee, 4 Strobh. L. 50, 51 Am. Dec. 653.

One tenant in common has no right, by means of a dam erected on land of which he is sole owner, to flow land owned in common without the assent of his cotenant, and thereby exclude him from the possession; and upon such exclusion his cotenant suffers the same wrong, and may pursue the same remedies, as if sole seised. Great Falls Co. v. Worster, 15 N. H. 412.

If one tenant in common erects a dam on his separate estate so as to flow the water back on the common property, the cotenant may recover for the injury. Odiorne v. Lyford, 9 N. H. 502, 32 Am. Dec. 387.

A flowage by a mortgagee of the mortgaged premises by a dam created on other land belonging to the mortgagee, and unauthorized by the nature of the mortgage, is a tortious act, and cannot be regarded as a possession under the mortgage title. Great Falls Co. v. Worster, 15 N. H. 412.

One who purchases premises subject to a mortgage is not entitled, under La. Civil Code, 462, art. 48, to erect a dam lower down the stream whereby the operation of a mill on the mortgaged premises is completely impeded. Boatner v. Henderson, 5 Mart. N. S. 186.

In a suit for damages for the penning back of water the recovery must be limited to the time of defendant's death, in case he dies pending suit, and his administrator is substituted as defendant in the action. Reagan v. Grim, 13 Pa. 508.

When a flowage of another's privilege has been caused by trustees of a deceased person's estate, damages cannot be recovered in a case action brought against those representatives as executors for acts *ultra vires* if done by executors. Plimpton v. Richards, 59 Me. 115.

III. *What is obstruction.*

a. *Bridges.*

1. *Generally.*

See also *supra*, II. a.

It does not follow necessarily, from the fact that injury has occurred to a riparian owner from water held back by a bridge, that anyone is liable for the injury in an action for tort. Wheeler v. Worcester, 10 Allen, 591.

But one exercising a franchise to erect a bridge over a stream will be liable for damages resulting from his obstructing the water course more than is necessary for its proper construction. Chestnut Hill & S. H. Turnp. Co. v. Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675.

One who, by illegally placing the abutments of a bridge in the channel of a river, so narrows the channel as to flood the property of another, is liable to him for the damages suffered. Tremblay v. Quebec North Shore Turnp. Road, Rap. Jud. Quebec, 18 C. S. 329.

One authorized to make a road must, in carrying it over water courses on private land, construct bridges, culverts, or other means of carrying off the water effectually, and keep the same in suitable repair. Rowe v. Granite Bridge Corp. 21 Pick. 344.

One whose property is located above a cause-

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way or bridge approach, which in times of high water acts as a dam to prevent the free flowing of it, cannot maintain an action to enjoin the building of the causeway in a particular manner merely because of possible slight injury to his property, where there is nothing to show that the productiveness of his land will be materially diminished, or that the decay or depreciation of his buildings will be capable of appreciation or such as to materially lessen the intrinsic value of his property. Bigelow v. Hartford Bridge Co. 14 Conn. 565, 36 Am. Dec. 502.

The degree of care and foresight one constructing embankments and culverts over natural streams must use in order to avoid liability for injury to adjacent property from flooding is that which a discreet and cautious man would or ought to use if the risk and loss were to be exclusively his own, and must be in proportion to the nature and magnitude of the injury likely to follow from the occurrence to be anticipated and guarded against. Madison v. Ross, 3 Ind. 236, 54 Am. Dec. 481.

2. *Railroad bridge.*

(a) *Duty as to construction.*

A railroad company having authority to construct its road over a water course owes adjoining landowners some duty to see that the water is not unduly obstructed to their injury. While the company cannot be made liable for every injury merely because it has bridged the stream, yet it is bound to exercise care to provide for the flow of whatever water may naturally be expected to flow in the stream.

If, in consequence of building a railroad across a valley and over a stream, with the use of all reasonable safeguards and precautions in constructing the work, occasional disturbances to the adjoining land will arise from winter freshets, it is the misfortune of the adjoining landowner, for which the railroad company is not liable. Bellinger v. New York C. R. Co. 23 N. Y. 42.

But the flooding of an owner's land as a necessary result of constructing a railroad across a natural water course is property "taken by law," within the meaning of the constitutional inhibition against taking private property by law without just compensation, so as to render the company liable for the resulting damages, from which a legislative grant authorizing the road will not relieve it, even though such is the intention of the grant. Evansville & C. R. Co. v. Dick, 9 Ind. 433.

Embankments may be erected in a proper manner for the interests of the railroad company erecting them, and still be constructed in such a manner as necessarily injures adjoining landowners; in which case there can be no place for the maxim, *Damnum absque injuria*. New York, C. & St. L. R. Co. v. Hamlet Hay Co. 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

A provision in the charter of a railroad company giving authority to construct its road across any streams of water its route may intersect, provided it restore such streams so crossed to their former state, or in a sufficient manner not materially to impair their usefulness, applies, not only to navigable streams, but to mere private water courses as well, and makes it the duty of such company, in exercising its privilege, to construct and maintain its bridges in such a manner that the water will not be obstructed, pent up, or otherwise caused to overflow lands of riparian proprietors. Chicago, R. I. & P. R. Co. v. Moffit, 75 Ill. 524.

Railroad companies are only bound to build and maintain such bridges and other structures over natural streams as ordinary and reasonable men can foresee shall be reasonably necessary to meet the ordinary contingencies and demands of nature. Peoria & P. Union R. Co. v. Barton, 38 Ill. App. 469.

Maintaining an obstruction to a natural water course is a violation of a public duty, and of private rights, creating a liability for damages to the persons injured thereby. Ohio & M. R. Co. v. Singletary, 34 Ill. App. 425.

A railroad company having a right of way over a stream of running water must construct its roadbed so as to carry off the water of the running stream, and a failure to perform this duty on account of an improperly placed tiling, which causes the water to flow back upon lands adjoining, is actionable negligence. Chicago, R. I. & P. R. Co. v. Andreesen, 62 Neb. 456, 87 N. W. 167.

A railroad company, in providing a passageway for the waters of a natural watercourse over which its roadway is constructed, is bound to anticipate and provide for increase in the flowage thereof by reason of the drainage, by artificial means, of all the land the waters of which naturally flow into such water course. Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621, Affirming 30 Ill. App. 552.

A railroad company must so construct bridges and trestles crossing natural streams and the approaches thereto as not to obstruct the natural flow of water in times of overflow. St. Louis, A. & T. H. R. Co. v. Winkelmann, 47 Ill. App. 276.

Public health and convenience, as well as the positive law of Illinois, alike demand that railways leading over natural streams and drains shall, by means of efficient and substantial culverts, or otherwise, be so constructed as to admit the escape of accumulating waters through them, in times of high water as well as low; and railroad companies are responsible for all damages to the owners of land from overflows resulting from a failure to perform their duty in this respect. Ohio & M. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279.

A railroad company in bridging a stream must provide a sufficient water way for the passage of the water, including the superabundant water which flows into and down the stream in times of ordinary flood. Cairo, V. & C. R. Co. v. Brevoort, 25 L. R. A. 527, 62 Fed. 129.

Under Tex. Rev. Stat. art. 4171, by which railroad companies are required, in constructing their roads, to take into consideration the natural lay of the land, and to construct culverts and sluices necessary for its proper drainage, they must use proper care so as not to obstruct the waters of ordinary floods to the damage of adjacent land. Gulf, C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

A railroad company constructing its road over a water course is bound to leave such water ways or openings as are sufficient to afford an outlet for all water that may reasonably be expected to flow through such water course, taking into consideration such freshets as might reasonably be expected to occur in view of the size of the stream, width of its bottom, height of its banks, carrying capacity, and the character of the country contributing to its flow. Union Trust Co. v. Cuppy, 26 Kan. 754.

A railroad corporation, in constructing its road, must provide, by culverts, bridges, and other means, that the water crossed or diverted by its road may flow uninterruptedly in its accustomed channels, and for any neglect to do so it is liable to the public injured, in an

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action for damages. March v. Portsmouth & C. R. Co. 19 N. H. 372.

It is the duty of a railroad company, in constructing its road across a stream, to provide a passageway sufficient to allow the passage of water from all such floods as may occur in the ordinary course of nature; but it is not liable for failing to provide for a flood which is not only extraordinary, but unprecedented, and could not reasonably have been foreseen. Houghtaling v. Chicago, G. W. R. Co. (Iowa) 91 N. W. 811.

When surplus water has flowed from an area of land in a channel with banks and clearly defined water course, through which, during certain months when there are heavy rains, water flows regularly, the channel must be said to possess the characteristics of a water course; and, when a railroad builds across it, some provision should be made for the uninterrupted flow of the water. Town v. Missouri P. R. Co. 50 Neb. 768, 70 N. W. 402.

A railroad company acting under legislative authority in constructing a bridge across a stream is bound to see that the openings are sufficient merely for any freshet that many reasonably be expected to occur in the stream. Bellinger v. New York C. R. Co. 23 N. Y. 42.

But if, at the time of the construction of a railroad, extraordinary inundations have occurred within the memory of men then living, their recurrence should be anticipated and provided against. Hence, where lands have been overflowed by reason of the construction of an embankment by a railroad company, it cannot defend, in an action to recover damages, on the ground that the damage was caused by reason of an extraordinary flood, where it appears that there was a similar overflow at a time thirty-two years previous to the one in question, and that there were two similar overflows, one nine years and the other nineteen years before such previous overflow. Gulf, C. & S. F. R. Co. v. Pomeroy, 67 Tex. 498, 3 S. W. 722.

A railroad corporation must construct a culvert and exercise ordinary care and diligence to keep it open through its embankment to vent ordinary floods. Fick v. Pennsylvania R. Co. 157 Pa. 622, 27 Atl. 783.

To build a railroad culvert that is insufficient to carry off the water, whereby water is ponded on another's land, is a wrongful and negligent construction. Fleming v. Wilmington & W. R. Co. 115 N. C. 676, 20 S. E. 714.

A railroad company must leave a space under its roadbed sufficient for the discharge of the water through its accustomed drainway, and a riparian proprietor may compel the company to discharge that duty. Knight v. Albemarle & R. R. Co. 111 N. C. 80, 15 S. E. 929.

Where a state statute authorizes the building of a railroad across water courses, but requires that they be restored to their former state and usefulness, the railroad company should, in so constructing its road, provide an outlet, not merely the water falling within the banks of the stream, but also for all water which has been accustomed to flow into the stream from the surface of the adjacent country. Kansas City, Ft. S. & M. R. Co. v. Cook, 57 Ark. 387, 21 S. W. 1066; St. Louis, I. M. & S. R. Co. v. Lyman, 57 Ark. 513, 22 S. W. 170.

A railroad company, in constructing a bridge over a natural water course through private property, or in repairing or restoring a bridge, is bound to leave room for the passage of water without flooding the adjacent land in all ordinary floods; but is not liable for damage to such land caused by an extraordinary flood. Illinois C. R. Co. v. Bethel, 11 Ill. App. 17.

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It is the duty of a railroad company whose road leads over natural water courses to construct substantial and efficient embankments and culverts so as to allow the escape of accumulating waters through them in times of high water so as not to overflow the lands of adjoining owners. Wabash R. Co. v. Sanders, 58 Ill. App. 213.

It is the duty of a railroad company, in constructing its road over water courses, to make suitable bridges, culverts, or other provisions for carrying off the water effectually; and this duty is no less imposed by a statute requiring it to restore streams crossed by its road to their former state so as not to impair their usefulness, than by the common law. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529.

An individual or company constructing a road pursuant to legislative authority, over water courses on private land, is bound to make suitable bridges, culverts, or other provision for carrying off the water effectually, and to keep them in suitable repair for that purpose, if practicable. Illinois C. R. Co. v. Bethel, 11 Ill. App. 17.

It is the duty of a railroad company, in constructing its roadway over natural streams, to make sufficient openings for the passage of the water so as to inflict no injury upon adjoining landowners by flooding, that can be avoided by proper care and skill. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529.

(b) *Measure of care required.*

A railroad company, in carrying its track over natural streams, must exercise the highest circumspection in making provision for unusual stages of water for the benefit of adjoining landowners. New York, C. & St. L. R. Co. v. Hamlet Hay Co. 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

A railway company in locating bridges and trestles, should regard the size and nature of the stream, the character and features of the adjacent country, the relative position and formation of the abutting land, its liability to overflows, and their probable extent and effect. They should be so constructed as not to be subject to the risks and perils arising from rainfalls known by experience to be incident to the particular region of the country though rarely occurring, or which competent and skilled engineers could reasonably anticipate. But the company is not bound to provide against unusual and extraordinary floods such as have never previously been known to occur and which could not have been foreseen by competent and skilful persons. Columbus & W. R. Co. v. Bridges, 86 Ala. 448, 5 So. 864.

A railroad company is bound to use ordinary care to build its crossing over a water course so as not to obstruct, to the damage of others, rainfalls such as may reasonably be expected, whether they are likely to be of frequent, or of rare, occurrence. Southern R. Co. v. Plott, 131 Ala. 312, 31 So. 33.

In order to relieve a railroad company from liability to a subsequent purchaser of land for its injury from overflow, caused by the making of a certain embankment in filling up trestle work over low lands, it must be shown that the work was done in accordance with skilful engineering and a proper construction of the road, having reference to the rights of adjacent owners. Ohio & M. R. Co. v. Nuetzel, 43 Ill. App. 108.

A railroad company, in constructing its roadway over a natural stream, is bound to exercise due care and skill to provide a sufficient

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outlet, taking the habits of the stream and all its surroundings into consideration, for the passage of the waters, and is liable for injury to adjoining property caused by its failure so to do. Ohio & M. R. Co. v. Wachter, 23 Ill. App. 415.

The reasonable precaution with respect to the construction of bridges, culverts, or other provisions for carrying off the water necessary to relieve one constructing a road over water courses on private land from the charge of negligence, is that such person bring to their construction all the engineering knowledge and skill ordinarily applied to work of like kind in view of the size and habits of the stream, the character of its channel, and the declivity of the circumjacent territory forming the water shed so as to avoid all danger from flooding in all ordinary floods or freshets. Illinois C. R. Co. v. Bethel, 11 Ill. App. 17.

It is the duty of a railroad company in constructing a bridge or other passageway for the flow of water of a natural stream, so to construct the same, in view of the size and habits of the stream, the character of its channel, and the declivity of the surrounding territory forming its watershed, as to guard against such floods or freshets as men of ordinary prudence can foresee, but not such as could not reasonably be anticipated. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529.

In constructing a culvert, a railroad corporation is bound to bring to its execution the engineering, knowledge, and skill, ordinarily known and practised in such cases. Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98.

A railroad company, in the construction of its road, is bound to exercise reasonable care to provide a passageway for water flowing in a natural water course with a well-defined channel and subject to sudden rises in times of freshet, and is liable in damages for the resulting injury upon its failure to do so. Drake v. New York, L. & W. R. Co. 75 Hun, 422, 27 N. Y. Supp. 739.

The use of such care as a prudent man would exercise in reference to his own affairs requires that a railway company, in the construction of its road, take into account the probabilities of overflows; and, in estimating these, it must consider what effect the size and length of the river near which it is building may have in producing them, as well as the number and frequency of former freshets. The railway company may not be required to provide against an unprecedented rise in the river, but that cannot be called unprecedented which has, for more than a quarter of a century, occurred every three, four, or five years; nor can that be called extraordinary which is but the natural result of the length and size of the river, taken in connection with the fall of water liable to occur at intervals, though separated from each other by several years. Gulf, C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

A railway company, in constructing bridges, culverts, and embankments, must provide against such damages as might reasonably be anticipated from overflow of the stream; but it will not be guilty of that culpable negligence which will make it responsible in damages if it fails to provide against such extraordinary floods as could not be reasonably foreseen by men possessing ordinary engineering skill and capacity required in the construction of railroads. Gulf, C. & S. F. R. Co. v. Pool, 70 Tex. 713, 8 S. W. 535.

The test in determining when a railroad company is liable for damages in case of an overflow resulting from the construction of an embankment is, Would a prudent man have anticipated such a flood as caused the damage? What a prudent man would do with reference to danger to his own property is not the test by which to determine the liability, for he might be willing to take the risk rather than to incur expenses to make provision against the danger; and he will not be justified in taking the risk when it will involve the destruction of another's property. Gulf, C. & S. F. R. Co. v. Pomeroy, 67 Tex. 498, 3 S. W. 722.

A railroad company is not released from liability for a failure to provide a sufficient culvert over a stream by the fact that such culvert was built according to the advice of skilled engineers, since the company must provide, not for the danger which a skilful engineer did anticipate, but for the danger which he ought to have anticipated. Houghtaling v. Chicago G. W. R. Co. (Iowa) 91 N. W. 811.

A railroad company, in constructing a box culvert through which, by reason of the manner of construction of its road, most of the waters of a creek pass during high water, instead of through a pile trestle over the main channel of the creek, through which they were intended to pass, is bound to exercise reasonable and ordinary care and diligence to make such culvert sufficient to carry off all the water of the creek naturally flowing thereto in times of high water, or caused to flow thereto by reason of such manner of construction. St Louis & S. F. R. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408.

A railroad company acting in pursuance of legislative authority is only required to exercise reasonable diligence and precaution in constructing passageways for water under its tracks, and is entitled to select a safe and massive structure, in preference to a lighter one, which would less obstruct the water. Central Trust Co. v. Wabash, St. L. & P. R. Co. 57 Fed. 441.

In planning and constructing a bridge across a river, the company must bring to the execution of the work the engineering knowledge and skill ordinarily practised in such works, and see to the practical application of such knowledge and skill to the work in hand,—among other things so as to allow of the passage of water and ice, such as are known to pass in the stream annually, or may reasonably be expected to occur occasionally, without regard to such great or sudden overflows as are often designated as acts of God. Omaha & R. Valley R. Co. v. Brown, 14 Neb. 170, 15 N. W. 321.

It seems, that if a railway company constructs its culverts, and makes them sufficient as conditions existed, and could have been ascertained by the exercise of ordinary care and skill at the time of their construction, and nothing occurs between that time and the date of the injury to land by an overflow to develop the insufficiency of the culverts, the company is not responsible for the damage by the overflow, although the culverts are in fact insufficient, the insufficiency being ascertained for the first time by the overflow. Gulf, C. & S. F. R. Co. v. McGowan, 73 Tex. 355, 11 S. W. 336.

(c) *Liability for injury.*

Where a railroad company constructs an insufficient culvert at a point where its road crosses a water course, and thereby floods the adjoining lands, it is liable for the injury inflicted. Robitaille v. Canadian P. R. Co. Rap. Jud. Quebec, 15 C. S. 216.

A railroad company is liable in tort for a

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nuisance when it obstructs a water course, and thereby causes the waters to spread over meadows and aggravate and protract a nuisance. State *ex rel.* State Bd. of Health v. Jersey City, 55 N. J. Eq. 116, 35 Atl. 835.

A railroad company is liable for damage resulting from the obstruction of a water course during a very heavy, though not extraordinary, rainfall. Neal v. Ohio River R. Co. 47 W. Va. 316, 34 S. E. 914.

A railroad company which constructs an embankment that causes an overflow of lands in time of flood is liable for damages caused by the overflow, where the flood was not unprecedented except in the length of time it lasted. The railroad company being bound to anticipate an overflow as great as the one in question, the length of time that it lasted is merely one of the consequences which it would be required to foresee. Gulf, C. & S. F. R. Co. v. Dunlap (Tex. Civ. App.) 26 S. W. 655.

Where land is condemned for use as a railway, the owner of land through which the railway runs, has a cause of action against the company, where, in the construction of its road, it has not used ordinary care, and, as a result, the water of streams is dammed back to the injury of the landowner. Texas C. R. Co. v. Clifton, 2 Tex. App. Civ. Cas. (Willson) § 489, p. 433.

A railroad company is liable for the damages caused by an overflow of the lands through which its road runs where the overflow is due to the construction of an embankment, by the company, without sufficient openings, which prevented the water from passing off as it did before the construction of the road. Texas & P. R. Co. v. Snyder (Tex.) 18 S. W. 559.

Where crops were destroyed by the negligence of a railroad company in constructing its roadbed and embankment so as to cause water to overflow and stand upon the land, the owner has a cause of action against the railroad company; and it is immaterial that the action is not brought under the statute providing for the construction of necessary culverts or sluices in roadbeds, and prohibiting the unnecessary obstruction of streams by railroad companies, for the reason that such cause of action rests upon the broader ground, that one who obstructs the waters of a running stream to another's hurt is responsible in damages therefor. Gulf, C. & S. F. R. Co. v. Steele (Tex. Civ. App.) 69 S. W. 171.

A railroad company is liable for injuries to an owner's land from overflow and the spreading of coal slack thereon as the result of the construction by such company of a culvert of insufficient capacity to carry off the water in time of freshets, thereby causing the same to back up against the roadbed and wash out the coal slack of which the embankment was composed, and depositing it upon such owner's land; and in such case no notice to abate the nuisance is necessary, although the roadbed was constructed by its grantor. Wabash R. Co. v. Sanders, 58 Ill. App. 213.

Where a railroad crosses a stream the railroad company is liable for damages caused by the overflow of adjacent lands, where it does not provide sufficient culverts for the escape of the water at ordinary stages of water, or during floods which could reasonably have been foreseen and guarded against. Kansas City, Ft. S. & M. R. Co. v. Cook, 57 Ark. 387, 21 S. W. 1066; St. Louis, I. M. & S. R. Co. v. Lyman, 57 Ark. 513, 22 S. W. 170.

A railroad corporation is liable for injury resulting from a culvert which is so unskillfully and negligently constructed as to be insufficient to vent the ordinary high water of a stream. Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98.

A railroad company, in constructing its roadbed over mines, and neglecting to provide sufficient drains as required by statute, is liable for injuries to the mines resulting from its obstructing a brook by the construction of a bridge, the water of which in times of flood flows down the railway and percolates into the mines, the company having removed the surface soil over the mines, which was impervious to water. Bagnall v. London & N. W. R. Co. 7 Hurlst. & N. 423, 31 L. J. Exch. N. S. 121, 8 Jur. N. S. 16, 10 Week. Rep. 232, Affirmed in 1 Hurlst. & C. 544, 31 L. J. Exch. N. S. 480, 9 Jur. N. S. 254, 9 L. T. N. S. 419, 10 Week. Rep. 802.

A railroad company is liable for the flooding of lands because of its failure to provide a bridge with an opening of sufficient capacity to meet all the ordinary exigencies of the climate and the situation of the stream, and also such extraordinary exigencies as experience would lead the people residing in that vicinity to believe might sometimes occur, although infrequently. Higgins v. New York, L. E. & W. R. Co. 78 Hun, 567, 29 N. Y. Supp. 563.

A railroad company is liable to one whose lands are flooded through the means adopted by the company's servants to protect a bridge. *Ibid.*

A railroad company is liable for neglect to provide a passage through its embankment for any ordinary flood, or such as could reasonably have been anticipated when the work was planned. Brown v. Pine Creek R. Co. 183 Pa. 38, 38 Atl. 401.

A railroad company, as against adjoining landowners, is not excused for failing to construct its roadbed, culverts, and ditches in such a manner as to afford free passage and egress to water, because it comes from a large river and from a great distance. Gulf, C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

Where a railroad company constructs its roadbed so as to obstruct a slough through which the waters of a river are carried off when the river overflows its banks, and, as a consequence of this obstruction of the natural flow of the water, adjacent land is injured by an overflow, the owner of such land may recover against the railroad company for the damages sustained. Gulf, C. & S. F. R. Co. v. Preston, 74 Tex. 181, 11 S. W. 1108.

A railroad company, although authorized by the legislature to erect a bridge across a stream in such a manner as not to impair its usefulness, is liable for injuries to lands not situated upon the stream, by an overflow of its water caused by the construction of the road over the stream and through its banks. Brown v. Cayuga & S. R. Co. 12 N. Y. 486.

Where a railway company, in order to protect one of its bridges, constructs an embankment without sufficient water ways therein to allow the overflow of a river to pass off in its usual channel, thereby causing an overflow of land, it is liable for the damage resulting therefrom. St. Louis & S. F. R. Co. v. Craigo, 10 Tex. Civ. App. 238, 31 S. W. 207.

A railroad company is liable for damages to land and crops from the backing of water thereon by reason of the insufficiency of a culvert constructed in an embankment over a water course to carry off the flood waters of such stream and of another stream overflowing its banks and running into the former, where it is a matter of common knowledge in that part of the country that similar freshets in such

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streams and the overflowing of the one into the other have occurred for years, and are reasonably to be expected. Union Trust Co. v. Cuppy, 26 Kan. 754.

A railroad company is liable for damages to land and crops occurring while the road is in the possession of a receiver or trustee, caused by the backing of water thereon by reason of the insufficiency of a culvert in an embankment previously constructed by the railroad company over a water course. *Ibid.*

A railroad company erecting a culvert over an ancient water course crossing its right of way is liable for failure to erect a culvert suitable and sufficient to prevent an obstruction of said stream. Penley v. Maine C. R. Co. 92 Me. 59, 42 Atl. 238.

A bridge which, because of its negligent construction, prevents the free passage of ice and water, is a nuisance, for every continuance of which, when damages have been sustained, an action will lie for the recovery of such damages as accrued before the action was brought; and one action is not a bar to a second action brought for damages thereafter sustained. Omaha & R. Valley R. Co. v. Standen, 22 Neb. 343, 35 N. W. 183; Omaha & R. Valley R. Co. v. Brown, 29 Neb. 492, 46 N. W. 39.

A railroad company will not be enjoined from rebuilding a bridge upon new piling driven parallel to the old piling, which is to be removed on the ground that such piles would obstruct the stream and flood a roadway and farms, where the outlet under such bridge is of more than double the capacity of a county bridge situated just above, and which, together with the flood gate constructed by riparian owners, is likely to catch and detain floating *débris*, rather than the bents of the railway bridge. Van Wert County v. Peirce, 90 Fed. 764.

Where a railroad company suffers pilings to remain in the bed of a stream under a bridge after they are no longer necessary for the construction or maintenance of such bridge, it is liable for injuries to adjoining property resulting from the consequent obstruction of the stream. Brink v. Kansas City, St. J. & C. B. R. Co. 17 Mo. App. 177.

A railroad bridge built in a mode not required for the due, reasonable, and proper construction of the road will form the basis of a right of action on the part of a riparian owner on whose land it backs water; and an action will also lie if the obstruction of the stream is a wanton and careless act on the part of the railroad company, not necessary to the due exercise of the franchise. Lathrop v. Grosvenor, 10 Gray, 52.

Where, in compliance with a statutory requirement to restore as nearly as practicable all water courses and streams to their former state and usefulness, a railroad company builds a plainly needed culvert, but makes it of such materials and in such a manner that it fills up and breaks down under ordinary stress to the damage of an adjacent landowner, it is liable. Hatch v. Vermont C. R. Co. 25 Vt. 49.

If a railroad obstructs a water course on its line so as to cause the water to flow back upon an adjoining owner's land to his injury, it is liable. Id. 28 Vt. 142.

A railroad company maintaining a bridge across a stream is liable for injuries to adjoining land resulting from its suffering the channel to become stopped up, thereby causing the water to flow back onto such land, although the bridge was not negligently constructed. Culver v. Chicago, R. I. & P. R. Co. 38 Mo. App. 130.

A railroad company is liable to the owner of a mill upon whose wheel water is backed by a bridge built by the company across the stream. Blood v. Nashua & L. R. Corp. 2 Gray, 137, 61 Am. Dec. 444.

A railroad company is liable for damming back water in the construction of its bridge, unless it can show that it has taken reasonable precautions to prevent injury to the injured land, so as to come within the statute requiring payment for injuries done in the construction of the road. Mellen v. Western R. Co. 4 Gray, 301.

A railroad company is liable for the damage occasioned the owner of land by overflow, caused by its act in so constructing its works as to obstruct the natural flow of water. St. Louis, A. & T. H. R. Co. v. Ellis, 58 Ill. App. 110.

A landowner is entitled to recover for the injuries sustained by the backing upon and overflowing of his land by water, caused by the construction by a railroad company of its roadway so as to obstruct a natural water course. Cleveland, C. C. & St. L. R. Co. v. Nuttall, 59 Ill. App. 639.

A railroad company is liable in damages to the owner of land for so constructing and maintaining a culvert through the embankment of its roadway where it crosses a natural stream, or suffering the same to become so filled up, as in ordinary floods and freshets to throw the water back and inundate such land above. Ohio & M. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279.

The erection by a railroad company of a culvert over a stream of insufficient capacity to take care of the waters thereof when the same is swollen by rains, thereby causing the flooding of adjacent property, is a private nuisance, for the continuation of which a grantee or alienee of such railroad company may become responsible, either to the original owner of such adjacent land, or to another deriving title from him; but such responsibility does not begin unless such alienee, after reasonable notice, refuses or neglects to reform or abate the nuisance, even though he has actual knowledge of its existence, for, until such notice is given, the injured owner is presumed to acquiesce in its continuation. West v. Louisville, C. & L. R. Co. 8 Bush, 404.

If there is no difficulty in constructing a culvert under a railroad to carry off water from a meadow, over which the road passes, the company will be liable for flooding the meadow, if it does not make the culvert. Johnson v. Atlantic & St. L. R. Co. 35 N. H. 569, 69 Am. Dec. 560.

A railroad company is liable for the damages sustained by an owner of land by its flooding as a result of the construction of its railroad embankment across a natural water course so as to increase the force and current of the stream at its high stages, thus forcing the waters onto such owner's land, although the embankment was erected under authority of law, in a proper and prudent manner, which law neither gives such damages, nor authorizes a suit therefor. Evansville & C. R. Co. v. Dick, 9 Ind. 433.

A railroad company, in constructing its embankment across a pond the watershed of which is much greater on the upper side, is bound by common prudence to a just regard for the rights of others to construct its culverts so as to keep the water on each side at the same level; and it is not sufficient merely to provide culverts adequate to carry the

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waters of the feeding stream alone. Bryant v. Bigelow Carpet Co. 131 Mass. 492.

A railroad company is not liable for injuries caused by the backing of water by its bridge over a stream, if the bridge was built in a careful and skilful manner, with openings large enough to discharge all the water flowing down the stream in any freshet that might be expected. Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co. 3 Hun, 523.

The frequent occurrence of freshets supposed to be extraordinary may be evidence of what the ordinary capacity of a culvert should be, in order that a railroad corporation shall not be held liable for negligence. Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98.

(d) *Other matters.*

Release of liability.

After being released from all claims for damages by reason of taking and using the land for a railroad, the railroad corporation will not be liable because a culvert thereon is not sufficient in time of freshet to properly carry off the water. Updegrove v. Pennsylvania Schuylkill Valley R. Co. 132 Pa. 540, 7 L. R. A. 213, 19 Atl. 283.

Where the necessary damages to land resulting from the proper construction of a railroad track over a natural stream have been awarded in a condemnation proceeding, or otherwise paid, they cannot afterwards be recovered in an action of tort. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529.

But damages for the location of a railroad on another's land are determined on the supposition that the work will be constructed with care and skill, and will not bar the subsequent recovery of damages caused by an insufficient culvert. Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98.

So, a release to a railroad company of all claims for damages sustained, or to be sustained, by reason of the location, construction, and operation of the road, does not cover damages arising from the negligent construction of the railroad embankment after the date of such release. Brown v. Pine Creek R. Co. 183 Pa. 38, 38 Atl. 401.

Damages resulting from the improper construction of culverts may be recovered notwithstanding the railroad company paid damages awarded in condemnation proceedings for crossing the same property. Atlantic & D. R. Co. v. Peake, 87 Va. 130, 12 S. E. 348.

A grant to a railroad company of a right of way releases it from liability for injury to adjoining land of the grantor arising from the obstruction of a stream of water by the railroad constructed in a prudent and careful manner; and if, in order to make the road safe, such obstruction is necessary, equity will not restrain it. Harrelson v. Kansas City & A. R. Co. 151 Mo. 482, 52 S. W. 368.

Damages assessed for land taken under power of eminent domain by a railroad company are for a road constructed with proper culverts, and the corporation will be liable for damage caused by neglect so to construct it, although it will not be liable on suit for contingent damages illegally assessed by the jury under the condemnation proceedings. Winchester & P. R. Co. v. Washington, 1 Rob. (Va.) 67.

A railroad company crossing a stream on land over which it has been granted a right of way by the owner is not liable for obstructing the natural flow of the stream in the absence of negligence or improper construction of the road, as the grant of a right of way operates as a release of all damages resulting from the construction and operation of the road in a reasonable manner. Wallace v. Columbia & G. R. Co. 34 S. C. 62, 12 S. E. 815.

A railroad company is not liable in a common-law action for damages for the flooding of an owner's land occasioned by the construction of abutments and embankments over a natural water course and across bottom lands, thereby obstructing the natural flow of the water during freshets, where the road was constructed under legislative authority authorizing condemnation of private property, "avoiding in all cases unnecessary damages or injury to the owners or proprietors," and the embankments and abutments were necessary to the safety of passengers and property passing over the road, and were built with care, skill, and prudence, not only as to safety of persons and property passing over the road, but also for the protection and safety of the owner of such injured land. The above injuries are included in the damages provided to be assessed and paid under the mode prescribed by the statute. Terre Haute & I. R. Co. v. McKinley, 33 Ind. 274.

A railroad company is liable to the owner of land, or his grantee, for damages thereto from flooding, resulting from its negligence in the construction, maintenance, or operation of its road over a natural stream, notwithstanding the payment by the company of the compensation or damages awarded such landowner in the condemnation proceeding for its right of way. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529.

A railroad company which has acquired by deed the right to construct its road across land is not liable for damages caused by the flooding of the land, because of the reconstruction of bridges, in the absence of negligence or the exercise of an excess of power. Hodge v. Lehigh Valley R. Co. 39 Fed. 449.

No reservation of a right to flood lands, conveyed by a railroad company, with water of a river backed up by the faulty construction of the embankment on which its tracks are laid, will be implied from the mere fact that the conveyance was made after the embankment was finished. Sellers v. Texas C. R. Co. 81 Tex. 458, 13 L. R. A. 657, 17 S. W. 32.

An owner of land is estopped from recovering damages because of the placing of an insufficient culvert in a railroad embankment, when, after its construction, he discharged the corporation forever from all suits, claims, demands, and damages whatever that might result from its erections. Hoffeditz v. Southern Pennsylvania R. & Min. Co. 129 Pa. 264, 18 Atl. 125.

But a riparian proprietor is not estopped from recovering damages resulting from an improperly constructed railroad culvert by damages having been awarded on condemnation proceedings, as it was then assumed that the corporation would perform its work properly and without negligence. Southside R. Co. v. Daniel, 20 Gratt. 344.

An owner of land is not estopped from claiming damages for the overflow of his land caused by the negligent construction by a railroad company of a bridge over a natural stream, on the ground that he and his predecessors had knowledge of the erection of the bridge and the manner of its construction, and made no objections, in the absence of proof that he knew that the bridge would flood his land, or that he acquiesced in such flooding.

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Sherlock v. Louisville, N. A. & C. R. Co. 115 Ind. 22, 17 N. E. 171.

Contributory causes.

Where a railway company constructs an embankment across a branch which overflows during rainy seasons, and the embankment increases the overflow of the adjoining land, the company is not relieved from responding in damages by the mere fact that it made ditches and trestles which would carry off the water as rapidly as the branch would when not overflowed. St. Louis, I. M. & S. R. Co. v. Morris, 35 Ark. 622.

Where a railroad company constructs a defective railroad embankment it is not relieved from liability to one whose land is overflowed by reason thereof, although it appears that the land was overflowed before the construction of the road, if the embankment contributes to the overflow. In such a case the railway company is liable for the injury caused by its negligence, but no more. Texas & P. R. Co. v. Padgett, 14 Tex. Civ. App. 435, 37 S. W. 92.

A railroad company which causes lands to be overflowed by obstructing a water course by its levees and trestles is liable for the injury, although the flow of water and the accumulations in the stream are increased by natural causes, such as clearing the land and the cultivation of the soil. Mississippi & T. R. Co. v. Archibald, 67 Miss. 38, 7 So. 212.

Where it appears that the width of a water way under a bridge is ample for all ordinary freshets, a railroad company is not liable on the ground of the defective construction of a bridge across the stream, when, during the breaking up of the ice which accumulated in a large body thousands of feet above on the stream, and floated down to the bridge in such a large mass that it did not immediately pass under, the water was caused to back up to the injury of property. Berninger v. Sunbury, H. & W. R. Co. 203 Pa. 516, 53 Atl. 361.

Where there is lawful authority for the construction of bridges or other structures over or upon running streams, the person building the same is liable for any negligence in the mode or method of doing the work. In such case, damage which is unavoidably done, or merely results incidentally from the proper construction, as the damming back by drift wood caught by the bridge, is *damnum absque injuria*. Abbott v. Kansas City, St. J. & C. B. R. Co. 83 Mo. 271, 53 Am. Rep. 581.

A railroad company which built its bridge across a stream in a prudent manner according to the best information it could obtain at the time of its construction is not liable for any damages which the bridge, in connection with an unexpected and unusual condition of the ice in the river, caused to the property adjoining; and to prevent such sudden damage it is not its duty to destroy the bridge. But if, on the other hand, the bridge is negligently constructed, the company will be liable. Omaha & R. Valley R. Co. v. Brown, 14 Neb. 170, 15 N. W. 321, 16 Neb. 161, 20 N. W. 202.

But it is the duty of a railroad company, in constructing its roadway over a natural water course not only to provide such a passageway for the water as is required by the natural lay of the land, but to maintain such water way so as to prevent its becoming filled up so as to obstruct the flow of water. Ohio & M. R. Co. v. Long, 52 Ill. App. 670.

Owners of property on each side of a river have a right to insist that a railway company bridging the river shall construct its bridge with spans of sufficient size to permit the flow of ice, and in this manner prevent a gorge and the overflow of adjoining property. Omaha & R. Valley R. Co. v. Standen, 29 Neb. 622, 46 N. W. 46.

The right of a railroad company to enjoy the use of its road bed as an easement carries with it a continuing correlative obligation to use reasonable care and diligence to keep a culvert over a stream, constructed by it, unobstructed, so that damage from flooding to the lands of adjacent owners may be avoided so far as practicable considering the size and structure of such culvert. West v. Louisville, C. & L. R. Co. 8 Bush, 404.

A railroad company is liable for injury caused by the overflow of the waters of a river occasioned by an ice gorge at its negligently constructed bridge, although authorized by law to construct its road across the stream. In constructing the bridge due regard must be had equally to the safety of the traveling public and to the adjoining landowners; neither should be sacrificed to the other. McClenegham v. Omaha & R. Valley R. Co. 25 Neb. 523, 41 N. W. 350.

A railroad company is bound to construct and maintain its trestles over natural water courses so as not to catch driftwood and cause overflow of adjoining land; and this applies to a lessee of the road after its construction. St. Louis, A. & T. H. R. Co. v. Brown, 34 Ill. App. 552.

A railroad company is liable for the flooding of an owner's land if the manner in which the railroad embankment was constructed is the cause of producing certain other results, the combined operation of which causes the overflow complained of. Ohio & M. R. Co. v. Nuetzel, 43 Ill. App. 108.

A railroad company is liable for the damage resulting from the overflow of a natural stream if it is caused by the negligent placing of piles under its bridge across the stream in such a way as to catch the drift and *débris* brought down in times of high water, thus causing an obstruction which causes the accumulation of the water and consequent overflow. Edwards v. Missouri, K. & E. R. Co. (Mo. App.) 71 S. W. 366.

A railroad company is not liable for the result of the clogging of its culvert by *débris* which it could not have anticipated would be carried down by the water; but such freedom from liability does not extend to the result of clogging caused by *débris* being carried down by the stream during a freshet not extraordinary and unprecedented. Houghtaling v. Chicago G. W. R. Co. (Iowa) 91 N. W. 811.

Where a bridge as originally constructed did not interfere with the flow of the stream, but subsequently the water was raised by the gradual accumulation of *débris* under it, the injury resulting from the obstruction did not become permanent, so as to set the statute of limitations running as against future or prospective damages, until the channel was subsequently intentionally filled in and a solid embankment made by the owner of the bridge. Bunten v. Chicago, R. I. & P. R. Co. 50 Mo. App. 414.

Where a railroad company constructs an embankment, and erects, as a part of a culvert, a bridge upon a public street, which is used by the public so that it has become the property of the city, the company is liable for damages from backwater caused partly by such bridge. Houston & G. N. R. Co. v. Parker, 50 Tex. 330.

Remedy, evidence, damages, etc.

An action at law, and not a proceeding un-

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der the eminent domain acts, is the proper remedy against a railroad company for flowing the bed of a natural water course so as to throw the water back on upper proprietors, where it does not appear that the flowing was necessary to the construction of the road, or that a new canal could not have been made for the passage of the water. Estabrooks v. Peterborough & S. R. Co. 12 Cush. 224.

Damaging an owner's land by the overflow of water thereon caused by the insufficiency of a culvert through a railroad embankment is not such a "taking," within the meaning of the Constitution, as to entitle such owner to have the damages assessed as for a "taking" as against anyone owning the road. Wabash R. Co. v. Sanders, 47 Ill. App. 436.

Although all special damages, present and prospective, to the owners of land, resulting or to result from properly constructing, maintaining, and operating a railroad, under the laws of Illinois, constitute, as to such landowner, one single, indivisible cause of action, which may be enforced; under the eminent domain act or otherwise; and after such right of action has once accrued a subsequent grantee of the land can maintain no action for damages he may subsequently sustain, which would have been anticipated and allowed as prospective damages in any suit his grantor might have brought in his name,—yet this does not relieve a railroad company from liability to a landowner, or his grantee, for damages to his land from flooding resulting from the construction by it, across the embankment of its roadway for the escape of the waters of a natural stream, of a culvert having an insufficient capacity to carry away the waters of the stream in times of high water. Ohio & M. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279.

The mere negligent and unskilful construction of a roadbed, by a railroad company, across a stream with an insufficient culvert gives no right of action until an overflow is thereby caused with resulting damages to a complainant's land. Cleveland, C. C. & St. L. R. Co. v. Kline (Ind. App.) 63 N. E. 483.

When a railroad is shown to have closed a common water highway by one of its bridges, the burden is on it of showing that it had authority to do so to relieve it from liability to persons injured by the obstruction. Doxsey v. Long Island R. Co. 35 Hun, 362.

A railroad company is not liable for flowage damages alleged to result from the location and construction of its embankment and culvert, when it is not clear that they were the proximate cause of the injuries alleged. Treichel v. Great Northern R. Co. 80 Minn. 96, 82 N. W. 1110.

Although a railway company has constructed an embankment without sufficient culverts to allow water from ordinary rainfalls to pass off, it is not liable for damages caused by an overflow of land, where the overflow was not caused by the defective embankment, it appearing that the top of the roadbed was below the level of the land which was overflowed. Texas & P. R. Co. v. Padgett, 14 Tex. Civ. App. 435, 37 S. W. 92.

One whose warehouse, situated on a stream at a point above a railroad embankment under which run two culverts, is flooded during a freshet, cannot recover from the railroad company, unless he shows affirmatively that the high water in the warehouse is due to the embankment, or to an obstruction in the culverts. Morris v. Richmond & D. R. Co. 65 Fed. 584.

In order to justify recovery for the negligent construction of a railway bridge across a river in such manner as to cause an ice gorge and the overflow of lands in the vicinity, there must be actual injuries resulting from the unlawful obstruction. Omaha & R. Valley R. Co. v. Standem, 22 Neb. 343, 35 N. W. 183.

In an action against a railroad company to recover for damages to crops which resulted from an overflow of lands caused by the erection of an embankment by the defendant, evidence of the cutting by defendant of its embankment during the overflow of the following year is admissible, not for the purpose of showing that defendant thereby admitted that it was negligent in constructing its road, but merely to aid in determining the effect which the embankment had in holding the water and causing the overflow of the land; and evidence of other parties as to the overflow of their lands below those of the plaintiff will not be admitted, where it appears that no satisfactory inference could be arrived at from that evidence, and that such evidence would raise a question as difficult of solution as the one before the court. Gulf, C. & S. F. R. Co. v. Dunlap (Tex. Civ. App.) 26 S. W. 655.

In an action against a railroad company to recover damages to crops by reason of an overflow caused by the improper construction of the roadbed, evidence that the company, in reconstructing the track after the overflow, improved the culverts in construction and capacity, is not admissible for the purpose of proving an admission by the company that the culverts were not sufficient for the purpose for which they were constructed. Gulf, C. & S. F. R. Co. v. McGowan, 73 Tex. 355, 11 S. W. 336.

In an action against a railroad company for damages to land by flooding, the owner of such land is entitled to recover for all injuries from such cause as a result of the construction of the roadway over a natural stream, irrespective of the question as to whether the roadway was properly or negligently constructed in the absence of any showing that the damages resulting necessarily from a proper construction of the road have been awarded in a condemnation proceeding, or otherwise paid. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529.

A railroad company that has constructed its road under lawful authority creates neither an abatable public nuisance, nor a continuing private nuisance, by failing to leave sufficient space between its embankments, or sufficient culverts, to pass a running stream in any rise that may reasonably be expected; so that, when it appears that the damage by damming back a stream by a railroad embankment is permanent, the railroad company is entitled to have permanent damages awarded. Ridley v. Seaboard & R. R. Co. 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730.

In an action against a railway company for causing overflow of land by the construction of an embankment across a branch, the company cannot set off the enhanced value given to the land by the construction of the road, where such increased value is given in common to other lands in the vicinity by the presence of the road. St. Louis, I. M. & S. R. Co. v. Morris, 35 Ark. 622.

When a stream is ponded back onto adjoining lands because of an insufficient railroad culvert, the measure of damages is the difference in the value of the injured land with the road constructed as it is, and what it would have been if the railroad had been skilfully constructed. Ridley v. Seaboard & R. R. Co. 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730.

In an action against a railroad company for damages caused by an overflow as a result of

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the alleged negligent construction of defendant's roadbed, the question of negligence is one for the jury. Gulf, C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

In an action against a railroad company for causing an overflow by the negligent construction of its roadbed, whether the flood during which the overflow occurred was extraordinary or unprecedented is a question for the jury. *Ibid.*

It is within the province of the jury, in an action against a railroad company for injury to an owner's land from overflow, to determine whether a trestle over a natural stream constitutes an obstruction to the natural flow of water by reason of which such lands were overflowed, or whether the amount of water overflowing his lands was increased by reason of the manner in which the trestle was constructed. St. Louis, A. & T. H. R. Co. v. Winkelmann, 47 Ill. App. 276.

In order to render a railroad company liable for maintaining its roadway in such a manner as to cause an owner's land to be flooded, where notice is necessary to the maintenance of the suit, it is sufficient if the company is so far apprised of the injury done and the claim for redress as not to be taken by surprise. Wabash R. Co. v. Sanders, 58 Ill. App. 213.

b. *Drift and débris.*

The mere facts that, by reason of the dam, the ice in the stream when it breaks up in the spring holds the water back so that it floods the wheels of an upper mill, and that the water is held back for a longer time than usual, do not give a right of action. Smith v. Agawam Canal Co. 2 Allen, 355.

But if, by reason of the accumulation of ice by the milldam, water is forced back upon the land of an upper proprietor to his injury, he has a right of action therefor. Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334.

One who builds a dam on a stream will be liable for injuries done by the holding back of ice which comes down in ordinary quantities borne by an ordinary freshet which can be expected at the time of year. Bell v. M'Clintock, 9 Watts, 119, 34 Am. Dec. 507.

If a dam is so erected as to cause the stream to become obstructed with ice, and the water of the stream to be turned back on the land of the upper proprietor to his injury, the owner will be liable for the resulting injury. Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287.

A lower proprietor is not entitled, by the maintenance of a dam and the collection of logs in large quantities, to raise the water in the river, and unreasonably set it back upon upper proprietors so as to impede and delay the running of their mills; but he may set back the water in its natural state to the boundary of the upper proprietor's land, and so maintain it, although at times the freshets might set back the water on the mill wheels to a greater extent than it otherwise would. Richards v. Peter, 70 Mich. 286, 38 N. W. 278.

A railroad company which cuts off pilings used in the construction of a bridge, and leaves them at such height as to cause an accumulation of *débris* to such an extent as to obstruct the natural current of the river and cause the flooding of lands, is liable for the injury sustained by reason of its negligence. Hagge v. Kansas City S. R. Co. 104 Fed. 391.

Where there are loose timbers along a stream due care in the construction or maintenance of a trestle may call for plans and methods to prevent their lodgment, and so prevent them from obstructing the flow of the water. Southern R. Co. v. Plott, 131 Ala. 312, 31 So. 33.

No recovery can be had for damages to a mill by the backwater from a lower mill if no damage was done except what was occasioned by flood wood on the land of the lower mill owner, and he removed the same within a reasonable time. Large v. Orvis, 20 Wis. 696.

The owner of the lower dam is not liable for the flowage of a wheel above him, if it is caused by the filling of the stream with sediment above the dam, which was not anticipated when the dam was constructed. Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240.

A dam across a nonnavigable river, where *débris* from the mines of an upper proprietor is arrested, does not constitute a private nuisance entitling the upper proprietor to abate it, unless the dam backs the water on to the upper proprietor's property, or causes the *débris* to lodge there. Turner v. Locy, 37 Or. 158, 61 Pac. 342.

If a dam cause the filling up of a stream with sand, and the raising of the water so as to leave the land on each side wet and unfit for cultivation, the owner may recover for the injury. Athens Mfg. Co. v. Rucker, 80 Ga. 291, 4 S. E. 885.

A riparian owner cannot recover flowage damages in excess of the easement from the owner of the dam, if caused by vegetation growing in the pool from purely natural causes, and without concurring negligence on his part. Knoll v. Light, 76 Pa. 268.

Where the channel of a stream becomes filled and choked by reason of *débris* lodging against a bridge maintained by a railroad company, its successor is not liable for a continuance of the nuisance if the removal of the bridge by it would not have affected the accumulations which had filled the channel during the maintenance of the bridge by the original company. Bunten v. Chicago, R. I. & P. R. Co. 50 Mo. App. 414.

A navigation corporation having the care and control of a dam which it permits to become filled up by the acts of others is liable for the injury thereby done to riparian owners. Schuylkill Nav. Co. v. McDonough, 33 Pa. 73.

Where a municipality adopts a stream as an open sewer, it is bound to keep open the channel and to remove accumulations of filth, ashes, or other material that obstruct the flow of, and throw the water out of its banks upon the land of adjoining owners. Blizzard v. Danville, 175 Pa. 479, 34 Atl. 846.

Sand, gravel, and worn marble from marble works cannot be permitted to accumulate in a stream in such a way as to cause the water to overflow the land of an upper proprietor. Ames v. Dorset Marble Co. 64 Vt. 10, 23 Atl. 857.

If the accumulation of sand in a stream is caused by a dam erected lower down the stream, the owner of the dam is not relieved from responsibility, even if this accumulation results in part from hillside clearings of the upper owners. Hines v. Jarrett, 26 S. C. 480, 2 S. E. 393.

But those undertaking to improve the navigation of a river are not liable to an action for the flooding of adjoining lands resulting from the action of staunches erected by them in the river, combined with the growth of weeds and accumulation of silt against the staunches, as the undertakers are under no obligation to cut the weeds or dredge the silt, except when necessary for the benefit of the navigation; and the landowner's remedy, if any, is under the compensation clause of the statute authorizing

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the undertaking. Cracknell v. Thetford, L. R. 4 C. P. 629, 38 L. J. C. P. N. S. 353.

So, a corporation owning the navigation of a river is not liable, on abandoning it pursuant to statutory authority, for failure to keep the abandoned channel free from silt and weeds, whereby the flow of the water is obstructed and adjacent lands are flooded, unless made so by statute. Hodgson v. York, 28 L. T. N. S. 836.

c. Other obstructions.

The owner of a river is liable to indictment for failure to cleanse it, whereby adjoining land is overflowed. King v. Wharton, Holt, 499, 12 Mod. 510.

If a proprietor undertakes to place a structure over a water course, he must take care that he does not prevent the accustomed flow of the water in the natural course from above. Niles' Works v. Cincinnati, 2 Disney (Ohio) 400.

A wall constructed in the bed of a river in such a way as to cause the river to overflow its banks to an appreciable degree in times of high water is a public nuisance. Rochester v. Erickson, 46 Barb. 92.

Obstructing the flow of a water course by placing a pipe in it for conducting the water will give a right of action to the upper landowner upon whose land the water is thereby turned. Warren v. Carey, 145 Mass. 78, 12 N. E. 999.

A land company is liable for damages from the overflowing of land by back water of a creek, the flow of which was obstructed by the caving in of a drain constructed by such company on its own land, and connected with, so as to continue across its premises, a drain or culvert substituted for the channel of the creek by a city in constructing an embankment across such creek in the grading of a street, and extended by the city onto the premises of the land company with its consent. Orchard Place Land Co. v. Brady, 53 Kan. 420, 36 Pac. 728.

A boom company which stops the logs flowing down stream, thereby causing the water to overflow, is responsible in damages irrespective of whether or not the stopping of the logs is due to negligence. Baumgartner v. Sturgeon River Boom Co. 120 Mich. 321, 79 N. W. 566.

Where the charter of a boom company requires payment for damages caused by the exercise of powers granted, payment must be made in case the boom causes the flooding of lands lying on the bank of the stream above it. Bald Eagle Boom Co. v. Sanderson, 81 Pa. 402.

The owner of land across which flows a water course is bound to keep it free of obstructions which would pen back the water and cast it onto adjoining land; and he is not relieved from liability for failure so to do by the fact that the obstruction consists of a fallen wall which has been located upon the adjoining land and the tenant of which has failed to keep it in repair, where it does not appear that the owner of such land is at all responsible for the existence or condition of the wall. Bell v. Twentyman, 1 Q. B. 766, 1 Gale & D. 223, 6 Jur. 336. In that case the action was by the owner of a reversion.

But the owner of the soil of a stream is not liable for failing to remove an obstruction placed therein by strangers, without his consent, and from which he derived no advantage, and which he offered to allow the plaintiff to enter and remove, as he could not be compelled to assume the expense and responsibility of removing the obstruction, which would involve a conflict and a lawsuit with those who had put it there. Saxby v. Manchester & S. R. Co. 59 L. R. A. 38 L. J. C. P. N. S. 153, L. R. 4 C. P. 198, 19 L. T. N. S. 640, 17 Week. Rep. 293.

A railroad company which has failed to clean out an abandoned canal and channel as it covenanted to do is liable for damages resulting from the overflow of water caused thereby, although the overflow was caused by extreme high water. Jones v. De Coursey, 12 App. Div. 164, 42 N. Y. Supp. 578.

A mill owner is liable for damages to a riparian proprietor on a creek flowing into his mill race, caused by the sand washing into the creek being prevented from flowing out by the mill-pond water. Cline v. Baker, 118 N. C. 780, 24 S. E. 516.

The owner of a lower mill is liable for damage from flooding the higher riparian land of another because of the filling of his dam with mud naturally washed down after the removal with notice, of a dam on the land of the upper owner, as the lower owner alone, is at fault. Hardin v. Ledbetter, 103 N. C. 90, 9 S. E. 641.

A lower riparian owner is not liable for an increased flowage of the land of an upper proprietor which is due to natural causes. Kemmerer v. Edelman, 23 Pa. 143.

If a municipal corporation, in acting under authority of a statute giving it the right to improve a water course flowing through its limits, negligently fails to provide a sufficient outlet for the water to pass off from the land of upper owners, as it had formerly done, it will be liable in an action of tort, although the statute provides a remedy for injuries done in the construction of the work. Boston Belting Co. v. Boston, 149 Mass. 44, 20 N. E. 320.

A riparian owner, who purchases of a town the material of an abandoned bridge, and allows it to remain in the stream, will be liable to upper proprietors for injuries caused by the consequent damming back of the water. Talbot v. Whipple, 7 Gray, 122.

A railroad company is not liable for the flooding of an owner's land caused by an obstruction to a natural stream beyond the line of its right of way, although such obstruction was the timbers of a railroad bridge washed out on its roadway above by an extraordinary flood. Illinois C. R. Co. v. Bethel, 11 Ill. App. 17.

d. Illegal, though beneficial.

Whether a riparian proprietor is liable for backing water on the land of another riparian proprietor by means of a dam, in a case where the latter has sustained no actual injury, is not free from doubt, though it seems from the American authorities that a recovery of nominal damages can be had. Haas v. Choussard, 17 Tex. 588.

One whose land has been unlawfully flowed by another is entitled to nominal damages, even though the flowage benefited the land, and such benefit cannot be set up as a complete defense, but only in mitigation of damages. Mize v. Glenn, 38 Mo. App. 98.

A riparian proprietor still has his action for damages from flowage because of the raising of a dam on another's land, although his property has been benefited by the alluvion deposited thereon as a consequence. Kimel v. Kimel, 49 N. C. (4 Jones L.) 121.

The owner of land flowed is entitled to recover nominal damages against the owner of a dam causing water to flow perceptibly higher than the natural level, although no actual damage is done to the land. Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53.

The mere fact that the upper mill has gone to decay will not give the lower owner a right

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to throw the water back on its wheels. Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 145.

It is no defense to an action for injury to an owner's land from overflow from the waters of a milldam erected and maintained by another that the mill and dam are of benefit to such land and to the public. Engard v. Frazier, 7 Ind. 294.

Where the water power of a mill owner is unlawfully destroyed by the construction of a dam below, which backs the water against his mill wheel, in a suit for damages by the mill owner he is entitled to recover, irrespective of the question as to whether the construction of the dam was necessary for the protection of the property of the defendant or that of other riparian owners. Miller v. Shenandoah Pulp Co. 38 W. Va. 558, 18 S. E. 740.

There are, however, cases in which the above doctrine has not been followed. And some cases which have, apparently, not followed it in which the decision in fact turned on other grounds. Upon principle, there can be no doubt that the effect which the casting back of the water will have can have no weight in determining the question of its legality. The flooding back of the water is a wrongful act of which the upper owner may complain if he wishes to; and the fact that it confers a benefit on him is something which the wrongdoer will not be heard to urge.

A lower Pennsylvania court held that a mill owner can recover no damages for the unlawful damming back of a stream if he suffers no injury thereby. Fahnestock v. Southern Pipe Line Co. 19 Lanc. L. Rev. 233.

Damages cannot be recovered by a riparian owner for injury to his mill site in the absence of evidence that the owner was prevented by the flowage from using the site. Worcester v. Great Falls Mfg. Co. 41 Me. 159, 66 Am. Dec. 217.

An action to abate as a nuisance a dam which it is alleged has been increased in height so that it will interfere with the working of mining claims above and a quartz mill thereat, which it is intended shall be constructed, cannot be maintained where it does not appear that the owners have ever commenced to work the claims, or that the claims are at all injured or likely to suffer damages therefrom. Harvey v. Chilton, 11 Cal. 114.

A riparian owner whose property is overflowed after the construction of a dam is not entitled to recover damages for the overflow from the builder of the dam, if the evidence shows that he would have suffered like injury had the dam been removed. Langdon v. Chicago, B. & Q. R. Co. 48 Iowa, 437.

A railroad company, in mitigation of the damages to be paid for the construction of a railroad across a farm in such a way as to interfere with the flow of the stream of water, may show that the raising of the water will tend to convey alluvion upon the land in such a way as to enrich it. Milwaukee & M. R. Co. v. Eble, 4 Chand. (Wis.) 72, 3 Pinney (Wis.) 334.

A mill owner is not liable for raising his dam so as to obstruct a drain which has not existed for the prescriptive period. Cotton v. Pocasset Mfg. Co. 13 Met. 429.

e. *Change in obstruction.*

1. *Repairing dam.*

A right to maintain a dam includes the right to mend it, or erect a new one to the same height, and to keep or make it tight. Frey v. Witman, 7 Pa. 440, 49 Am. Dec. 484.

A right to maintain a dam on another's land includes the necessary incident to enter upon the premises to make necessary repairs. Edgett v. Douglass, 144 Pa. 95, 22 Atl. 868.

The grantor of a dam cannot interfere with its maintenance in the same condition of tightness as it was at time of grant, and this duty will be enforced by equity. Rosamund v. Forgie, 18 Grant Ch. (U. C.) 370.

A mill owner has the right to maintain his dam as it was when he acquired title, and he has the right to repair it after it has become dilapidated so as to let water escape, although the water in the pond is thereby raised higher and retained longer than it was when the dam was in the dilapidated condition. Butler v. Huse, 63 Me. 447.

Where a mill owner has maintained a dam long enough to raise the presumption of a grant, he may repair it for the purpose of making it tighter, although the effect may be to keep the water more continuously at the upper level. Hynds v. Shults, 39 Barb. 600.

A right having been acquired to flow lands by a certain dam, although it may leak and cause less flowage by being unrepaired, when not abandoned no liability accrues for making it tight and causing the flowage contemplated when the damages were paid. Schuylkill Nav. Co. v. Freedley, 6 Whart. 109.

But if repairs to a milldam, which, without increasing its height, make it more impervious to water, so that adjacent land is more deeply or in greater area submerged than the owner of the dam had acquired the right to maintain, to the additional, permanent, and manifest injury of the owner of the flooded lands, he has a good action in trespass on the case against the wrongdoer. Shumway v. Simons, 1 Vt. 53.

One having a prescriptive right to maintain a dam which would raise the water to a certain height will not be prevented from repairing his dam so as to keep the water at that height by the fact that by reason of the leaky condition of the dam the water has not been kept at that height. Cowell v. Thayer, 5 Met. 253, 38 Am. Dec. 400.

Damage for flowage by a new dam cannot be recovered if it flows the water back no farther than the former dam did under the terms of a grant. Lacy v. Arnett, 33 Pa. 169.

The capacity of a dam from its height is the measure of the easement which the owner has to flow back water on the land of another; and if, through leakiness or other cause, the dam does not gather such a head of water as it might, and for that reason the flow of back water is not as great as the capacity of the dam would warrant, the owner may repair the same or construct a new dam of the same height, and is not liable for damages from such an increase of the extent of back water caused thereby as is justified by the capacity of the dam. Baker v. McGuire, 53 Ga. 245.

The owner of a milldam which, on account of its defective condition, does not back water to the extent of its full capacity, has the right to build a new dam of the same height, or to repair the old one, and back water to the extent which the height of his dam warrants, without becoming liable for damages caused by the increased overflow. Maguire v. Baker, 57 Ga. 109.

An easement for the overflowing of lands by back water from a milldam, which passes with the mill tract to subsequent owners thereof, gives them the right to overflow such lands by the construction of a new dam to the extent to which they were overflowed by the old one, and they are only liable for damages oc-

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casioned by an increase of such overflow due to the construction of the new dam. Oakley Mills Mfg. Co. v. Neese, 54 Ga. 459.

It is a good defense to an action by landowners to enjoin the erection of a milldam on a stream, the back waters of which overflow their lands, that the dam is but being rebuilt and repaired as it existed before being washed away by high water, and as it had been continuously maintained for the preceding fifty years, overflowing such lands to the same extent as they will be overflowed after the dam is rebuilt, adversely, and under a claim of the right so to do. Ogle v. Dill, 55 Ind. 130.

The owner of land servient to a flowage easement is entitled to damages from the dominant owner if, after the erection of a new dam, the old water marks are flooded, the fitness of the land for cultivation diminished, if sand is deposited in his ditches, or, presumably, if the new dam is higher or of the same height, but tighter, than the old one. Jenkins v. Conley, 70 N. C. 353.

But in a suit for damages from an increased flowage of an upper tract caused by the rebuilding of a dam, when the old dam caused no damage, it must be proved that the new dam is of increased size. Godfrey v. Maberry, 84 N. C. 255.

2. *Increasing height of dam.*

Damages must be paid in case land is flooded by the raising of a dam. Gorman v. Trice, 79 Ga. 731, 5 S. E. 129.

The mere maintenance of a dam by a lower riparian proprietor higher, broader, or wider is no injury to an upper owner if his lands are not unlawfully damaged thereby. Nigh v. Sowerwine, 12 U. C. Q. B. 67.

But the owner of a milldam cannot, after the erection of another higher up the stream, increase the height of his own so as to interfere with the wheel of the upper owner. Sumner v. Tileston, 7 Pick. 198.

The raising of a railroad embankment from time to time within five years of the bringing of a suit by a landowner for damages to his land from flooding caused by the obstruction of such embankment, as raised, to the natural flow of water, is sufficient to maintain the action, although the embankment itself was erected more than five years before the institution of the suit. Ohio & M. R. Co. v. Nuetzel, 48 Ill. App. 108.

One whose lands are overflowed by the rebuilding to a greater height of an ancient milldam, the proper height of which was fixed by his deed as of the date thereof, may have recovery therefor; and a judgment in an assault and battery action by the mill owner against him, committed when he broke down the new dam, which, though holding him liable for the assault, acquitted him of the trespass on the ground that the dam had been raised and he had a right to break it, is conclusive upon the latter points. Ward v. Ward, 22 N. J. L. 699.

Damages may be recovered for a new flowage caused by raising a dam where the mill owner had lost by prescription the right of a former owner to flow such lands as much as he required. Russell v. Turner, 59 Me. 256.

Flowage damages may be recovered where it appears that, while respondents have maintained a dam in that town for more than twenty years, within that time they have erected another dam above the former, thereby raising the water 6 feet, it appearing that the damages were suffered only after the last dam was built. Gleason v. Tuttle, 46 Me. 288.

The lessee of water power of a dam belonging to canal commissioners is liable for the overflow of an island in the stream above caused by the raising by such lessee of the height of the dam by means of flashboards, although the same were put on with the consent of the canal superintendent. Economy Light & P. Co. v. Cutting, 49 Ill. App. 422.

An increase in the flow of land by a dam within the statutory period will give a right of action for the injury done, notwithstanding the right may have been acquired by prescription to flow the land to a certain extent. Schelke v. Johnson, 89 Wis. 384.

Although the right to damages for the building of a dam under permission of a statute has been barred by lapse of time, in case the dam is raised so as to cause new injury to the upper proprietor the damages therefor may be assessed in the mode provided by the statute. Baldwin v. Calkins, 10 Wend. 167.

In an action for obstructing the flow of water from a mill by backwater, caused by the raising of the height of a lower milldam, it is immaterial which dam was erected first, where both originally belonged to the same remote grantor. Williamson v. Yingling, 80 Ind. 379.

Raising the height of a milldam on a stream above its height at the time of the purchase by another of a mill on the same stream above, so as to cause the backwater to obstruct the machinery of the upper mill, in the face of objections and remonstrances on the part of the owner, constitutes a good cause of action for the damages sustained thereby. *Ibid.*

The owner of a milldam across a stream is liable for the overflow of the land of an adjoining owner from backwater from the dam, and to an abatement of the dam where the overflow was caused by the unauthorized act of the owner in increasing its height above that at which it was established and formerly maintained, and in narrowing the channel of the stream by levees so as to impede the natural flow of the water. Scheible v. Law, 65 Ind. 332.

A mill owner entitled to maintain a dam at a given height, and, temporarily, to add flashboards thereto, has no right to replace the flashboards with a permanent structure increasing the height by the same amount, to the injury of an upper riparian proprietor. Billings Slate & Marble Co. v. Hanger, 62 Vt. 160, 19 Atl. 231.

The right to maintain a dam of a given height does not justify the construction of a flume 2 feet higher, extending 8 feet along one end thereof, as against an adjoining owner damaged thereby. Wilson v. Wilson, 2 Vt. 68.

One who has a perfected right by prescription to overflow another's land by means of a milldam of a given height may, nevertheless, be liable to that other for causing an overflow by means of flashboards added to the dam, which have the effect of raising it. Weed v. Keenan, 60 Vt. 74, 13 Atl. 804.

The granting of a right to maintain a dam of a certain height, with a proviso that nothing in the grant shall be construed to authorise the raising of the dam, is not a contract by the owner of the dam that he will not raise it. Colwell v. May's Landing Water Power Co. 19 N. J. Eq. 245.

An action for obstructing the flow of water from a mill by raising the height of a dam on the stream below is not a suit for negligence, but for wrongful acts, and the doctrine of contributory negligence is not applicable. Williamson v. Yingling, 80 Ind. 379.

A verdict for damages resulting from an increase of the overflow of lands which are sub-

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ject to an easement of backwater from a milldam, by the construction of a new dam by purchasers of the mill tract, to whom the easement passes with the tract, cannot be sustained by mere proof that the overflow is greater, without any evidence to show how much greater, or the amount of damage caused by such increased overflow. Oakley Mills Mfg. Co. v. Neese, 54 Ga. 459.

The raising of a dam, causing the overflow of land, is an invasion of the landowner's rights by a positive act of the proprietor of the dam, and not a case of negligence requiring the landowner to exercise due care to avoid the consequences thereof in order to entitle him to recover. Athens Mfg. Co. v. Rucker, 80 Ga. 291, 4 S. E. 885.

The owner of a mill seat on a stream, who alleges an unlawful increase in the height of a millidam below, is entitled to an injunction restraining the damming and backing up of the waters of the stream by the other, only to the extent of such increase. Tatem v. Gilpin, 1 Del. Ch. 13.

Where the grantee of the privilege of keeping a dam at a prescribed height, but no higher, erected a new dam, subsequently, lower down the stream, of the same height as the old one, he will not be restrained from placing on the dam movable stop logs to enable him to make use of the surplus water which would otherwise flow over it, where such stop logs would raise the height of the water on the plaintiff's land only when the mill is not working, and then to the extent of about 1½ inches, at which time they are, however, always removed by the defendant. Beamish v. Barrett, 16 Grant Ch. (U. C.) 318.

3. *Change of location.*

The owners of land on a pond, the owner of the pond having an easement to maintain it by means of a dam, have no ground of complaint, and, as against them, the easement is not destroyed or extinguished, where the location of the dam is changed, where their land is above the new dam, and no greater or different area is flowed by the new dam than was flowed by the old; and it makes no difference that in the change in the dam the rights of property in front of which the dam was constructed were infringed. Bradley v. Warner, 21 R. I. 36, 41 Atl. 564.

The right to back water in a creek to the height which a dam at a certain point raises it does not necessarily give the right to erect a new dam of the same height at a point higher up the creek, as the width of the two dams, the conformation of the land on the shore lines, and various other local conditions might cause inequality in their capacity for detaining and backing water and thereby injuring the lands above. Stafford v. Maddox, 87 Ga. 537, 13 S. E. 559.

A grant of a right to flow land for mill purposes is not destroyed by taking down a dam and erecting a new one in its place, or erecting a new dam above the old one on land which was a part of the original privilege to which the easement of the right to flow was appurtenant. Forbes v. Com. 172 Mass. 289, 52 N. E. 511.

Under a grant of property with the right to erect a dam across a creek on other lands of the grantor, and to take the water therefrom in race ways so as to give the grantee the best possible use of the water, the building and maintaining of a dam on the land of the grantor will not prevent the subsequent transfer of the dam to the land of the grantee in such a manner as to flow the water back on the grantor's land so far as it was flowed by the old dam. Barber v. Nye, 65 N. Y. 211.

IV. *Effect of character of stream.*

A judgment for damages for the flooding of an owner's land, caused by the act of another in damming up a natural water way, thereby causing back water, cannot be maintained in the absence of any proof that the slough in question was a natural water way. St. Louis Merchants' Bridge Terminal R. Co. v. Pepper, 84 Ill. App. 116.

But one whose land is overflowed by the obstruction of a water course may have an action although the stream is not an ancient one. Smith v. Babb, 1 Vin. Abr. 557.

A lower proprietor constructing a dam so as to pen back the water upon an upper mill is not relieved from liability by the fact that the water from the mill flowed through an artificial channel into the river. Wadsworth v. McDougall, 30 U. C. Q. B. 369.

Where a channel is cut to straighten a water course, and the water flows in the new channel for a number of years, a railroad company in constructing its road through the property is bound to treat the new channel as the water course, and cannot obstruct it to the injury of adjoining owners. Missouri P. R. Co. v. Keys, 55 Kan. 205, 40 Pac. 275.

One who constructs a grating across an artificial water course which he has contracted with one from whose land the water flows not to obstruct in such a way that it will be likely to accumulate rubbish and back the water upon an upper proprietor, will be liable for the injuries in case it does so, even to a stranger to the contract. The liability of the contractor in reference to obstructions caused by it which would naturally injure riparian property was the same as it would have been if the parties had been riparian proprietors upon a natural stream. Babbitt v. Safety Fund Nat. Bank, 169 Mass. 301, 47 N. E. 1018.

An injunction will be granted forbidding the maintenance of an embankment which impedes the flow of the water of a natural stream fed as well by springs as from the watershed of surrounding hills, and which for twenty-five years has been conducted from complainant's land by means of an artificial ditch, which substantially followed, however, the natural flow of the water. Miner v. Nichols (R. I.) 52 Atl. 893.

A landowner cannot change a water course on his land which flows through a trestle in a railroad embankment, crossing it so as to make the stream run along the embankment to its threatened destruction, and then require the trestle to be kept open for its escape, although the trestle is across the old course of the stream. Harrelson v. Kansas City & A. R. Co. 151 Mo. 482, 52 S. W. 368.

Where a person builds a passageway through his lands for the flow of a natural stream, he must make it of sufficient capacity to take care of, not only the accustomed flow, but any increase in the flow caused by improvements above. Niles' Works v. Cincinnati, 2 Disney (Ohio) 400.

Though one in abating a nuisance must choose the method that will do the least damage, it does not apply where such method would inflict an injury upon an innocent third party, and in that case such a method need not be followed; so held in a case in which the owner of land revoked a license under which the water of a mine had been carried across his land by a drain which, before reaching his land,

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passed over the intervening land of a third person, and which drain he obstructed at a point where the intervening land joined the land of the mine owner, thereby inflicting greater damage on the mine owner's land than would have been inflicted had he made the obstruction at a point where the drain reached his land, but which would have caused some injury to the intervening land. Roberts v. Rose, L. R. 1 Exch. 82, 35 L. J. Exch. N. S. 62, 12 Jur. N. S. 78, 13 L. T. N. S. 471, 14 Week. Rep. 225, 4 Hurlst. & C. 103, Affirming 3 Hurlst. & C. 182.

The channel universally taken by a stream which ordinarily loses itself in a sink hole whenever the water rises high enough to overflow the sink cannot be blocked up, although overflows do not on the average occur as often as once a year. Carriger v. East Tennessee, V. & G. R. Co. 7 Len, 388.

Overflow of water obstructed by a dam across an abandoned river bed, which was lawful when built, is to be laid to the account of Providence, and not to the hand of man, if it would not have happened except for the filling up of the new channel of the river by natural causes. Payne v. Kansas City, St. J. & C. B. R. Co. 112 Mo. 6, 17 L. R. A. 628, 20 S. W. 322.

V. *Effect of flood.*

a. *Ordinary freshets.*

The United States is liable, under a statute providing compensation for injuries done by structures in aid of navigation, for the overflow of lands caused by ordinary freshets which could have been reasonably anticipated and provided against in the construction of a dam for the improvement of navigation. Velte v. United States, 76 Wis. 278, 45 N. W. 119.

A riparian owner has no right to maintain a dam at such height as to set the water back upon an upper proprietor at the ordinary stage of water in the stream, construing this to mean its stage in such rises or high water as are usual, ordinary, and reasonably to be anticipated, but not to include its stage in such extraordinary freshets as cannot reasonably be anticipated at particular periods of the year. Ames v. Cannon River Mfg. Co. 27 Minn. 245, 6 N. W. 787.

A railroad company is liable for the flooding of adjoining lands, where, by reason of constructing its road across low lands, on an embankment without sufficient openings, the flood water from a river is penned back and caused to overflow a bank constructed around adjoining lands, under drainage acts, for the purpose of protecting the lands from floods, even though the statute under which the road was built did not require it to construct openings in its embankment to prevent flood waters from spreading over the surface as they had been wont to do. Lawrence v. Great Northern R. Co. 4 Eng. L. & Eq. 265.

A railroad company will not be liable for obstructing by its embankment water which has left the bed of the stream above the place where the embankment is located, and is flowing over the surface of the country. Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co. 3 Hun, 523.

This holding is in accordance with the rule that flood water of a river may be treated as surface water, as to which see *note* to Cairo, V. & C. R. Co. v. Brevoort (C. C. D. I.) 25 L. R. A. 531.

It was held in one case that the mere fact that water is backed up in times of freshets upon the wheels of an upper mill because of the maintenance of a dam by the lower proprietor and his storing logs in the pond will not give the upper owner a right of action. Richards v. Peter, 70 Mich. 286, 38 N. W. 278.

And in Monongahela Nav. Co. v. Coon, 6 Pa. 383, 47 Am. Dec. 474, the court, in discussing the right of a navigation company, says that a riparian owner may use the water power to the full extent of the stream, by ponding the water back to his line, although the effect will be that in times of high water the obstruction will cause an overflow upon the land of an upper riparian owner.

But in McCoy v. Danley, 20 Pa. 88, 57 Am. Dec. 680, the court held that the lower proprietor will be liable for injury caused by the ordinary high water of the stream which is thrown back by his dam, and states that the rule of the Coon Case can only be applied to floods which are extraordinary in their character.

The doctrine of the former cases can hardly be considered correct, because the lower proprietor is required to take notice of the freshets that may naturally be anticipated, and to refrain from adding to the upper owner's injury by them.

However, the grantee of a right to flow another's land to a certain extent is not liable if that limit is exceeded during an extraordinary rise, as otherwise he would be deprived of the beneficial enjoyment to which he is entitled. Wallace v. Headley, 23 Pa. 106.

To determine the right of a lower riparian owner to maintain his dam at a certain height its effect in ordinary medium or ordinary low stages of water is not conclusive; but its effect in ordinary high water, or such freshets as may reasonably be anticipated, is to be considered. Ames v. Cannon River Mfg. Co. 27 Minn. 245, 6 N. W. 787.

A riparian owner may keep his dam at such a height as to swell the water in the channel of the stream in its natural state up to his neighbor's line, and he is not answerable for damage done by high water however it may be increased by the obstruction below; but if the condition of the stream does not exceed its usual height at any particular season, he will be liable if, in times of ordinary high water, the overflow passes his neighbor's line. Dorman v. Ames, 12 Minn. 451, Gil, 347.

A riparian owner will be liable for all damages caused to the upper proprietor by water thrown back on his dam in times of high water which are usual, ordinary, and reasonably anticipated. *Ibid;* Ames v. Cannon River Mfg. Co. 27 Minn. 245, 6 N. W. 787.

A lower proprietor has no right to construct his dam so as to throw the water back on the upper proprietor in times of ordinary freshets. But he is not responsible for damages caused by extraordinary floods. Bristol Hydraulic Co. v. Boyer, 67 Ind. 236.

A riparian proprietor, whether he be the owner of one or both banks of a running stream of water, has no lawful right to build any obstruction which in times of ordinary flood will operate to throw the waters of such stream upon the lands of another proprietor so as to overflow and damage them. Farris v. Dudley, 78 Ala. 124, 56 Am. Rep. 24.

One who erects a dam is responsible for all the injury caused by it in times of usual, ordinary, and expected freshets. McCoy v. Danley, 20 Pa. 85, 57 Am. Dec. 680.

Throwing the water back in any degree, even at times of freshets which ought to be anticipated, or of ordinary stage of the water, is illegal. Humphrey v. Irvin, 18 W. N. C. 449.

One having a right to flood the lands of his neighbor by means of a dam of a given height, bound, however, to open the sluices and lower

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the water whenever it runs 4 inches over the top, is liable, on proper averments, when he has omitted raising the gates as required. Hutchinson v. Granger, 13 Vt. 386.

The one building a dam will be liable for freshets enhanced by the dam. Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766.

If the dam causes the stream to overflow the land above only when the stream is swollen, the upper proprietor will be entitled to the proportionate amount of damages. Pugh v. Wheeler, 19 N. C. (2 Dev. & B. L.) 50.

b. *Extraordinary floods.*

A railroad corporation is not liable for damages resulting from so repairing its bridge as to obstruct the flow of an extraordinary flood. Welker v. Northern C. R. Co. 1 W. N. C. 210.

Failure on the part of a railroad company to provide a bridge across a creek of sufficient size, strength, and capacity to allow the unobstructed flow of an immense volume of additional water, in which were floating logs, trees, etc., caused by an unexpected and extraordinary flood, is not negligence so as to render the company liable for the overflow of the land of an adjacent owner occasioned thereby. Peoria & P. Union R. Co. v. Barton, 38 Ill. App. 469.

Under Tex. Rev. Stat. art. 4171, which requires railroad companies, in constructing their embankments, to provide such culverts and sluices as may be required by the natural lay of the land for its necessary drainage, a company is not required to make provision for extraordinary floods which could not reasonably have been foreseen. Gulf, C. & S. F. R. Co. v. Pomeroy, 67 Tex. 498, 3 S. W. 722.

In determining the right of a landowner to recover for the flowing of his land by a dam, the jury should consider the effect of those ordinary periodical freshets which can be foreseen with reasonable certainty, but not unusual and extraordinary freshets which cannot be foreseen. Sabine v. Johnson, 35 Wis. 185.

One obstructing the waters of a stream, which overflow and injure adjoining property, is not relieved from liability on the ground that the overflow was the result of an unprecedented flood, unless it appears that his act in obstructing the water did not add to or concur in producing the injury, and that it would have been the same had the stream been unobstructed. Kenney v. Kansas City, P. & G. R. Co. 74 Mo. App. 301.

A railroad company which maintains a culvert and embankment is not liable for the flooding of a mill above them, or the destruction of a lumber yard below when the embankment gave way, where the injuries were due to extraordinary rainfalls and a heavy rainstorm which followed a cyclone. Central Trust Co. v. Wabash, St. L. & P. R. Co. 57 Fed. 441.

One who owns a dam is not liable to one injured by an event in law called an act of God, which would not have caused injury in the absence of the dam; he is only liable for injuries which are the necessary effects of the dam. Dorman v. Ames, 12 Minn. 451, Gil. 347.

A railroad company which constructs an embankment must provide culverts under the embankment sufficient to carry off water in case of ordinary rains, and it is not liable for the overflow of land where the culverts are not large enough to carry off the water during extraordinary floods,—that is, floods which men of ordinary prudence would not have anticipated and provided for. Houston & G. N. R. Co. v. Parker, 50 Tex. 330.

If the dam of the lower owner does not throw the water back to a bridge of the upper owner, the former will not be liable when, by reason of a great storm of wind and rain, the water backs up and destroys the bridge. China v. Southwick, 12 Me. 238.

Owners of a milldam are not liable for injuries occasioned by the flowage of land where it is due to an extraordinary, unusual, and unexpected flood. Cobb v. Smith, 38 Wis. 21.

What is extraordinary.

By ordinary floods are understood all usual and expected freshets occurring in a stream in certain seasons of each and every year, and extraordinary floods are those not occurring annually. Illinois C. R. Co. v. Bethel, 11 Ill. App. 17.

A flood is not extraordinary which is such as residents of the neighborhood might expect from their observation. Brown v. Pine Creek R. Co. 183 Pa. 38, 38 Atl. 401.

Floods such as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence, must be taken into consideration in estimating hazards attending the obstruction of water courses. The term "act of God," in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374.

The phrase "act of God," as applied to water courses, would include only floods or extraordinary freshets, and not such rises or high water in a stream as are usual and ordinary and reasonably anticipated at particular periods of the year. Dorman v. Ames, 12 Minn. 451, Gil. 347.

It is the duty of those changing or restraining the flow of water to provide against the consequences that will result from such extraordinary rainfalls as have occasionally occurred, and which are likely to again occur. Ohio & M. R. Co. v. Ramey, 139 Ill. 9, 28 N. E. 1087.

In an action against a railroad company for the flooding of adjoining land, alleged to have been caused by the defective construction of its embankment over a natural stream, it is a question of fact for the jury whether such flooding was due wholly to such an extraordinary flood as ordinary prudence could not have anticipated, or wholly to the defective construction of such embankment, or to both causes. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529, Reversing 43 Ill. App. 78.

In an action to recover for overflows caused by the damming back of a stream, which have occurred at times of high water twice within five years, it cannot be said, as matter of law, that floods cannot be considered as extraordinary which occur only twice in a period of five years, where there is nothing to show that they have occurred so frequently during any other similar period of time. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529.

A flood during which the plaintiff's lands are injured by the obstruction of water, due to a railroad bridge and embankment, is not, as matter of law, so extraordinary as to relieve the company from liability, where similar floods have theretofore occurred. Van Duzer v. Elmira, C. & N. R. Co. 75 Hun, 487, 27 N. Y. Supp. 474.

In an action against a railroad company for injury to an owner's land from overflow caused by the manner in which a railroad bridge was constructed over a natural stream, it is a question of fact for the jury to determine whether the overflow was due to a storm of such extraordinary and unusual character as to relieve the railroad company from liability. Chicago B. & Q. R. Co. v. Schaffer, 26 Ill. App. 280.

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Effect of negligence.

A railroad company is not relieved from liability for the flooding of the land of an adjoining owner upon the ground that the same was caused by an extraordinary rainfall, where, but for the negligence of the company in maintaining a solid embankment without providing suitable and proper outlets for the passage of the water in its natural course, the overflow might not have occurred. Ohio & M. R. Co. v. Nuetzel, 43 Ill. App. 108.

But a person negligently obstructing the flow of a river at a time of an unprecedented rainfall is not liable for injury to lands overflowed, unless such negligent obstruction was an active agent in bringing about the loss, without which it would not have occurred. Coleman v. Kansas City, St. J. & C. B. R. Co. 86 Mo. App. 476.

Where an unusual rainfall and the negligent obstruction of a stream concurred in causing it to overflow its banks, the person causing the obstruction is liable for such injuries as would not otherwise have occurred. Brink v. Kansas City, St. J. & C. B. R. Co. 17 Mo. App. 177.

In order to render a railroad company liable for obstructing the flow of a water course during an extraordinary rainstorm, its negligence in constructing its bridge without sufficient escape for the water must have been one of the efficient causes of the injury, without which it would not have occurred; and it is not liable when the effect of its negligence is merely conjectural, and the storm one of such an overwhelming and destructive nature that the result would have been the same had there been no railroad bridge. James v. Kansas City, P. & G. R. Co. 69 Mo. App. 431.

An embankment obstructing the flow of a water course is an efficient cause of the flooding of adjoining land, when, in concurring with an unusual rainfall, it increased the volume of the overflow and the extent of the injury to the land and crops. Kenney v. Kansas City, P. & G. R. Co. 74 Mo. App. 301.

A railroad company is not liable for an overflow of water caused by such very unusual rainfalls as would amount to an "act of God," even if they had negligently allowed a culvert to become obstructed. Texas & N. O. R. Co. v. Anderson (Tex. Civ. App.) 61 S. W. 424.

A railroad company constructing a bridge or removing an old one is not required to foresee and prepare against an unprecedented storm, and is not liable for an overflow occurring during such a storm, although it would not have occurred except for its negligent obstruction of the stream, unless such obstruction would have caused the overflow during an ordinary storm. Coleman v. Kansas City, St. J. & C. B. R. Co. 86 Mo. App. 476.

In an action to recover damages caused by the overflow of a lake, a charge that if the overflow was caused by an unprecedented and unlooked for storm defendant was not liable, is properly refused, where the negligence complained of was the failure to maintain sufficient outlets, and there was evidence tending to show a failure in that regard, and that if they had been properly maintained the injuries complained of would not have happened. Birmingham R. & Electric Co. v. Doss, 131 Ala. 177, 32 So. 493.

The construction of a railroad embankment in a manner that cuts off 80 per cent of the passage of freshet water is a negligent disregard of the right of a landowner to have the water flow past his land in its natural way without being retarded or concentrated and poured through with increased force. Lampley v. Atlantic Coast Line R. Co. 63 S. C. 462, 41 S. E. 517.

Although there may have been some degree of negligence in the maintenance of a culvert, a railroad company is not liable for damage by reason of its insufficient capacity to pass an extraordinary flood of such overwhelming and destructive character as by its own force, and independently of the particular negligence alleged or shown, produced the damage. Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529, 3 Pennyp. 518.

A railroad company is liable for injury to the land of an owner by flooding caused by its negligence in so constructing and maintaining an embankment for its track over bottom lands bordering a stream as to obstruct the flow of the water of such stream during a flood caused by extraordinary rainfall, where such rainfall was such as would be anticipated by prudent persons. Ohio & M. R. Co. v. Ramey, 139 Ill. 9, 28 N. E. 1087.

VI. *Character of injury.*

To render one liable for damming back water upon adjoining land, it is not necessary that the particular damage caused should be within the anticipation of a reasonably intelligent and prudent person. Schmeckpepper v. Chicago & N. W. R. Co. (Wis.) 93 N. W. 533.

Damages may be recovered for injuries to personal property caused by water set back by a dam. Bastian v. Eau Claire, 56 Wis. 172, 14 N. W. 55.

A riparian owner having on hand cattle fit for the market at the time water is wrongfully backed up so as to interfere with the proper feeding of the stock is not bound to market such as are in condition, at once, in order to avoid impending loss, if the market is at that time unfavorable. McCleneghan v. Omaha & R. Valley R. Co. 25 Neb. 523, 41 N. W. 350.

Where an owner of cattle has a mere license to pasture them on the land of another, he cannot recover against a railroad company for causing an overflow of such land which resulted in the death of his cattle for want of grass, or the value of milk which the cows would have given had they not been prevented from grazing on such lands. Such damages are too remote a result of the negligence of the railroad company. Sabine & E. T. R. Co. v. Johnson, 65 Tex. 389.

A railroad company which fills up open trestle work in the embankment of its road over bottom land bordering upon a river, thereby in some degree retarding or obstructing the flow of the water of such river in times of flood, causing it to back up and cover a greater surface above the embankment, is not thereby liable to the owner of cattle for their injury during a flood while such cattle were in pens belonging to another, placed therein for the purpose of feeding and fattening them after such trestle work had been filled up,—especially as it is not certain that such flooding might not have occurred irrespective of such obstruction. Toledo, W. & W. R. Co. v. Hunter, 50 Ill. 325. In this case the owner of the cattle acted with his eyes open in placing them in the pens. He did not sue for injury to real estate.

Damages may be recovered for injury to land by percolation or seeping caused by a milldam. Ellington v. Bennett, 59 Ga. 286.

In Esson v. Wattier, 25 Or. 7, 34 Pac. 756, it is said that if, by the construction of a dam, the water of a stream is raised above its natural level, and by percolation causes irreparable injury to neighboring land, an injunction will be granted to prevent it; but the court concluded that the evidence in the case did not show percolation.

In Pixley v. Clark, 35 N. Y. 524, 91 Am. Dec. 72, Reversing 32 Barb. 268, it is said, if a dam is raised to such an extent that the pressure of the water causes percolation which renders

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the land of an adjoining owner damp and unproductive, there will be a cause of action.

The owner of land along a stream in which the water is raised by a dam and artificial embankment is not bound to construct a drain along the foot of the embankment to protect his land from water forced through the soil by the increased pressure, to the injury of his land. Pixley v. Clark, 35 N. Y. 524, 91 Am. Dec. 72.

VII. *Remedy.*

a. *Abatement.*

If water flows to another's land, and he stops the water course so that it floods my land, I may abate that which causes the estoppel, and he shall not have an action for my entry on his close because the stopping of the water was his own doing. 8 Edw. IV. 5, pl. 14.

The upper proprietor may enter upon the land of the lower proprietor and remove the nuisance. Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53.

The flowage of land may be remedied by entering upon the lower land and removing the dam. Winchell v. Clark, 68 Mich. 64, 35 N. W. 907.

But upper riparian owners upon whose land water is backed by a dam of the lower proprietor have no right to divert the water from the stream by means of a ditch, and carry it upon the land of the lower proprietor for the purpose of removing the injury. Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731.

An upper mill owner may, of his own authority, enter upon the premises of a lower owner and remove as a nuisance a sufficient portion of a dam by which water is turned back upon his mill to the destruction of his water power. But such redress must be exercised reasonably, without force, and must not exceed the measure of right. Liles v. Cawthorn, 78 Miss. 559, 29 So. 834.

The owner of an ancient mill may lawfully enter the close of another and remove a dam erected therein by which the water of the stream below the mill is made to flow back and interfere with the mill wheel. Hodges v. Raymond, 9 Mass. 316.

The upper proprietor may enter upon the land of the lower proprietor and remove enough of the latter's dam to let the water run off from his property. Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265.

One to whom a dam in the stream below his mill is a nuisance, if he wishes to abate the same, must do so within a reasonable time. Moffett v. Brewer, 1 G. Greene, 348.

The construction of a dam causing the water in a ravine to flow back upon mining claims above so as to hinder the free use thereof and prevent an outlet for the tailings therefrom is a nuisance, which may be peaceably abated by such mine owners, as the California statute defining nuisances and prescribing the remedy by action does not take away any common-law remedy in the abatement of nuisance which it does not embrace. Stiles v. Laird, 5 Cal. 121, 63 Am. Dec. 110.

The owner of land bordering on a stream may lawfully dig a canal upon his own land which will prevent it from being flowed by the erection or raising of a dam below, if he does not thereby divert the water from its natural course. Storm v. Manchaug Co. 13 Allen, 10.

A dam built by the state to aid navigation cannot be destroyed by individuals because it is injurious to public health, although the state officials have neglected it, and permitted it to become out of repair. Harris v. Thompson, 9 Barb. 350.

Adjoining owners to a side cut or chute off a river, closed in the improvement of the river under legislative authority, may not proceed privately to abate the works of the improvement company, but, if injury is done them, should proceed at law. Black River Improv. Co. v. La Crosse Boom & Transp. Co. 54 Wis. 659, 41 Am. Rep. 66, 11 N. W. 443.

A mere intermeddler who has no occasion to intervene for the protection of substantial rights of his own, and cannot justify as the servant of one who had such rights requiring protection, cannot be heard to justify his abatement of an alleged nuisance by showing that the dam did in fact constitute a nuisance. Toothaker v. Winslow, 61 Me. 123.

To justify an upper riparian proprietor, as a prior appropriator, in destroying dams erected on the lower lands of another, as a private nuisance, his premises must have been flowed by the back water, or injured in some other way in consequence of the obstruction to the flow of the stream. Turner v. Locy, 37 Or. 158, 61 Pac. 542.

The common-law right of one whose land is injured by an unlawful flowage, to enter and abate the nuisance, is not extinguished by a grant by the legislature of equitable jurisdiction to certain courts; and he may still either take the remedy in his own hands and remove the obstruction causing the flowage, or bring an action for damages. Great Falls Co. v. Worster, 15 N. H. 412.

Although one who proceeds under his common-law right of abating a nuisance which unlawfully flows his land, without the institution of legal process, may adopt means in removing the nuisance which will prove effective by draining the water in a reasonable time, and need not exercise his right of removal in the most convenient way for the one creating the nuisance, yet he must act in a reasonable manner, and refrain from unnecessary injury. *Ibid.*

In order to justify the diversion of water from a milldam by the digging of a ditch for the abatement of a nuisance, the jury must find from the facts that such dam at the time of the digging of the ditch was a nuisance either public or private, and, if the latter, that the person digging such ditch was injured by such nuisance, and that such ditch as dug did not carry off more water than was necessary to abate such nuisance. Gates v. Blincoe, 2 Dana, 158, 26 Am. Dec. 440.

A statute making it a criminal offense to injure a milldam does not take away the common law right to abate such dam as a nuisance, by tearing it down, when its effect is to throw back water to an injurious extent on the wheels of the abater's mill, although not to stop them entirely. State v. Moffett, 1 G. Greene, 247.

If a milldam is erected so as to flow the water back on the upper proprietor under circumstances which might justify him in abating it, he must confine his acts to the dam itself, and remove only such portions as cause the injury. Moffett v. Brewer, 1 G. Greene, 348.

One in possession of swamp lands under a certificate from the state cannot be enjoined, at the suit of a lower riparian proprietor operating a mill, from cutting a ditch on the land of which he is in possession for the drainage therefrom of surface water and water turned back thereon by the milldam, where the mill owner shows no right by grant, license, or prescription to so turn the water back, since, as owner of the soil on which his mill stands, he has no such right. Wattier v. Miller, 11 Or. 329, 8 Pac. 354.

A town will not be enjoined from opening sluiceways into a mill pond to prevent the water overflowing a highway, where the remedy at law is adequate. Wing v. Fairhaven, 8 Cush. 363.

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Where, in the construction of a dam, a new and more convenient highway is laid out over the stream, and the slope of the dam covers part of the old highway, there is a nuisance created, where the highway was not legally changed by town authorities; but where it appears that the new highway is better than the old, and does not constitute a nuisance in fact, the owner of land along the highway is entitled to relief against the owners of the dam only to the extent that he is individually injured; and in such a case, where the land of the plaintiff and the passway to the highway are flooded by the dam, a court of equity will grant him relief by decreeing that the owners of the dam widen the opening in it, where the land will be relieved from overflow thereby, and will not decree a complete removal of the dam from the highway and river. Stone v. Peckham, 12 R. I. 27.

An injunction will be granted to restrain the threatened destruction of a dam admitted to be built and maintained, not in excess of authority, by one whose land is flowed by it, where great destruction of property is likely to be caused, and the trespasser admits his insolvency. Winnipissiogee Lake Co. v. Worster, 29 N. H. 433.

An agreement by the owner of a milldam, permitting the owners of land overflowed by back water therefrom to abate the same if the water is not let out of the pond at a specified time, in consideration of their agreement not to sue for damages occasioned by the overflow, entitles such owners to a judgment for the abatement thereof in an action to enforce the agreement, as it is clearly the intention of the parties to remove the injury occasioned thereby, and implies that the dam shall be kept down, although there is no covenant not to rebuild. Ulrich v. Hull, 17 Wis. 424.

An obligation to cut down the waste way of a dam 20 inches, and to keep the water down 20 inches below the top of the present waste way, is complied with if the waste way is cut down 20 inches. Quinby v. Sprague, 17 Me. 226.

The lower owner on a natural channel may not obstruct it because another has subjected it to an unnatural flow of water, if a third and innocent party is injured thereby. Martin v. Riddle, 26 Pa. 415 note.

The lower proprietor will not be permitted to construct a dam across a stream for the purpose of holding back surface water which the upper proprietor has thrown into the stream. McCormick v. Horan, 81 N. Y. 86, 37 Am. Rep. 479.

The lower owner cannot construct dams for the purpose of stopping the flow of water in a stream merely because the upper owner has cut ditches for the purpose of draining the water on his land into the stream. Hooper v. Wilkinson, 15 La. Ann. 497, 77 Am. Dec. 194.

When the owner of the servient estate under a flowage easement wrongfully tears away the dam, the mill owner may recover the profits he has lost by the suspension of the operation of the mill. Merriman v. Russell, 55 N. C. (2 Jones Eq.) 470.

b. *Suits generally.*

1. *Statutory action.*

When the remedy for flowage damages caused by a navigation corporation is specified by statute, they cannot be recovered in a common-law action. McKinney v. Monongahela Nav. Co. 14 Pa. 65, 53 Am. Dec. 517.

Where a corporation is empowered to erect a dam of a certain height across a navigable stream, and maintain the water at that height continually, without any provision for compensation to one whose property is thereby injured, the remedy of the property owner is at common law, and not under the milldam acts, which empower the jury to regulate the height of dams and the times of flowage, and assess yearly damages. Cogswell v. Essex Mill Corp. 6 Pick. 94.

But when one causing flowage of another's land does not institute proceedings to determine the damages, as provided in the act authorizing it, the damages may be recovered on suit by the injured party. Nash v. Upper Appomattox Co. 5 Gratt. 332.

When the legislature provides a particular method by which damages flowing from the exercise by a corporation of its powers are to be ascertained and compensated, a neighboring proprietor, whose land is flowed by the company's dam, cannot proceed against it in the first instance as a wrongdoer, and disregard the remedy given him by the legislature. Woods v. Nashua Mfg. Co. 4 N. H. 527.

Alterations in a weir across a river, by a water-supply company which raised the water to the damage of a mill, are made pursuant to the powers given the company by its charter, so as to entitle the mill owner to the remedies provided by it, although neither the mill, nor the weir or its site, were described in the books or plan, nor was the weir in the line of works there described, but that part of the river in which the mill and weir lay was in the plan. King v. Nottingham Old Waterworks, 6 Ad. & El. 355.

A statute giving summary remedy for damages occasioned to other mill owners by the erection of milldams has reference to the location of new dams, and does not apply to a change in the construction of dams already erected, although the change may result in backing more water on upper mill seats. Garrett v. Bailey, 4 Harr. (Del.) 197.

When a corporation has lawfully flowed a mill privilege, the owner cannot eject them therefrom, but must rely upon the charter remedy for damages. Lehigh Valley R. Co. v. McFarlan, 31 N. J. Eq. 706, Reversing 30 N. J. Eq. 180.

A court of equity will not enjoin the owners of a mill, below on a stream, from so raising their dam as to flow back the water upon a watered meadow, belonging to the owners of a mill above, and a drain rightfully used by them for the purpose of relieving their meadow from water taken from their mill trench during irrigation, where by statute, the meadow and drain being no part of the mill privilege, the defendants, as owners of their mill estate, have a right to flow the meadow and drain, subject, exclusively, to the remedy provided by such act; and the plaintiff will be required to seek his remedy under that act. Bull v. Valley Falls Co. 8 R. I. 42.

Under a statutory liability for damages to property fronting upon the street for a railroad excavation or embankment within the lines of the street, the owner of such property cannot recover for damages caused by stoppage of a water course or the natural flow of surface water by its embankment outside the limits of the highway. New Castle & F. R. Co. v. McChesney, 83 Pa. 522.

The fact that a statute giving one a right to build a dam across a public stream upon his own land provides a summary mode of appraising and paying the damages arising therefrom will not prevent the maintenance of an action for the damages if the statutory remedy is not made exclusive. Crittenden v. Wilson, 5 Cow. 165, 15 Am. Dec. 462.

To obstruct the flow of water to the injury of riparian proprietors is a private nuisance, and a statute making it a public one does not change its character so as to deprive riparian proprietors of their common-law remedies, but merely grants, as additional remedies, those existing for the suppression of public nuisances. Welton v. Martin, 7 Mo. 307.

An action for damages for the damming back

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of water onto plaintiff's land is not abated by a judgment in a subsequent statutory action to abate the dam as a nuisance, where the plaintiff's damages were not assessed in the latter action, although they might have been. Gould v. Langdon, 43 Pa. 365.

Damages are not to be recovered by any peculiar process prescribed by the charter of a corporation authorized to hold real and personal estate necessary and convenient for the purpose of conveying to a municipality a supply of water for domestic purposes, etc., and to take water therefor, and the process is prescribed for recovery of damages incurred in the exercise of the powers thus granted, when the damage was caused by a grist mill operated by the corporation. Clark v. Rockland Water Power Co. 52 Me. 68.

2. *Common-law action.*

The ancient form of action for the casting of water back on an upper landowner seems to have been an assize of nuisance or a *quod permittat*. And in Beswick v. Cunder, Cro. Eliz. pt. 2, p. 520, it is said that action on the case does not lie against a purchaser of land for continuing a dam across a stream adjoining the land, thereby flooding other land, but the remedy is by an assize or *quod permittat*.

But in Sly v. Mordants, 1 Leon. 247, a case occurring six years earlier than the Beswick Case, plaintiff recovered judgment in an action on the case for obstructing a water course and thereby flowing his land. A motion in arrest of judgment on the ground that the plaintiff, having the freehold, therefore ought to have an assize, was denied.

And in Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333, it is said that the remedies of assize and *quod permittat* for the damming of water back upon upper riparian land were discontinued, and the action of case substituted therefor, prior to the discovery of this country.

But the assize of nuisance was recognized in 1828 in Pennsylvania as an existing remedy for injuries caused by a milldam. Barnet v. Ihrie, 17 Serg. & R. 174.

If a man stops a water course by which land of which I am seised in fee is surrounded, though I may have an assize, yet, I may have an action on the case at my election. Stye v. Mordant, 1 Rolle, Abr. 104.

An upper riparian owner, whose lands are flooded by a mill pond made by a dam below, may maintain an action on the case for the consequential damages. Johns v. Stevens, 3 Vt. 308.

Case will lie for the recovery of damages for a flowage in excess of the easement therefor, caused by changing the location of the bulkhead either rightfully or wrongfully, that being a fact not determinable in this action, but in *quare clausum*. Keller v. Stoltz, 71 Pa. 356.

An action on the case will lie for erecting a milldam so as to overflow land of an adjoining owner, which, before the erection of the dam, was dry. Carruthers v. Tillman, 2 N. C. (1 Hayw.) 501.

For consequential damages to one having the title to gold and ore imbedded in land, with the right to enter thereon and to the use of the water in a stream running through the premises to enable him to mine the ore, caused by the submerging of the land by backwater from a dam constructed across the stream by an adjacent proprietor lower down, action on the case is the proper remedy, and ejectment does not lie, where there is no adverse holding. Ezzard v. Findley Gold Min. Co. 74 Ga. 520, 58 Am. Rep. 445.

A landowner injured by a nuisance created by the overflow of his land with water from the premises of another is not limited to his action to abate the same, but may sue to recover the damages sustained by the wrongful acts. Will v. Sinkwitz, 41 Cal. 588.

A riparian owner may sue for each distinct injury arising from an illegal obstruction of a water course. Southside R. Co. v. Daniel, 20 Gratt. 344.

Equity will not restrain one from pursuing his claim for the recovery, by legal proceedings, of damages for the injury he has received from the raising of a dam which has been adjudged unlawful. Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 135.

Equity will not enjoin the bringing of weekly suits before the justice of the peace for maintaining an obstruction across a water course, where the suit is between two individuals, and the right has never been settled at law. Eldridge v. Hill, 2 Johns. Ch. 281.

A disseised owner of land subjected to flowage for six years cannot maintain trespass *quare clausum* without first regaining possession. Mansur v. Blake, 62 Me. 38.

Ejectment will not lie where a case involves only the right to flood land; it is otherwise if possession and title to the land are also involved. Simpson v. Wabash R. Co. 145 Mo. 64, 46 S. W. 739.

Ejectment will not lie to annul merely an easement to flow land where plaintiff is, subject to the easement, in control and possession of the land. Wilklow v. Lane, 37 Barb. 244.

The owner of the bed of a stream cannot maintain an ejectment suit for the same against one erecting a dam on the stream below, where the only effect of its erection is to make the water in the channel of the stream within its banks stand at a greater depth than before the dam was built. Such damming of the back water is not a taking of his land so as to entitle him to a judgment for its possession. Burke v. Carlinville Water Co. 176 Ill. 555, 52 N. E. 266.

Flowage damages may be recovered in assumpsit by one who has reserved a right thereto in a grant of the lands to a third party, from one who has promised by parol to pay them. Jewett v. Ricker, 68 Me. 377.

3. *Equitable remedies.*

Courts of equity have always afforded relief in cases of the wrongful flowage of land whenever the cases have been brought within the principles upon which their jurisdiction is founded.

In Lamborn v. Covington Co. 2 Md. Ch. 409, Johnson, Ch., said that nothing can be clearer than the power of the court to prohibit the obstruction of water courses, the diversion of streams from mills, the back flowage upon them, and injuries of like kind, which, from their nature, cannot be adequately compensated by damages at law.

A court of chancery has jurisdiction to order obstructions to a water course removed, and to restrain interference with its natural flow. Ferris v. Wellborn, 64 Miss. 29, 8 So. 165.

Equity may require the removal of an obstruction to a water course which constitutes a nuisance. Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395.

Equity will prevent the unauthorized obstruction of the natural flow of a stream when a nuisance both injurious to property and dangerous to health would be created thereby. Masonic Temple Asso. v. Banks, 94 Va. 695, 27 S. E. 490.

Keeping up a milldam to the nuisance of a mill privilege further up the stream is within the terms of a statute giving equity jurisdiction of suits touching nuisances, and is not removed from such jurisdiction by the exclusion

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of cases in which there is an adequate remedy at law, where the provision for the abatement of the nuisance at law is by motion, the granting of which is discretionary. Bemis v. Upham, 13 Pick. 169.

Where lands are rendered comparatively worthless by backwater from a dam, and a nuisance is thereby created, deleterious to health, and the enjoyment of the premises is thereby impaired, the injured person is entitled to the protection of equity. Carlisle v. Cooper, 21 N. J. Eq. 576.

A bill in equity is the proper remedy to prevent the raising of the height of a dam, the pond created by which is alleged to be injurious to the health of an adjoining property owner, although it is not available to abate the nuisance created by the dam as it exists, because of a remedy therefor under the Georgia Penal Code. Norwood v. Dickey, 18 Ga. 528.

The remedy of a riparian owner by injunction to restrain the raising of a dam so as to render a ford between his tracts of land impassable, which by the construction of the dam and consequent flowing back of the water had already been made difficult and dangerous to cross, is not taken away by a statute giving mill owners the power to obtain the right to construct dams and flow land by taking certain steps which they alone, and not the owner of the land flooded, can initiate, since, until such steps are taken and compensation paid, no rights are obtained by the mill owner preventing the landowner from exercising otherwise available remedies. Kirkendall v. Hunt, 4 Kan. 514.

It seems that, in the absence of a statute to the contrary, equity will entertain jurisdiction of a suit to enjoin the owners of a mill below on a stream from so raising their dam as to flow back upon a watered meadow, belonging to the owners of a mill above, and a drain rightfully used by them for the purpose of relieving their meadow from water taken from their mill trench, during irrigation. Bull v. Valley Falls Co. 8 R. I. 42.

A court of equity has power to restrain the increasing of the height of a millidam if such increase of height would be productive of loss of health in the family of another resident in the neighborhood of such mill, whether the mill is located in the town or in the country. Minor v. De Vaughn, 72 Ga. 208.

A suit in equity may be maintained to ascertain the height to which the owner of a dam is entitled to flow back water upon the lands above the dam. Carlisle v. Cooper, 18 N. J. Eq. 241.

Chancery has jurisdiction of an action against a nonresident for obstructing a natural water course on her land by which the use of a large quantity of fine productive lands on an adjoining plantation is destroyed. Gordon v. Warfield, 74 Miss. 553, 21 So. 151.

The owner of land overflowed by the erection of a dam by another can maintain a bill in equity to require the payment of the damages awarded him by an arbitration mutually agreed upon, or an abatement of the dam. Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083.

A court of equity will not, at the suit of an upper riparian owner threatened with injury, enjoin the holders of charters granted by adjoining states, giving the exclusive privilege perpetually of constructing and maintaining locks at falls on a navigable river forming a common boundary, and authorizing the making of a dam and flowing or otherwise injuring property in connection therewith, from building on the original site a new dam to be used for manufacturing purposes; although it is shown that transportation, owing to better and cheaper railroad facilities, had for many years ceased at these river locks; that the former dam, then only used to run a sawmill, had been carried away twenty-five years before; and that during that whole time there had been no use of the franchise, or anything done under the charters; because the practical effect of such an injunction would be indirectly decreeing a forfeiture of such charters; and, while such a forfeiture may be adjudged for nonuser, long continued and intentional, such a judgment can only be rendered in a court of law in a direct action for the purpose. Ottaquechee Woolen Co. v. Newton, 57 Vt. 451.

Equity does not have jurisdiction over an alleged unlawful flowage of a mill privilege which is justified under a plea of prescription, as the contention pertains to an invasion of a legal estate in lands. Outcalt v. George W. Helme Co. 42 N. J. Eq. 665, 9 Atl. 683. Overruling Helme Co. v. Outcalt (N. J. Eq.) 3 Cent. Rep. 472, where it had been held that a mill owner may maintain a suit in equity against a miller down stream who has raised his dam so that it backs water and impedes the upper mill, to obtain a decree fixing the lawful height of the lower dam, and for an injunction against continuing the injury, as this is irreparable, and there is no adequate legal remedy therefor.

Although a mill owner maintained his dam at an illegal height prior to its destruction, equity will not restrain him in rebuilding it, or even in reconstructing it above the authorized height, in the absence of allegation that he intended, or was about, to do so. Talley v. Tyree, 2 Rob. (Va.) 500.

In the absence of an allegation in a bill of the threatened or proposed raising of a dam, or of anything showing an intention so to do, defendant making affidavit of no intention to raise the same, an injunction should not be granted to restrain the raising thereof. Wheeler v. Steele, 50 Ga. 34.

In Hudson v. Burk, 48 Mo. App. 314, an action to recover damages for the obstruction of a water course, and to restrain the rebuilding of the obstruction which had been washed away, the majority of the court were of the opinion that it was not an action of an equitable nature so as to entitle the plaintiff to the application of equitable rules in assessing his damages, and distinguished it from Paddock v. Somes, 102 Mo. 226, 10 L. R. A. 254, 14 S. W. 746, an action to recover damages and to restrain the continuance of a nuisance, in which equitable rules were applied on the ground that while, in the Hudson Case the obstruction had already been removed, and the only equitable relief asked was to restrain its rebuilding, in the Paddock Case the nuisance complained of was not only in existence, but in a previous action to recover damages had been declared a nuisance; so that, while the action was to recover damages for its continuance, it was, in effect, an equitable action to abate it.

Injury must be irreparable.

In Rosser v. Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712, which was an action to restrain the location and operation of a mill as creating a nuisance and interfering with a spring of water on adjacent lands, it is said that "it may be safely laid down as applicable to this class of cases that it must be satisfactorily shown that the proposed erection would inflict an irreparable injury,—such a one as could not be adequately compensated in damages; or it must threaten materially to impair the comfort of the existence of those living near it, to entitle those aggrieved to the aid of the preventive justice of the law. But a clear and plain case must be made out."

The common-law remedy of one whose water rights are injured by a lower proprietor dam-

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ming back water is not sufficient to deprive him of equitable relief by way of injunction, although he is not at the time applying the water power to any useful purpose. Graham v. Burr, 4 Grant Ch. (U. C.) 1.

Equity will not by injunction order the lowering of a dam by which another's land is wrongfully flowed, although to his damage, if plaintiff does not show that the injury was irreparable, or the mischief pressing or urgent, the plaintiff having slept on his rights for five years. Hieskell v. Gross, 7 Phila. 317, 3 Brewst. (Pa.) 430.

Where plaintiff's access to a highway is interrupted by the erection of a dam extending into the highway, and such dam does not constitute a public nuisance in fact, equity will not grant relief to the plaintiff, where it appears that his injury can be remedied by extending the slope of the embankment on to his land so as to afford access to the highway, as the injury caused by the dam in such case can be remedied by an action at law for damages. Stone v. Peckham, 12 R. I. 27.

An injunction will not be granted to restrain the erection and operation of a mill on the ground that it deprives the owner of adjacent lands of a spring thereon, where it appears that by digging a ditch and making an embankment the spring would be protected from the rise in the stream occasioned by the operation of the mill, or it does not appear but that a well could easily be had in the neighborhood of the spring. Rosser v. Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712.

The maintenance of a milldam will not be enjoined as a private nuisance on the ground that the land of the complainant is thereby overflowed, where the damage is trivial and can be fully compensated for in an action at law, and the injury may be remedied by the building of levees. Thomas v. Calhoun, 58 Miss. 80.

The flooding of land by the maintenance of a dam will be enjoined, irrespective of the extent of the injury, where substantial injury is done to the property of the complainant, and the flooding may generate disease. White v. Forbes, Walk. Ch. (Mich.) 112.

Equity will not restrain the owner of a dam from rebuilding it while he still has a right to cause the necessary flowage thereby, and without sufficient ground of irreparable injury being shown. Talley v. Tyree, 2 Rob. (Va.) 500.

Equity will not specifically enforce a contract by the owner of a milldam which injures property flowed by the pond to reduce the height of the dam and clean out the channel of the stream sufficiently to relieve the land of the surplus water, where the contract provides liquidated damages for failure to perform it, and nothing appears to show that an action at law would not furnish adequate relief. McCarter v. Armstrong, 32 S. C. 203, 8 L. R. A. 625, 10 S. E. 953.

The construction of a dam so as to cause the water of a stream to set back upon the newly constructed water power of an upper riparian proprietor, whose right to construct such water power had been determined only by the *ex parte* proceedings by which he secured permission to erect the same, does not present a case of irreparable damage or pressing necessity entitling the upper proprietor to an injunction. Welton v. Martin, 7 Mo. 307.

Ordinarily, where an injury is done to land by the overflow of waters, caused by the erection and maintenance of a nuisance, which occurs only occasionally, in the absence of the insolvency of the wrongdoer, an action for damages would afford a complete remedy, and equity will not entertain a suit to enjoin the nuisance; but there may be cases where the constant exposure of lands to overflow may result in damages of such a nature that they cannot be adequately compensated at law, and, in a clear case, a court of equity will grant relief against a continuing nuisance, without waiting for a judgment at law establishing the fact of the nuisance and the plaintiff's legal right. Hagge v. Kansas City S. R. Co. 104 Fed. 391.

Right established at law.

A court of equity will not interfere to abate a private nuisance created by the overflowing of land by backwater from a milldam until the right has been established at law. McCord v. Iker, 12 Ohio, 387; Porter v. Witham, 17 Me. 292.

The owner of a mill and dam is not entitled to an injunction restraining the raising of a dam to a height likely to cause the water to flow back and injure his mill, until he shall have first established his rights in a court of law, unless the defendant's dam was constructed pursuant to the statute relating to milldams, which gives such remedy. Arnold v. Klepper, 24 Mo. 273.

But an injunction will be granted to restrain the obstruction of a stream which serves to drain land through which it runs, although the complainant has not established the fact of injury, by an action at law, where the injury is manifest, the right clear, and the nuisance a continuing one. Learned v. Hunt, 63 Miss. 373.

The grantee of land with the fall of water in a creek and the full use of a mill that may be erected, so that the grantor shall not raise an existing dam so as to impede any mill which may be erected, cannot, in case he erects a mill within the back water of the lower dam, maintain an equity suit to enjoin the maintenance of the lower dam until he has established his right at law,—especially where, in consideration of his deed, he releases the grist mill and land thereby covered and appertaining, and also the water, milldam, and ground covered thereby. Van Bergen v. Van Bergen, 3 Johns. Ch. 282, 8 Am. Dec. 511.

Injury trifling.

Equity will not interfere to restrain the overflowing of land by backwater from a milldam where the damages are trifling, or of a merely nominal character. McCord v. Iker, 12 Ohio, 387.

If a property owner, by raising a head of water on his own property, is about to cause serious and irreparable damage to his neighbor's property, equity will restrain him; but if the injury is comparatively slight, and may be compensated in damages, an injunction ought to be refused. Quackenbush v. Van Riper, 3 N. J. Eq. 350, 29 Am. Dec. 716.

Injunction will not lie to prevent the raising of water by a milldam so as to cover pieces of swamp land which have never been productive or brought into general use, since the injury is not irreparable in its nature. Bassett v. Salisbury Mfg. Co. 47 N. H. 426.

The construction of a dam will not be enjoined at the suit of a landowner upon the ground that it will cause water to overflow the banks of a stream and flood his land, where it appears that such overflow would only occur during freshets, and that such land has been overflowed during such freshets in the absence of any dam, as it cannot be presumed such dam will increase the damage resulting thereto. Esson v. Wattier, 25 Or. 7, 34 Pac. 756.

But one whose land has been overflowed by the construction of a dam, and who has established his right by an action at law, is entitled to a perpetual injunction, although his damage is small, amounting to about £2 per annum. Wright v. Turner, 10 Grant Ch. (U. C.) 67.

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In Beamish v. Barrett, 16 Grant Ch. (U. C.) 318, a bill to restrain the damming back of water, Richards, Ch. J., said that later authorities tend to show that the court of chancery has power to restrain the damming of water, though no express damage has been caused by it, as where its continuance for a sufficient period may ripen into a right. But that, in exercising that power, the court ought not to go beyond what is necessary to protect the interest of the party applying.

The maintenance of a dam which sets back water upon about a quarter of an acre of the complainant's land will not be enjoined, nor will the dam be abated, where such course would result in great public inconvenience, and since it would be entirely disproportionate to the nature and extent of the grievance complained of; but the complainant will be confined to an allowance by way of damages. Fox v. Holcomb, 32 Mich. 494.

One whose mill site is covered by backwater caused by a lower dam, and who has purchased none of the material nor taken any steps towards erecting a mill, except commencing a dam, which is entirely insufficient, may not have an injunction to prevent the defendant from flowing backwater upon the mill site, when the defendant has built a mill, erected a dam, expending a considerable sum of money, without any objection on the part of plaintiff, although he well knew the facts, and when he has given no notice of an intention to institute an action under the statute for the recovery of damages. Nosser v. Seeley, 10 Neb. 460, 6 N. W. 755.

A railroad embankment will not be destroyed because creating a nuisance by obstructing the natural flow of waters, when compensatory damages can be recovered. Brown v. Carolina C. R. Co. 83 N. C. 128.

Injunction will not be granted against the unlawful raising of the height of the water of a public lake, where, upon complaint, it was drawn down, and repetition of the act is improbable, while the one responsible therefor is of unquestioned ability to respond for the damages. State v. Sunapee Dam Co. 70 N. H. 458, 50 Atl. 108.

Where, after an action was commenced against defendant for raising his dam so as to overflow the plaintiff's land, he removed the flashboards, thereby lowering the water so that it did not set back upon plaintiff's land except after severe rains or sudden melting of snow, and it not appearing that such occasional overflowings would injure the trees growing on plaintiff's land, no irreparable injury or mischief is shown entitling him to an injunction. Smith v. King, 61 Conn. 511, 23 Atl. 923.

Laches.

One injured by the damming back of water must move promptly in order to be entitled to an injunction against the dam, and he cannot acquiesce in the dam for a period of years, and then, when the water is temporarily drawn down, apply for an injunction against the restoration of the level on the same basis that he might have applied at the time of the construction of the dam. Southard v. Morris Canal & Bkg. Co. 1 N. J. Eq. 518.

A landowner who acquiesces in the construction of a new dam of increased height, whereby his property will be subject to additional flowage, will not be awarded an injunction restraining the defendants from increasing the dam to such height as to furnish necessary power, but will be awarded such damages for the additional flowage as are equitable. Blake v. Cornwell, 65 Mich. 467, 32 N. W. 803.

A court of chancery will not, at the instance of one sleeping seven years after he had cause to complain, enjoin the maintenance of a dam setting water back on his lands, even where injury is alleged by way of interference with his enjoyment of home and domestic comfort not measurable in damages (Outcalt v. George W. Helme Co. 42 N. J. Eq. 665, 9 Atl. 683, Followed). Hyde v. French (N. J. Eq.) 21 Atl. 1069.

Injunction will not lie to compel the lowering of a dam which was raised under an agreement to purchase the land to be flowed thereby, although the mill owner has failed to carry out his contract, where the dam has been permitted to remain for several years. Stevens v. Ryerson, 6 N. J. Eq. 477.

A court of equity will not retain a bill to abate a dam which flows lands of the plaintiffs until their title is established at law, after upwards of forty years' user by the defendants of the dam upon payment of compensation, as they aver, under claim of right. In such a case of protracted delay and long adverse user the plaintiffs, before filing their bill, should assert their rights at law. Sprague v. Rhodes, 6 R. I. 57, 75 Am. Dec. 678.

An injunction will not be granted to restrain the rebuilding of a dam at the suit of one whose lands are flooded thereby, where, for nineteen years, he has acquiesced therein and in the rebuilding thereof several times when destroyed by floods, with the exception of a verbal notice at the time of its original construction that it would infringe his rights, in the absence of any fraud, misrepresentation, or unfair dealing on the part of the defendants, or of any accident, mistake, or excuse for the delay on his part. Sheldon v. Rockwell, 9 Wis. 167, 76 Am. Dec. 265.

Where the grantor of a mill site prescribes in the deed that the grantee shall have the right to overflow his lands within specified limits, and the grantor allows the grantee to maintain the dam in such a condition as to flow the water beyond the specified limits for more than two years, and subsequently the grantor, as mortgagee of such mill site and water privilege, advertises the same for sale in such condition, and permits a subsequent grantee of the mill site to repair the dam, keeping it at the same height, and to erect mills adjusted to that height, he will not be granted an injunction to compel the lowering of the dam so as to restrict the flowage within the limits expressed in his grant to the former grantee. Sprague v. Steere, 1 R. I. 247.

Permitting a milldam to be built and to remain for ten years is such laches on the part of a landowner, whose lands are overflowed by the waters of such dam, as will prevent the interference of a court of equity to abate such nuisance, until the right to maintain it is tried at law. Caldwell v. Knott, 10 Yerg. 209.

Damage to lands and injury to a spring caused by the backing up of the waters from a dam are not such an immediate and irreparable injury to clear and undoubted rights as to confer upon a court of equity jurisdiction to abate or prostrate such milldam, where the owners of the lands claimed to be injured consented to the building of the dam, and the same was allowed to remain, without protest, for upwards of ten years. The question whether this parol license can be revoked after the expense incurred in building such dam and the length of time that has elapsed since its erection is one determinable in courts of law, and not of equity. *Ibid.*

That a dam has been kept up without compensation, to the injury of the plaintiff, is not ground of demurrer to a bill for injunction, merely because it does not appear that his right before the filing of the bill has been established at law. In such a case, under the more modern

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doctrine of the equity courts, the lapse of time, short of the time of limitation, will not deprive the plaintiff of his right to have the milldam abated, although it is not alleged that his right has been established in an action at law. Sprague v. Rhodes, 4 R. I. 301.

Temporary injunction.

A temporary injunction restraining the erection of a milldam will be granted where it appears on the face of the bill that its erection would result in an overflow of complainant's lands above, although the injuries caused thereby might not be large. Phillips v. Stocket, 1 Overt. 200.

A temporary injunction will be granted to restrain a threatened nuisance by the erection of a milldam, until the fact of the nuisance can be ascertained by submission of the question to a jury, where the evidence is sufficient to require such a submission, and the nuisance, if any, created thereby, would be such as to affect public health, and might affect the comfort and health of complainant and his family. Ogletree v. McQuaggs, 67 Ala. 580, 42 Am. Rep. 112.

In an action by an upper riparian owner to compel a lower proprietor to remove a wing dam alleged to cause the water to flow back upon the water wheels and premises of the upper owner, an injunction *pendente lite* restraining the raising or backing of water upon the water wheels is improper, where the lower proprietor denies that the wing dam has such effect, since it compels him, at his peril, to determine one of the principal issues to be tried in the action. Keeseville v. Keeseville Electric Co. 59 App. Div. 381, 69 N. Y. Supp. 249.

A temporary injunction restraining, pending an action for a permanent injunction, the abatement to a certain height of a dam causing the overflow of the lands of another, is properly refused, where it does not appear that proceedings for the construction thereof were ever had under the milldam act, or that the consent of those whose lands are overflowed was ever obtained, but the right to relief is based on the fact of ownership, and that the owner had never been ordered to remove it, but such dam had, in a proceeding between the owners of the overflowed land and the actual possessors and managers of the milldam, been declared a nuisance and ordered abated,—as a matter of fact it is a nuisance as to such owners,—and they are able to respond to all damages which may be caused by the abatement of the dam. Akin v. Davis, 14 Kan. 143.

Under a bill asking that the proper height of a dam be determined and fixed by a decree, and praying for general relief, an injunction should not be granted restraining the defendant until the final hearing from strengthening the dam or doing anything to make it more permanent, thus preventing its protection against high waters or other accident, it not appearing that the trespass is irreparable in damages, or that defendant is insolvent and incapable of responding to any recovery that may be obtained by complainant, or that the injunction is necessary to avoid a multiplicity of actions. Wheeler v. Steele, 50 Ga. 34.

Instances of relief afforded.

Equity will restrain the filling of a water course by one who has contracted to grade the street, until a culvert can be erected over it in accordance with the intention of the city, of which he had notice before he received his contract. Sanger v. Philadelphia, 10 Phila. 338.

A perpetual injunction will issue against raising a dam if the riparian lands of another are flowed thereby without right, even though, as a consequence, the mill property be rendered valueless. Wright v. Turner, 10 Grant Ch. (U. C.) 67.

Equity will enjoin the erection of a milldam whereby the complainant's lands would be inundated and the timber killed. Whitfield v. Rogers, 26 Miss. 84, 59 Am. Dec. 244.

A lumber company will be restrained by injunction from maintaining a dam whereby marsh land of the complainant, suitable for raising hay, is flooded and rendered worthless for such purpose. That the annual freshets contribute to the injury will not excuse the company, where, of themselves, they are not sufficient to seriously impede the growth of the hay. Stone v. Roscommon Lumber Co. 59 Mich. 24, 26 N. W. 216.

The owner of land fronting on a lake is entitled to injunctive relief restraining the flooding of his land by the maintenance of a dam across the outlet of the lake. Lloyd v. Thomson, 60 N. Y. Supp. 72.

Equity may require the lowering of a dam erected so as to interfere with dams above on the same stream. Hammond v. Fuller, 1 Paige, 197.

Equity may restrain the erection of a dam across a stream when a nuisance would be created thereby. Atty. Gen. v. Blount, 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526.

The removal, by decree of a court of equity, of a mill dam whereby lands are flooded, so far as it exceeds a proper height, is not a matter of right, but rests with the equitable discretion of the court, and is dependent upon the circumstances of the case. Miller v. Cornwell, 71 Mich. 270, 38 N. W. 912.

The owner of a milldam will be enjoined from maintaining it at such a height as practically to destroy 300 acres of land, and inflict constantly recurring injury upon the owners, who severally would have a right of action involving a multiplicity of suits and vexatious litigation. Turner v. Hart, 71 Mich. 128, 38 N. W. 890.

Injunctive relief to abate a milldam whereby lands are flooded is not a matter of course, but depends upon the circumstances of the case. *Ibid.*

A mill owner may be restrained by injunction from raising his dam for the apparent purpose of embarrassing a railroad company in constructing its road across his land, although duly condemned. Longwood Valley R. Co. v. Baker, 27 N. J. Eq. 166.

Mill owners injured by the unlawful raising of a dam, whereby the water is flowed back upon their mill wheels, are entitled to injunctive relief against any future raising of the dam, or keeping up its height, to their injury. Farnum v. Blackstone Canal Co. 1 Sumn. 47, Fed. Cas. No. 4,675.

An injunction will be granted at the suit of a landowner to restrain the construction by a water company of a new dam at a different site, resulting in the destruction of his easement in a ford in the stream and the enlargement of a ditch upon his land beyond the limits of the right of way therefor owned by the company, and the cutting of timber in the accomplishment of such work, as such injury is more than a mere trespass, and goes to the destruction of his estate. Mendenhall v. Harrisburgh Water Power Co. 27 Or. 38, 39 Pac. 399.

An upper mill owner may have an injunction restraining a lower owner from raising his dam, when repairing it after a flood, to such a height as to cause it to back water upon the upper mill, when there is no claim that the volume of water in the river has increased, or that the relative height of defendant's and plaintiff's mills has been changed, and when the backwater did not

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trouble the plaintiff before the dam was repaired or before the freshet. Stumbo v. Seeley, 28 Neb. 212, 36 N. W. 487.

One whose land is overflowed by reason of the raising of the water of an adjoining lake because of the existence of a dam across the outlet may have mandatory injunction to compel the removal of the dam. Troe v. Larson, 84 Iowa, 649, 51 N. W. 179.

An injunction will not be granted to restrain one tenant in common from reconstructing a dam in violation of an alleged agreement, for a valuable consideration, between the plaintiff and such tenant in common, that a decree may be taken, perpetually enjoining the erection of the dam, on a former bill still pending between the plaintiff and both of the tenants in common, and in which an injunction had been refused, where the other tenant in common, whose interest, if any, has been assigned as a homestead for his wife and children, is not a party to the second bill. Glass v. Clark, 53 Ga. 380.

The wrongful closing up, by the construction of a dam therein, of the outlet of a lake which has existed as a running stream or creek forty years, thus causing the overflowing of lands adjacent to such lake and outlet, and depriving the owners thereof of the use of the water of the outlet, is an invasion of property rights which a court of equity will protect. Roberts v. Rust, 104 Wis. 619, 80 N. W. 914.

A railroad company will be enjoined from filling up trestle work over a stream, leaving only an archway of insufficient size to permit the escape of water during ordinary or heavy rainfalls, the effect of which would be to cause the water to overflow adjoining lands to the great and irreparable injury thereof, which damages will be continuous from year to year, compelling the owners to bring numerous suits to recover therefor. Lake Erie & W. R. Co. v. Young, 135 Ind. 426, 35 N. E. 177.

The construction by a railroad company of culverts or drain pipes through the embankment of its roadway of insufficient size or capacity to carry off the water of a stream after heavy rainfalls, by reason of which the land of an owner is overflowed, greatly injuring it, is a continuing and recurring nuisance, for the abatement of which such owner can maintain a bill in equity. Ecton v. Lexington & E. R. Co. 21 Ky. L. Rep. 921, 53 S. W. 523.

An overflow of an owner's lands on a stream of water, caused by the erection of a milldam below, thereby destroying the only lasting spring on his place, in which destruction such owner did not acquiesce, is so manifestly a nuisance, and the owner's right to its abatement so clear, and the injury caused of such a character that it cannot be compensated in damages, that a court of equity will interpose to prevent the mischief, without the necessity of a trial at law being first had to establish the existence of a nuisance. Vaughn v. Law, 1 Humph. 123, Distinguishing Caldwell v. Knott, 10 Yerg. 209.

An injunction restraining a lumber company from repairing and operating a dam whereby the lands of the complainant are flooded will not be suspended so as to permit a further flowing of the complainants' lands to enable the lumber company to float the remainder of its logs, where two suspensions of sixty days each have already been granted, affording the company ample opportunity to get out its logs. Michigan Land & Iron Co. v. Cleveland Sawmill & Lumber Co. 109 Mich. 164, 66 N. W. 953.

4. *Indictment.*

An indictment will not lie for conspiracy to commit the civil trespass of flowing the lands of riparian owners by means of flashboards upon a dam, with the intent of depreciating their value. State v. Straw, 42 N. H. 393.

5. *Joinder.*

An action for damages for past injuries occasioned by the obstruction of a natural stream cannot be joined in a suit for injunction restraining the maintenance of such obstruction. Miner v. Nichols (R. I.) 52 Atl. 893.

Plaintiff in an action for damages arising from injuries to his land occasioned by overflow caused by the wrongful construction and use of a milldam may unite therewith a cause of action to abate the milldam, or to perpetually enjoin its use so far as it is wrongful and a nuisance. Drinkwater v. Sauble, 46 Kan. 170, 26 Pac. 433.

Although an action to recover damages for the obstruction of a water course also seeks to restrain the rebuilding of the obstruction, it is not of an equitable nature, so as to entitle the plaintiff to the application of the rule that in equitable actions to abate a nuisance the assessment of damages is a mere incident; and equity, having taken jurisdiction, will afford a complete settlement of the differences between the parties, assessing all damages accruing to the time of trial. Hudson v. Burk, 48 Mo. App. 314.

No recovery for damages can be had in an action for the abatement of a nuisance created by the backwater from a dam and for injury resulting therefrom, where it appears that before the action was brought the dam had been removed, as equitable jurisdiction of the action for damages exists only as incident to the power to abate the nuisance, and on the abatement thereof the court has no jurisdiction for any purpose. Grigsby v. Clear Lake Water Works Co. 40 Cal. 396.

c. *Pleading; evidence.*

A bill alleging (1) a right of flowage from forty years' acquiescence in its exercise, and (2) the acquisition of the right to construct and maintain the dam from the persons interested prior to its erection, cannot be sustained by a proof of adverse use for the prescriptive period, no attempt being made to show a right under a power of eminent domain, or by the production of a written grant. Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 180.

The measure of damages is not a necessary averment in a suit to recover for the wrongful flooding of land. St. Louis Trust Co. v. Bambrick, 149 Mo. 560, 51 S. W. 706.

A mill owner is not entitled to recover for diminution of rents under a count for hindering and obstructing the use of his mills and machinery, and rendering the same of little or no value, and subjecting the owner to great loss and expense by the interruption of the business of his mills, and depriving him of the profit thereof, as he sets up no cause of action therefor. Plimpton v. Gardiner, 64 Me. 360.

Nominal damages cannot be awarded for simply flooding upper riparian property by a milldam under a complaint which seeks damages for injury to a wheel in operation because of backwater from the dam, which injury is not sustained by the evidence. Taylor v. Keeler, 50 Conn. 346.

Causes of action for damages from the destruction of crops on part of a tract of land, and the preventing of the planting of crops on another part of the same tract, arising from a single wrongful overflowing of the entire tract, cannot be split: and judgment in an action on one of such causes of action without the joinder of the other is a bar to a subsequent action on the latter. Wichita & W. R. Co. v. Beebe, 39 Kan. 465, 18 Pac. 502.

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In an action for flowage damages resulting from the erection of a dam across a river, it is not sufficient to prove that the flowage was caused by the obstruction of two lateral sluices in the banks of the stream, and not part of the dam. Good v. Mylin, 8 Pa. 51, 49 Am. Dec. 493.

In an action for the abatement of a dam, evidence of injury done after the commencement of the action may be given. Hayden v. Albee, 20 Minn. 159, Gil. 143.

In determining the question whether or not a dam backs water, or will back water, upon an upper mill, the fact that a ripple existed below the mill should not be overcome by evidence of surveys and levels made by engineers. Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914.

In an action for injuries to land from flooding caused by the act of an adjoining landowner in obstructing a water course forming the line between the two tracts, the damages cannot be estimated from the mere opinion of witnesses. Noah v. Angle, 63 Ind. 425.

In an action by a landowner for injury to his premises by overflow from a dam erected by another, the opinion of witnesses as to the amount of damages sustained by the overflow is inadmissible, although they may describe the injuries and state the circumstances so as to enable the jury to form their own conclusions as to the amount of damages. Sinclair v. Roush, 14 Ind. 450.

A prescriptive right to flow land by means of a dam attached to an ancient mill site is not a prescriptive right in the estate, so as not to be within the rule which excludes persons having interests in common from testifying in favor of each other. Sargent v. Gutterson, 18 N. H. 467.

In an action for injury to a mill by backwater from a lower dam, witnesses not experts may state what effect the backwater produced upon the power of the wheel. Williamson v. Yingling, 80 Ind. 379.

In an action against a railroad company for causing the overflow of a river by obstructing the same by means of an embankment, evidence is not admissible that land 20 miles above, and land 10 miles below, that of the plaintiff had been overflowed by the caving in of the river bank, where it is not shown that such lands are similarly situated with reference to the defendant's embankment, or whether or not such lands had been subject to overflow before the construction of the embankment. St. Louis & S. F. R. Co. v. Craigo, 10 Tex. Civ. App. 238, 31 S. W. 207.

In an action by a landowner against a railroad company for damages to his crops by the overflow of the waters of a creek, alleged to have been caused by the manner in which the railroad embankment was constructed along and over the stream, expert testimony is admissible to show that the overflow was the result of natural causes, and not the construction of the embankment, to be considered by the jury in connection with all the other facts in the case. Ohio & M. R. Co. v. Webb, 142 Ill. 404, 32 N. E. 527.

Expert testimony is admissible, in an action against a railway company to recover damages to crops from the flooding of an owner's land, to show the laws of alluvial streams, the cause and manner of growth of deposits of sediment, and the effect of such deposits upon such streams in a long course of years, where it is alleged that the water by which such crops were destroyed was dammed back upon, and caused to overflow, such owner's land by an embankment constructed and maintained by the railway company along bottom lands and across a branch of a natural water course. Ohio & M. 59 L. R. A.

R. Co. v. Neutzel, 143 Ill. 46, 32 N. E. 529, Reversing 43 Ill. App. 108.

In an action by a landowner against a railroad company for injury to his land by flooding alleged to have been caused by the insufficient capacity of a culvert built by the latter over a natural stream, the opinion of an engineer of experience in such matters, as to the capacity of the culvert to carry away all the water that might be expected, is competent. Chicago & A. R. Co. v. Calkins, 17 Ill. App. 55.

On the question of the acquisition of a right of flowage by prescription, testimony by one of the defendants operating the mill and dam as to the operations of a former mill owner for whom he worked, is competent. Bucklin v. Truell, 61 N. H. 503.

Whether or not a dam was rebuilt higher than it could be rightfully maintained may be evidenced by the work accomplished by the mill, and what it would do if the dam were only at the height claimed by complainant. Detweiler v. Groff, 10 Pa. 376.

When, by the descriptions in the deeds of a mill site and water privileges, it is not certain what was the level of the mill pond conveyed, it may be shown that by agreement between the mill owner and the upper owner a monument to mark the extent of the pond was fixed; but evidence of the mere pointing out to his successor in title of such a monument, with the assertion of a right to fill the pond to its level, without proof that the upper owner had any knowledge of it, is not competent upon this point. Horner v. Stillwell, 35 N. J. L. 307.

The declarations of a former mill owner respecting the height to be maintained in the mill pond to avoid unnecessary flowing of upper lands are competent against his successor in title in a suit for flowage by the owner of such upper lands. *Ibid.*

In an action for overflowing land by means of an ancient milldam, in existence long enough to confer prescriptive rights, where the complaint is that the height of the dam has been increased, it is competent to show that the height claimed by a former mill owner was less than that of the dam complained of, where the deeds of the mill site convey only the land by metes and bounds, without showing the extent of the water rights. Ten Eyck v. Runk, 26 N. J. L. 518.

The fact that water above a bridge was 2 feet higher than it was below it, and flowed under the bridge with great force, but stood several feet deep below the bridge, does not show that a dam below the bridge did not aid in backing up the water above the bridge. Payne v. Kansas City, St. J. & C. B. R. Co. 112 Mo. 6, 17 L. R. A. 628, 20 S. W. 322.

Admissions against title to land under a mill pond, made by a grantor, are not admissible in evidence against his grantee, when it is not shown whether they were made while he was in possession or afterwards. Towner v. Thompson, 81 Ga. 171, 6 S. E. 184.

In an action for damages to land by the flooding thereof by reason of the insufficiency of a culvert in a railroad embankment, evidence is admissible that an attempt was made to raise a crop on the damaged land, as tending to show that the yearly value of the land for the purposes of cultivation was affected by the nuisance. Georgia R. & Bkg. Co. v. Berry, 78 Ga. 744, 4 S. E. 10.

It is competent, in an action for obstructing or altering the flow of water, to show the condition and value of the injured premises at the time of trial, not for the recovery of damages since suit began, but as a basis of comparison to enable damages up to time of suit to be properly estimated. Morris Canal & Bkg. Co. v. Ryerson, 27 N. J. L. 457.

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Where, in a suit against a railway company for damages from overflow of land, caused by improper construction of the company's road, the defendant has pleaded that the overflow was the result of an extraordinary and unusual flood, against which human foresight could not provide, and evidence has been introduced of freshets having occurred at different intervals for a series of years prior to the one by which the plaintiff was damaged, which were equal to it, evidence of the freshet in the year following that in which the damage complained of occurred, greater than the one which caused such damage, is admissible, in connection with the proof relating to previous overflows, as a circumstance tending to show that the flood causing the damage to the plaintiff was an occurrence against which ordinary and reasonable care might have provided. Gulf, C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

To entitle the owner of land to recover more than nominal damages in an action for injury thereto from the backwater of a mill pond, he must prove to the satisfaction of the jury that the water did flow back upon his land, that it was caused by the wrongful act of defendant, and that he had suffered some injury therefrom prior to the institution of the suit. Lewin v. Simpson, 38 Md. 468.

But if a dam flows water back on the upper owner, the law presumes damage, and no special damage need be shown in order to sustain an action. Woodman v. Tufts, 9 N. H. 88; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53.

In an action for flowing a meadow and rendering it less productive, defendant cannot give evidence that other meadows on the same stream had exhibited the same marks of deterioration, unless the land is shown to be similar to plaintiff's. Standish v. Washburn, 21 Pick. 237.

The damage done by flowing land cannot be shown by proving the value of hay cut upon other lands, the relation of which to the land flowed was not shown. Smith v. Russ, 22 Wis. 439.

d. *Limitation.*

A period may be fixed within which claims must be made for injuries caused by constructing a dam, after the expiration of which no claim for damages can be allowed, although injury did not occur, and could not be foreseen, before the expiration of that time. Call v. Middlesex County, 2 Gray, 232.

A grant of an easement to flow lands will be presumed, by analogy to the statute of limitations, after twenty years' peaceable and uninterrupted adverse enjoyment by the flowing thereof to the same extent during such period and no recovery can be had for damages occasioned thereby. Rooker v. Perkins, 14 Wis. 80.

The ten years' limitation on the right to recover damages from the flowing of land by a milldam is inapplicable to the flowing of land by a dam forming part of works in aid of the navigation of the Fox and Wisconsin rivers. Arimond v. Green Bay & M. Canal Co. 31 Wis. 316.

The right by prescription to flow lands by backwater from a dam in aid of navigation, and therefore not subject to the limitation as to milldams, can be acquired only by twenty years' uninterrupted, adverse user, and not by ten years' user, in analogy to the ten years' limitation fixed by statute for the recovery of land from one taking possession thereof under color of title. *Ibid.*

Minn. Gen. Stat. chap. 31, § 17, limiting the time for commencing an action for damages, does not apply to a suit to enjoin an obstruction to the flow of water. Cook v. Kendall, 13 Minn. 324, Gil. 297.

Minnesota ten years' statute of limitations Gen. Stat. chap. 60, § 12, applies to an action for the abatement of a milldam as a nuisance, and to enjoin its maintenance. Eastman v. St. Anthony Falls Water Power Co. 12 Minn. 137, Gil. 77; Thornton v. Webb, 13 Minn. 498, Gil. 457.

Injury to land by backwater from a milldam is within the statute of limitation requiring actions for injury to real estate to be brought within six years from the date the cause of action accrued. Lucas v. Marine, 40 Ind. 289.

When damage is done to lands by continuous flooding or sobbing for a series of years, the injury is not a single act, but continuous acts, and a right of action is not lost because the statute of limitations bars recovery for the time when loss first occurred. Spilman v. Roanoke Nav. Co. 74 N. C. 675.

The statute of limitations is not available to one who has dammed backwater upon another's land, since every continuation of a nuisance is, in law, a new nuisance. Ramsdale v. Foote, 55 Wis. 557, 13 N. W. 557.

Although a cause of action originates in favor of an upper riparian proprietor at the time of the penning back of the waters of a stream by a lower owner, successive causes of action originate with each successive injury arising from a continuance of the obstruction; and the statute of limitations for each injury commences to run from the time of the injury, and not from the time of the original wrongful obstruction. Devery v. Grand Canal, Ir. Rep. 9 C. L. 194.

Until a prescriptive right accrues from twenty years of adverse use, an action for damages, sustained within six years before its commencement, is not barred by the statute of limitations, when it is brought for an overflow of water, not for an obstruction of longer continuance which caused it. Delaware & R. Canal Co. v. Lee, 22 N. J. L. 243.

The statute of limitations begins to run against an action to recover future or prospective damages for flooding land by the obstruction of a stream from the time the obstruction becomes permanent in its effect, so as to entitle the person injured to an immediate action for both present and prospective damages. Bunten v. Chicago, R. I. & P. R. Co. 50 Mo. App. 414.

The cause of action for the abatement of a dam as a nuisance, by injunction, accrues at the time the dam is built so as to injuriously affect plaintiff's property, and the running of the statute of limitations begins at that time. Eastman v. St. Anthony Falls Water Power Co. 12 Minn. 137, Gil. 77.

But the statute of limitations begins to run against an action for injuries caused by a milldam from the time the injuries are inflicted, and not from the erection of the dam. Prentiss v. Wood, 132 Mass. 486.

The statute of limitations begins to run against an action to recover for injury to property by a dam, not from the time the dam is built, but from the time the injury is ascertained and realized. King v. United States, 59 Fed. 9.

When the water from a dam has been set back over the land for several years less than the period of limitation, the upper proprietor may maintain an action, if, upon attempting to make a new use of his property, he finds that the use is interfered with by the water. King v. Tiffany, 9 Conn. 162.

An action for damages from the continuance of an obstruction created by a milldam backing water against the milling plant of an upper proprietor, although brought more than two years after the erection of the dam, is not barred by a statute requiring actions for damages from the erection of milldams to be brought within two years

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from the erection thereof, where the obstruction is treated as temporary only, both by such action and by a prior pending action to abate or lower the dam and for damages then accrued, brought within the two years, the statute applying only to such dams as are permanent and lasting. Hardesty v. Ball, 43 Kan. 151, 23 Pac. 937.

The statute of limitations does not begin to run against an action for obstructing the flow of a stream until damage results to plaintiff from such obstruction, where the obstruction is of gradual formation. Culver v. Chicago, R. I. & P. R. Co. 38 Mo. App. 130.

But where a permanent culvert was faulty in its original construction and insufficient to carry off the waters seeking passage through it at that time, the statute of limitations commenced to run at the time of its construction, against an action for obstructing the flow of the water. Bird v. Hannibal & St. J. R. Co. 30 Mo. App. 365.

In case of injury by flowing land by a milldam, the right to maintain which has not been acquired by prescription, the landowner is not barred of his action by lapse of the statutory period for maintaining actions of that character, since the injury is a continuing one; but no recovery can be had for injury which arose beyond the statutory period. Baldwin v. Calkins, 10 Wend. 167.

Each overflow upon the land of an adjacent owner caused by the negligence or want of skill of a railroad company in its mode of construction or management of a bridge or embankment over a running stream creates a new cause of action for injury thereby occasioned to the crops upon the land. Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529.

The right of action for damages to land by overflow caused by the construction by a railroad company of solid embankments, in place of trestle work originally constructed adjoining a bridge over a natural stream for the passage of high water, accrues when the stream is actually obstructed thereby and damage results, and not when the embankment is erected. New York, C. & St. L. R. Co. v. Hamlet Hay Co. 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

Minn. Comp. Stat. chap. 29, § 17, providing that no action for damages occasioned by the erection and maintenance of a milldam shall be hereafter sustained, unless such action be brought within two years after the erection of such dam, is construed to limit the time within which an action may be commenced for damages occasioned by the erection of a milldam, and does not begin to run until injury has been done by the dam; for, until that time, no cause of action exists. Thornton v. Turner, 11 Minn. 336, Gil. 237; Hempsted v. Cargill, 46 Minn. 118, 48 N. W. 558.

Where the erection of a dam creates a permanent injury to adjacent land by overflowing the same from the time of its construction, limitation in an action for such injury will run from the time when the dam was built. Missouri, K. & T. R. Co. v. Graham, 12 Tex. Civ. App. 54, 33 S. W. 576.

The duty of a railroad company so to construct and maintain its culverts across natural streams as to inflict no injury upon the riparian or adjacent owner of property by overflow is a continuing duty, and each overflow caused by negligence or want of skill in constructing such culverts is an independent wrong for which a rightful possessor of the lands overflowed may maintain successive actions for damages to his crops or other property. Ohio & M. R. Co. v. Wachter, 23 Ill. App. 415.

The improper and unlawful construction and maintenance of its roadway by a railroad company, so as to obstruct the flow of a natural stream, is a continuing breach of duty, and each injury suffered by reason thereof constitutes a new cause of action from the date of which the statute of limitation runs, and not from the time the roadway was improperly constructed. Ohio & M. R. Co. v. Elliott, 34 Ill. App. 589.

It is no defense to an action for damages to land from the overflowing thereof by backwater caused by the accumulation of sand washing into the stream from a ditch constructed by the defendant, that such ditch was constructed and has been used by him for the period necessary for the acquirement of a prescriptive right, where the lands have been overflowed for less than such period, as prescription runs, not from the time of the digging of the ditch, but from the infringement of plaintiff's rights by the formation of the obstruction. Roundtree v. Brantley, 34 Ala. 544, 73 Am. Dec. 470.

Continuance after a request to abate a nuisance created by the erection of a milldam is a new ground of action, without resorting to the period of time when it was first erected. Loftin v. M'Lemore, 1 Stew. (Ala.) 133.

A railroad company acquires no prescriptive right to overflow the lands of another by maintaining an insufficient and negligently constructed bridge upon its right of way for more than twenty years, where less than twenty years have elapsed since the flooding occurred which first invaded such owner's rights, caused by said bridge, at which time the cause of action on account thereof first accrued. Sherlock v. Louisville, N. A. & C. R. Co. 115 Ind. 22, 17 N. E. 171.

Where an injury to crops and lands is caused by the negligent construction of a railway embankment which arrested and held the flood waters of a natural stream on the lands, the owner's cause of action accrues at the date of the injury, and not at the date of the negligent construction of the improvement. Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540.

The statute of limitations begins to run against an action for injuries from a milldam, not from the time of the erection of the dam, but from the time the injuries are done. Hempsted v. Cargill, 46 Minn. 118, 48 N. W. 558.

The limitation period begins to run against an action to recover damages from a railway company because its embankment causes water to overflow plaintiff's land when the embankment is completed, the injury then being complete; and, although the railroad company leaves an opening beneath the track for the purpose of permitting cattle to pass under it, but not for a water way, for which purpose it is not adapted, the embankment will be considered as solid for the purpose of determining the time from which the statute of limitations begins to run. Haisch v. Keokuk & D. M. R. Co. 71 Iowa, 606, 33 N. W. 106.

A right to damages for the overflow of lands, caused by the defective construction of a culvert by a railroad company, accrues at the date of the overflow, and not at the time the road was built. Chicago, R. I. & P. R. Co. v. Andreesen, 62 Neb. 456, 87 N. W. 167.

In computing the period required to elapse to confer a prescriptive right to flood adjacent lands by a mill pond, the time begins when the lands were first overflowed, not when the dam was erected. Hurlbut v. Leonard, Brayton (Vt.) 202.

The cause of action for damages to crops and land from the backing of water thereon by reason of the insufficiency of a culvert in a railroad embankment on the railroad right of way arises at the time of such injury, and not at the time of the construction of the culvert, so that the statute of limitations does not begin to run

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until such damage occurs. Union Trust Co. v. Cuppy, 26 Kan. 754.

The statute of limitations begins to run, in case of water ponded back by a railroad embankment, from the time the first injury is sustained, and not necessarily from the construction of the road. Ridley v. Seaboard & R. R. Co. 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730.

Where growing crops are injured by an overflow which results from the negligent construction of an embankment by a railroad company, the statute of limitations begins to run, not from the time the embankment was erected, but from the time the injury occurred, where it appears that at the time the embankment was constructed it was uncertain as to whether it would cause adjoining land to be overflowed. St. Louis, I. M. & S. R. Co. v. Yarborough, 56 Ark. 613, 20 S. W. 515.

The statute of limitations does not begin to run against a cause of action for constructing a culvert in a railway roadbed too small to carry off the water from the adjoining lands, until it becomes evident, by a storm sufficient to demonstrate the fact, that the culvert is too small. Sullens v. Chicago, R. I. & P. R. Co. 74 Iowa, 659, 38 N. W. 545.

A cause of action for overflowing lands, due to a culvert in a water course which narrowed the passage in time of freshet, accrues at the time of the actual injury, not from the date of constructing the culvert, and is not barred by the statute of limitations until the lapse of six years. Delaware & R. Canal Co. v. Wright, 21 N. J. L. 469.

Although the cause of action for overflowing upper riparian property by water held back by a railroad culvert does not arise, so as to start the running of the statute of limitations, until the injury is actually done, yet all rights of action may become barred when the period has elapsed, since the first injury is done by the erection, which is necessary to establish easements in land. Buntin v. Chicago, R. I. & P. R. Co. 41 Fed. 744.

The defense of the statute of limitations is not available to defeat a recovery for the flowing of that part of the plaintiff's lands which were owned by the state until shortly before the action was brought. Zeidler v. Johnson, 38 Wis. 335.

e. *Venue; judgment.*

A company which maintains, under state authority, locks and dams in a river for the improvement of navigation, will be enjoined from raising its dams to such a height as to produce consequential injury to a water-power company located upon such river, but within another state, by the diminution of its flow of water. Holyoke Water Power Co. v. Connecticut River Co. 22 Blatchf. 131, 20 Fed. 71.

A suit will be sustained in the state where the damages occur, where damages are claimed by reason of a dam erected across a river, where it is the boundary between two states, and the mill is situated in the other state. Wooster v. Great Falls Mfg. Co. 39 Me. 246.

When a stream flows through premises, and is the boundary of two counties, the court of either county has jurisdiction over a suit for an injury to the premises by the presence of a dam. Powers v. Ames, 9 Minn. 178, Gil. 164.

Where a railway company constructed an embankment without sufficient water ways on the north side of Red river in the Indian territory, it was held that the company was liable for injury to lands by overflow on the south side of the river and in the state of Texas, and that the action could be maintained in the courts of that state. St. Louis & S. F. R. Co. v. Craigo, 10 Tex. Civ. App. 238, 31 S. W. 207.

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An action on the case to recover damages for a flowage of land situated in one county, by a dam situated in another county, is local, and should be brought in the county where the injured land lies, and not in the county where the dam doing the injury is situated. Worsted v. Winnipiseogee Lake Co. 25 N. H. 525.

The nuisance caused by a dam flowing a certain highway is indictable where such nuisance occurs, although the dam which occasioned it is entirely within another state. State v. Lord, 16 N. H. 357.

An action for nuisance to lands by overflowing them with back water from a dam must be tried in the county where the lands lie, or the cause of action arose. Deacon v. Shreve, 23 N. J. L. 204.

In an action for injury to a mill by water backed on its wheel the place of injury is at the location of the mill, so that the venue of the action is there, and not at the location of the dam which causes the injury. Thompson v. Crocker, 9 Pick. 59.

A suit for an injunction to restrain the threatened injury to real property by the construction of a dam which it is alleged will result in the flooding thereof is an action for an injury to real property, within Cal. Civil Code, § 392, requiring actions for an injury to real property to be brought in the county where the subject of the action is situate. Drinkhouse v. Spring Valley Waterworks, 80 Cal. 308, 22 Pac. 252.

An action for injury to land by flooding caused by the construction of a dam on a stream below may be instituted in the county in which the dam lies, although the injured land lies in another county. Pilgrim v. Mellor, 1 Ill. App. 448.

An action against a railroad company for injuries to real estate from the overflow of a river caused by the alleged negligent construction of a railway bridge is transitory, and need not, under the Nebraska statute, be brought in the county where the cause of action arose. Omaha & R. Valley R. Co. v. Brown, 29 Neb. 492, 46 N. W. 39.

Forasmuch, in an action on the case for flooding land to the permanent injury of the soil, it is essential to show title, a justice of the peace is without jurisdiction. Dixon v. Scott, 18 N. J. L. 430; Vantyl v. Marsh, 5 N. J. L. 507.

But the backing of water by a milldam overflowing lands and destroying rice crops, preventing further cultivation and tending to the immediate annoyance of the citizens generally, may be abated by justices of the peace, under Ga. Code, § 4094 (now 4760), providing for the abatement, by the order of two or more justices of the peace, of any nuisance which tends to immediate annoyance of the citizens generally. Wetter v. Campbell, 60 Ga. 266.

The court should not direct the removal of a dam where the prayer of the petition is simply for an injunction to restrain the flowing back of waters upon complainant's property. Lummery v. Brady, 8 Iowa, 33.

The right of a millowner to maintain a certain dam is *res judicata* between the parties to the suit after verdict and judgment. Kilheffer v. Herr, 17 Serg. & R. 319, 17 Am. Dec. 658.

Upon a conviction for the offense of erecting and maintaining a dam constituting a nuisance, a judgment ordering the abatement of the nuisance is improper, since the maintenance and continuance of a nuisance are distinct offenses. Munson v. People, 5 Park Crim. Rep. 16.

Recovery of merely nominal damages in a suit for prospective as well as present damages to land from the erection of a dam and changes in the flow of water caused thereby is a bar to a subsequent action for the depreciation in the

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value of the land. Swants v. Muller, 27 Ill. App. 320.

An owner whose land is injured by overflow from a dam is estopped from denying that such dam, erected by another, is of a permanent character, giving a right of action which is entire and can only be sued on by the party owning the land at the time of the injury, where he has elected to treat the injury as embracing prospective, as well as present, damages, and has recovered a judgment therefor. *Ibid.*

If nominal flowage damages have been recovered in a suit establishing the rights of the parties at suit, a subsequent suit may be maintained for the recovery of real damages. Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766.

A claim for flowage damages is "established" when the right to have it allowed is shown. Delaware Division Canal Co. v. McKeen, 52 Pa. 117.

So far as the ground of a suit for flowage damages is the same as that litigated in a former suit, it pertains to *res judicata*. Rockwell v. Langley, 19 Pa. 502.

When it is *res judicata* that a dam is too high, the owner is responsible for a continuance of the nuisance,—at least until he makes a substantial reduction, so that a reduction of 1/6000 of an inch cannot be held sufficient, but is merely fanciful. James v. Sterrett, 4 Pa. Co. Ct. 584.

A judgment for plaintiff in an action for wrongfully throwing back water upon his mill wheel is conclusive in his favor in another action for subsequent injuries from the same cause. Mersereau v. Pearsall, 19 N. Y. 108.

A verdict for defendant in an action for alleged damage to land by the backing of water thereon caused by the construction and maintenance of a milldam is not necessarily conclusive upon the plaintiff in another action brought therefor, where the maintenance of the dam, after the first suit, without any alteration thereof, may have caused a change in the condition of the channel, producing higher water than before, or heavier rains may have fallen, resulting in damage to plaintiff, since the commencement of the former suit. Jones v. Lavender, 55 Ga. 228.

In an action for damages for the overflowing of land by a third dam constructed in the same place as two former dams, a judgment for plaintiff in a former action for damages caused by the overflowing of the land by the preceding second dam is prima facie conclusive against defendant's claim to a prescriptive right to overflow beyond a point agreed upon in a written agreement between him and a former owner of the land, arising from the maintenance by him of back water from the first dam to a point beyond that so agreed upon, unless the judgment in such former action was only for the excess of the overflow from the second over and above that caused by the first dam; but if the damage caused by the third dam, whether greater or not than that occasioned by the first dam, is equal to that for which plaintiff recovered in the former action, that judgment is conclusive as to plaintiff's right to recover something for the overflow caused by such third dam. Green v. Weaver, 63 Ga. 302.

Allegations in an action for damages for the submerging of land by backing water from a milldam, that, in consequence of the erection and maintenance of the dam, certain described land and timber had been rendered worthless and of no value, "in all to her damage, $1,000," make such action one for the recovery of the entire damage resulting therefrom, which bars any subsequent action by the same plaintiff against the same defendant for damage resulting to the same land from the same cause. Clark v. Lanier, 104 Ga. 184, 30 S. E. 741.

A former recovery of damages by a landowner for injuries to his land from back water on account of the erection by a railroad company of a bridge over a stream is not a bar to another action for damages resulting to the same land by a continuance of the nuisance, where such bridge was not built in a reasonably proper and skilful manner, but was imperfectly and negligently constructed, by reason of which the loss and injury resulted. Chicago, B. & Q. R. Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239, Affirming 26 Ill. App. 280.

A judgment against a person for wrongfully maintaining a dam so as to cast water upon another's property is not conclusive in a subsequent suit for injuries occurring after the first judgment, where the evidence in the latter suit shows that he was not the owner of the premises on which the nuisance was committed at the time of the first judgment, or since. Hanse v. Cowing, 1 Lans. 288.

A judgment against the administrator of one who erected a milldam so as wrongfully to flow upper riparian property is not evidence in a subsequent suit against vendees of the heirs of the one who erected the dam, except to establish its own existence and the legal consequences flowing therefrom. Jarnigan v. Mairs, 1 Humph. 473.

Where, by judgments at law and a decree in chancery, obtained against the former owner of a milldam, the overflow of such milldam on the lands of an owner above was established as a nuisance, and such milldam was ordered cut down to a certain height, and it was afterwards sold to a party who reconstructed the same and raised its height above that allowed in said decree of court, his grantee, by reason of his relation as a privy in estate, is bound by the facts found in such judgments and decree, and cannot set up the claim that, by reason of such reconstruction, a new nuisance would have to be established. Vaughn v. Law, 1 Humph. 123.

It is no defense to an action at law for damages caused to adjacent property by overflow from a milldam, that a decree in chancery was previously entered dismissing a bill filed by the same party against the same defendant, to perpetually enjoin, as a nuisance, the overflow for which damages are claimed in such suit at law. Coulter v. Davis, 13 Lea, 451.

A judgment in a justice's court as to liability for overflowing land by the erection of a dam is, until reversed, conclusive between the parties in a subsequent suit in the supreme court. Boyer v. Schofield, 2 Keyes, 628.

Damages for obstructing the flow of water from a mill by backwater caused by the unauthorized raising of the height of a lower dam, and a judgment abating so much of the dam as caused the unlawful overflow, may properly be allowed in the same action. Williamson v. Yingling, 93 Ind. 42.

A decree completely abating a dam is proper, although its partial removal would prevent the flowing of complainant's lands, when, if reduced, it would become a useless obstruction to the natural flow of the stream, and create a pool detrimental to the health of the neighborhood. Treat v. Bates, 27 Mich. 390.

Where a dam wrongfully flows water back upon the upper proprietor, a judgment is proper directing the lowering of the dam sufficient to avoid that result. Rothery v. New York Rubber Co. 90 N. Y. 30, Affirming 24 Hun, 172.

The owners of a mining claim in the bed of a river, the waters of which have been diverted therefrom by means of a race for the purpose of working such claim, are entitled to a decree

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ordering a diminution of a dam erected below their claim subsequent to the establishment thereof, or, if necessary, to an entire abatement. Ramsay v. Chandler, 3 Cal. 90.

A recovery of damages for the negligent flooding of land will be conclusive of the right to recover for subsequent injuries from the same cause. Plate v. New York C. R. Co. 37 N. Y. 472.

A recovery in a suit for damages to crops and land by reason of an overflow caused by the defective embankment of the defendant railroad company during a heavy rain is a bar to a subsequent suit for the recovery of damages for injury to a part of the same tract of land and other property thereon caused by an overflow during a freshet which occurred during the pendency of the former suit, although it appears that the embankment of the railroad company does not necessarily cause overflow of such lands, but that overflows occur only in event of very heavy rains and high water. Texas & P. R. Co. v. Long, 1 Tex. App. Civ. Cas. (White & W.) § 559 p. 281.

A subsequent wrongful flowing of another's land raises a new cause of action. Texas & P. R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. 902.

A satisfaction given by one in possession of land under a lease, for flooding the land and destroying the trees, does not bar an action by the owner of the reversion. Bedingfuld v. Onslow, 3 Lev. 209.

Damages having been recovered for the maintenance of a dam higher than it ought to be, they cannot be recovered for a continuance of the nuisance, if it has been reduced to its lawful height, however slight that reduction may have been. James v. Sterrett, 137 Pa. 234, 20 Atl. 655.

If a mill owner has a prescriptive right of flowage without payment of damages, the judgment of a court of record will be as effectual to devest him of that right when his case has been submitted to arbitration as a deed of conveyance and is then a *res judicata*. Hersey v. Packard, 56 Me. 395.

Injuries arising after an arbitration of the amount to be paid for the overflow of land by a dam may be the subject of a subsequent action. Phillips v. Terry, 3 Keyes, 313.

An award by arbitrators of damages for overflowing lands is not wholly void for including claims previously adjudicated, when these can be readily separated, but it will be enforced for so much thereof as is good. Hoagland v. Veghte, 23 N. J. L. 93.

An award of arbitrators, to whom, pending an action for damages resulting from the overflowing of land caused by a milldam, the question of the height of the dam is submitted, which states that they proceeded to measure the dam and found it to be "4 feet 4 inches from the bottom of the river to the top of the dam on the east side of the river," will be set aside for want of certainty in regard to the measurement of the dam. Stanford v. Treadwell, 69 Ga. 725.

An award of arbitrators on the question of overflowing lands by a milldam, that the owner of the dam pay to the owner of the land a specified sum annually "for each year he keeps his milldam up to a certain point indicated by the arbitrators to a certain stump," includes the right of the dam owner to raise the water to the height so indicated by them. Sitton v. Cureton, 72 Ga. 207.

An award made by arbitrators appointed in pursuance of a written agreement between two milldam owners to determine whether the lower dam, by causing backwater, obstructed the operations of the other mill, and, if so, what amount of damages such owner has sustained, and how much the dam should be lowered to prevent the obstruction in future, is void and unenforceable, where, although definite and sufficient as to the amount of damages awarded, it is uncertain and indefinite in that part of the award requiring the dam to be taken down so that the quantity of head of water above it shall be reduced 11 inches lower than it was on the particular day the premises were examined. McDonald v. Bacon, 4 Ill. 428.

f. Damages.

The damages to be recovered for the damming back of water depend, not only on the kind of action brought,—that is, whether it is for temporary or permanent damages,—but also upon the character of the nuisance,—whether it is of a permanent nature or only temporary.

For permanent obstruction.

There is a West Virginia case which holds that where the power of a mill owner is destroyed by the wrongful construction of a dam below his mill which backs the water, the damage sustained by him is permanent, and a recovery of damage confers a license on the defendant to continue the cause indefinitely; and, in estimating the damages, the value of the water power of the plaintiff must be taken into consideration, as well as the damage occasioned to the mill by reason of the permanent loss of the power. Miller v. Shenandoah Pulp Co. 38 W. Va. 558, 18 S. E. 740.

That rule can hardly be of universal application, because, if the dam is wrongful, it certainly is not permanent, unless the upper owner chooses to treat it so, or unless reasons of public policy require it to be held to be permanent. In other cases the fact that it is wrongful shows that it is abatable, and therefore temporary, and that damages should be awarded as in other cases of temporary injuries.

Although an embankment obstructing the flow of a stream is of a permanent nature, a person injured by the overflow is not compelled, or entitled, to recover all damages in one action, where the overflow is not permanent, but occurs annually; and successive actions may be maintained for injuries to crops. The test seems to be, not the permanency of the obstruction, but the permanency and certainties of the injuries inflicted by it. McKee v. St. Louis, K. & N. W. R. Co. 49 Mo. App. 174.

When a water course is obstructed by a railroad embankment, a riparian proprietor is entitled to have permanent damages assessed in the absence of an undertaking by the railroad corporation to restore the water to its original course. Arthur v. Grand Trunk R. Co. 22 Ont. App. Rep. 89.

Where damage is caused to land by overflow which results from the construction of an embankment by a railroad company, the proper measure of damage is the difference between the actual value of the land at the time the work was completed, supposing the consequences to be known, and the value of the land in case the overflow was increased by the construction of the embankment. St. Louis, I. M. & S. R. Co. v. Morris, 35 Ark. 622.

The measure of damages, if any are allowable, to property affected by it, for the erection of a permanent dam, is the difference between the value of the property before and after the erection. Kentucky Lumber Co. v. King, 23 Ky. L. Rep. 1422, 65 S. W. 156.

The measure of damages for permanently

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overflowing plaintiff's land and obstructing his prescriptive right of way by water cast upon it by erecting a dam is the value of the land submerged, and the depreciation in the value of the remainder by the destruction of the road. Hall v. Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

Where a dam is constructed which causes plaintiff's property to be permanently overflowed, the measure of damage is the difference in the value of the property at the time the damages were inflicted and its value before that time. Rowe v. Shenandoah Pulp Co. 42 W. Va. 551, 26 S. E. 320.

The owner of land injured by the overflow of water thereon from a stream, caused by the manner in which a railroad company has constructed its roadway over the same, may recover damages from such railroad company for past and future injury to the land in one suit, as for a permanent nuisance, and such recovery is a bar to all future actions. The measure of damages in such case will be the depreciation in the market value of the land, accruing from the construction of the road in such a manner as to cause the overflow. Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621.

Where a dam caused a permanent injury to land by overflowing it, the resulting depreciation in the value of the land is the proper measure of damages. Missouri, K. & T. R. Co. v. Graham, 12 Tex. Civ. App. 54, 33 S. W. 576.

Where the injury to land by overflow resulting from the erection of a dam by a railway company is permanent and continuous, the damages therefor must be estimated on the market value of the land at the time the dam was constructed, and not at the date of trial. *Ibid.*

Where land is injured by an overflow, the measure of damage is the difference between the market value immediately before and immediately after the injury, and not the difference between the value at any time before the injury and at any time thereafter up to the time of trial. Texas Trunk R. Co. v. Elam, 1 Tex. App. Civ. Cas. (White & W.) § 445, p. 201; Texas C. R. Co. v. Clifton, 2 Tex. App. Civ. Cas. (Willson) § 489, p. 433; St. Louis Trust Co. v. Bambrick, 149 Mo. 560, 51 S. W. 706.

The measure of damages recoverable by a purchaser of land overflowed by a dam at the time of his purchase, the right to flow which is not acquired until after his purchase, is the value of the land so overflowed and the depreciation in value of his remaining lands by reason thereof, to be assessed as of the time of such purchase, with interest on the amount awarded from that date to the day of trial. Pick v. Rubicon Hydraulic Co. 27 Wis. 453.

The measure of flowage damages is the difference between what the property would have sold for as affected by the injury and what it would have brought unaffected by such injury, at the time the injury was ascertainable and due. The compensation is to be prospective as well as retrospective, but to be estimated with reference to the time when the injury was committed. Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362.

In an action against a railroad company for damages to land from backwater caused by the imperfect and negligent construction of a bridge over a stream, whereby the free passage of the water is obstructed, the party whose property is damaged is not bound to assume that the structure will be a permanent one, and therefore sue for all damages for past and future injury to his land; but he has the right to regard the nuisance as of a transient character, and, instead of bringing one action for the whole injury to the value of his property resulting from the original construction, he may sue for the amount of such injury as he suffers from its continuance. Chicago, B. & Q. R. Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239.

Temporary structure.

The rule that in actions for injury to real property the measure of damages is the difference between the value of the property just before and immediately after the injury, does not apply where the injury results from the construction of a dam causing the water to flow back on the injured property, as the nuisance is not permanent, but may be subsequently removed, or, if not removed, another action may be maintained for the subsequent damages; in such cases the measure of damages consists of the loss sustained in the rental value of the property down to the time of the commencement of the action. Pinney v. Berry, 61 Mo. 359.

Where the cause of injury to realty by water may be remedied or removed by the expenditure of labor or money, it will not be regarded as permanent or irremediable, and, in an action to recover for a negligent injury in such case, the measure of damages will be the actual damages sustained at the time of bringing the action, and not the permanent depreciation of the value of the realty in consequence of the injury. Nashville v. Comar, 88 Tenn. 415, 7 L. R. A. 465, 12 S. W. 1027.

Damages, past and prospective, may not be recovered in an action against a railroad company for overflow caused by the negligent construction of its roadbed across a stream with an insufficient culvert; recovery may be had only for the damages which have been sustained up to the time of the commencement of the action. Cleveland, C. C. & St. L. R. Co. v. Kline (Ind. App.) 63 N. E. 483.

Where a railroad company constructs its road across a stream, and fails to provide a sufficient culvert for the water to pass through, and land is thereby overflowed, in the absence of an injury to the soil, the measure of damage is the loss to the owner in the use or the rental value of the land which had accrued at the time the suit was brought, and not the salable value of the land. Kansas City, Ft. S. & M. R. Co. v. Cook, 57 Ark. 387, 21 S. W. 1066; St. Louis, I. M. & S. R. Co. v. Lyman, 57 Ark. 513, 22 S. W. 170.

When damage from unlawful flooding is due to a cause that may be removed, the measure of damages is the difference in productivity before and after the flooding. Adams v. Durham & N. R. Co. 110 N. C. 325, 14 S. E. 857.

An injury to real estate by the overflow of water, which is not necessarily permanent, may be estimated for each year of the overflow by ascertaining the difference between the fair market value of the land immediately before and immediately after the injury in each year. Sullens v. Chicago, R. I. & P. R. Co. 71 Iowa, 659, 33 N. W. 545.

Compensatory damages are enough, in the absence of malice or aggravating circumstances, for it cannot fairly be presumed that a dam will be continued at an unlawful height and continue a nuisance in the face of a judicial decision conclusively fixing its character. But if the owner will not abate it, he may be compelled to do it in a second action by a verdict for punitive damages. McCoy v. Danley, 20 Pa. 85, 57 Am. Dec. 680.

In an action against a railroad company to recover damages caused by an overflow which resulted from the negligent construction of its road, the measure of damage is the injury which

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the land and the property thereon sustain from the successive overflows when they occur, where it appears that the result of the overflow is not to take a part of, or effect a change in, the realty itself, and not the difference between the value of the land at and just before the time of the building of the road, and the market value of the same after the injury was done. Gulf, C. & S. F. R. Co. v. Helsley, 62 Tex. 593; Galveston, H. & S. A. R. Co. v. Tait, 63 Tex. 223; Galveston, H. & S. A. R. Co. v. Seymour, 63 Tex. 347; Sabine & E. T. R. Co. v. Johnson, 65 Tex. 389; Green v. Taylor, B. & H. R. Co. 79 Tex. 604, 15 S. W. 685; Gulf, C. & S. F. R. Co. v. Hepner, 83 Tex. 136, 18 S. W. 441.

A landowner has a right, in an action against a railroad company for damages to his crops by overflow caused by the negligent and improper manner in which the company had constructed its rondway over a natural stream, to regard the nuisance as of a transient character, and need not have all his damages, both present and prospective, assessed in one suit. St. Louis, A. & T. H. R. Co. v. Brown, 34 Ill. App. 552.

Damages caused by backwater from a milldam can be recovered only up to the time of commencing action, and not up to the time of trial. Jones v. Lavender, 55 Ga. 228.

Damages for a continuing trespass by overflowing land are limited to those which have accrued before the action is commenced, and loss or damages accruing after action brought cannot be recovered therein; but a new right of action is given for such damages so flowing from the continuance of the trespass. Savannah & O. Canal Co. v. Bourquin, 51 Ga. 378.

The damages recoverable by one in possession of a mill and dam for injury to it by backwater from a lower dam is the actual injury to the use of the mill suffered by him up to the bringing of the suit. Warring v. Martin, Wright (Ohio) 380.

Where the obstruction to a stream had been washed away previous to the commencement of an action to recover damages for the obstruction, damages for injury inflicted by rebuilding it during the pendency of the action cannot be recovered, for the reason that where the nuisance is temporary, and has been or may be removed, only such damages as accrued previous to the institution of the action can be assessed. Hudson v. Burk, 48 Mo. App. 314.

The measure of damage for wrongfully flowing land by constructing a dam is limited to the injury actually sustained at the commencement of the suit. Brown v. Chicago & A. R. Co. 80 Mo. 457.

One suing for injuries to land and crops caused by the formation of a bar in a stream raised by a marble company's discharging sand therein, is entitled to recover all the damages resulting from unlawful acts committed before suit, although some of the consequences did not become apparent until afterwards. Goodrich v. Dorset Marble Co. 60 Vt. 280, 13 Atl. 636.

The measure of damages for a continuing trespass by the flowing of water back upon plaintiff's land is limited to the time of bringing the suit. Close v. Samm, 27 Iowa, 503.

In a suit to recover damages by flowage of lands, plaintiff can only recover for injuries actually sustained before suit brought, and such recovery will not bar a future action for damages accruing after suit brought but before verdict rendered. Cobb v. Smith, 38 Wis. 21.

Damages for injuries caused by overflow of land by the wrongful erection of a milldam can be recovered only to the time of the issuance of the writ, not to the time of filing the declaration. Langford v. Owsley, 2 Bibb, 215, 4 Am. Dec. 699.

In an equitable suit to restrain the continuance of a nuisance created by obstructing the flow of a water course, the court, in assessing damages, is not limited to those inflicted prior to the commencement of the suit, as in an action at law, but may assess those that accrue during the pendency of the suit. Lamar v. Charlotte & S. C. R. Co. 10 S. C. N. S. 476.

Plaintiff in an action for damages by the overflowing of land by backwater is entitled to recover for any damages suffered, even after suit brought, if they are the natural and necessary results of the acts done prior thereto. Baltimore v. Merryman, 86 Md. 584, 39 Atl. 98.

Injury to crops.

A covenant in a deed giving the right to erect a milldam on a creek, that the water shall not be raised so as to damage certain land, and, if raised in the winter, shall be taken off in time for the crop in the spring, contemplates actual damages only; and plaintiff's recovery should be restricted accordingly, unless the injury complained of is a failure to take off the water in the spring in time for the crop, in which case he would be entitled to nominal damages in vindication of his right, though no actual damage was sustained. Green v. Weaver, 63 Ga. 302.

In an action to recover damages for injury caused by an overflow of land and crops, the plaintiff cannot recover for damage done to crops on such portions of the land as were rented to tenants who had paid their rent. St. Louis, A. & T. R. Co. v. Trigg, 63 Ark. 536, 40 S. W. 579.

Where crops are injured by an overflow of land as a result of the negligent construction of a railroad, the owner of the land can recover, as damages against the railroad company, only the value of his interest in his crops which were raised by his tenants on shares. Texas & P. R. Co. v. Saunders, 4 Tex. App. Civ. Cas. (Willson) § 304, p. 528, 18 S. W. 793.

When one's crop has been destroyed by overflow caused by the improper construction of a railway, the injured party, as far as money can do so, ought to be put in the same condition that he would have been had the tort not been committed; and interest upon the value of the crop so destroyed, from date of its destruction, is as necessary as the value itself. Gulf, C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

The measure of damages for the destruction of growing crops by overflowing them with water is their value in their condition at the time of the injury. Lommeland v. St. Paul, M. & M. R. Co. 35 Minn. 412, 29 N. W. 119.

The measure of damages for injury to, or destruction of, growing crops from the flooding of land is the value of the same at the time they were injured or destroyed. St. Louis Merchants' Bridge Terminal R. Co. v. Pepper, 84 Ill. App. 116.

Where a crop is injured or destroyed by an overflow, the measure of damages is the actual value of the crop which was injured or destroyed at the time of such injury or destruction, with legal interest upon the amount from that date. Texas & St. L. R. Co. v. Reid, 1 Tex. App. Civ. Cas. (White & W.) § 255, p. 120; St. Louis, I. M. & S. R. Co. v. Yarborough, 56 Ark. 613, 20 S. W. 515; St. Louis, I. M. & S. R. Co. v. Lyman, 57 Ark. 513, 22 S. W. 170.

In an action for injury to an owner's crops by an overflow, the value thereof, if not up when destroyed, must be estimated upon the basis of rental value and cost of seed and labor; but, when the crop is more or less matured, its value when destroyed constitutes the measure of dam-

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ages. Ohio & M. R. Co. v. Nuetzel, 43 Ill. App. 108.

Where growing crops are injured by an overflow, the correct criterion for ascertaining the value of such crops at any period of their existence is to prove what the crops were worth at or near the place they were grown when matured, and to make proper estimates and allowances, from ascertained or ascertainable facts, for the contingencies and expenses attending the further cultivation and care of the crops. Gulf, C. & S. F. R. Co. v. McGowan, 73 Tex. 355, 11 S. W. 336.

The measure of damages for the destruction of an ungathered crop of produce as the result of an overflow caused by the defective construction of a railroad is the value of the crop as it stood on the ground and at the place where it was destroyed, and not the market value of the crop after it was gathered and conveyed to market. Sabine & E. T. R. Co. v. Smith, 73 Tex 1, 11 S. W. 123.

The measure of damages against a railway company for the destruction of growing crops and land injured or destroyed by overflow caused by the defective construction of a railroad track is the market value of the destroyed crop at the time it was destroyed, and the injury to the land caused by the overflow. Gulf, C. & S. F. R. Co. v. Pool, 70 Tex. 713, 8 S. W. 535.

The measure of damages for the destruction of crops by flooding is the value of the crops when destroyed, with the right to the owner to mature and harvest them, in estimating which it is proper for the jury to take into consideration the fact that the land was very fertile and productive, and had produced for a series of years crops which were larger and brought better prices than the average. Economy Light & P. Co. v. Cutting, 49 Ill. App. 422.

In case of injury to growing crops by water thrown upon the land by another's negligence, the measure of damages is the difference between the value of the premises immediately before the overflow and the value of the same immediately thereafter, the growing crops being regarded as part of the realty, and not the estimated value of the crops destroyed. Drake v. Chicago, R. I. & P. R. Co. 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215.

The measure of damages for the destruction of grass by an overflow is its value at the time destroyed; and when the injury is of such a character as to prevent the growth of the grass, and to deprive the owner of the use of his pasture for a considerable time, he is entitled to damages for the value of the use of the land for such purpose of pasturage in the condition it would have been but for the overflow, there being no permanent injury to the land. Starvation of cattle cannot be added to the value of the use of the pasture during the alleged overflow, as such matters are too remote, and, if allowed, there would be double damages for the same injury; but if exposure to deep water caused injury to and loss of stock, and the overflow was the direct and proximate cause of such injury, and it was the result of the negligence of defendant, and not of the failure of plaintiff to use reasonable care to protect his cattle after or during the overflow, damages are recoverable for such loss. Broussard v. Sabine & E. T. R. Co. 80 Tex. 329, 16 S. W. 30.

The additional amount of cotton which the landowner would have raised but for the overflow, and the value of such cotton when ready for market, without evidence as to the expense of cultivating, gathering, preparing it for and placing it in market, does not show the value of the crop at the time of the injury, and, hence, does not afford the proper means of measuring the landowner's damage. International & G. N. R. Co. v. Pape, 73 Tex. 501, 11 S. W. 526.

It seems that the most satisfactory means of arriving at the value of a growing crop injured by an overflow is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of its preparation and transportation to market. The difference between the value of the probable crop in the market and the expense of maturing, preparing, and placing it there, will, in most cases, give the value of the growing crop. *Ibid.*

Though the measure of damages for the destruction of grass caused by an obstruction alleged to have been erected by defendant, which prevented the natural flow of water, is the value of the grass when the overflow occurred, yet, when the overflow is of such long duration as to destroy the use of the land for pasturage, and prevent, thereafter, the growth of grass, that fact may be considered as an element of damage. Sabine & E. T. R. Co. v. Brousard, 69 Tex. 617, 7 S. W. 374.

Under the rule that the owner of land overflowed by reason of the negligence of another may recover the value of the crops and of other property destroyed by the overflow, the value of grass submerged and destroyed may be recovered. Sabine & E. T. R. Co. v. Johnson, 65 Tex. 389.

Under the rule that the owner of land overflowed by reason of the negligence of another may recover the value of the crops and of other property on the land destroyed by the overflow, the value of fruit trees destroyed may be recovered. *Ibid.*

The measure of damages for the loss of growing crops by flooding is their value when the loss occurred, to determine which evidence as to the probable yield, if the loss had not occurred, is admissible. Chicago, B. & Q. R. Co. v. Schaffer, 26 Ill. App. 280.

In an action for damages for overflowing lands where the special damage alleged is injury to crops and fruit trees, and there is no evidence to show permanent injury to the land, the court should charge the jury restricting the damage to the crops and trees; and it is error in such a case to charge the jury as to the measure of damages in case of permanent injury to the land. Gulf, C. & S. F. R. Co. v. Hepner, 83 Tex. 136, 18 S. W. 441.

In an action against a railroad company to recover damages for injury to crops by an overflow which resulted from the negligent construction of an embankment by the company, the jury, in arriving at the value of the crops at the time they were destroyed, may consider the probable value at maturity, if it appears from the evidence that the crops would have matured had they not been destroyed by the overflow in question. St. Louis, I. & M. & S. R. Co. v. Lyman, 57 Ark. 513, 22 S. W. 170.

For the purpose of determining the value of a growing crop destroyed by an overflow, it is proper to consider circumstances existing at the time the crop was destroyed, as well as at any time before the trial, favoring or rendering doubtful the conclusion that the crop would become more valuable, and to consider the hazards and expenses incident to the process of supposed growth or appreciation. Hence, where the evidence showed that the crop was destroyed by backwater from a railroad embankment, but that a few days afterwards there was a general overflow which would have destroyed the crop had the embankment not been erected, a verdict for damages, which was based upon the assumption that the crop would have matured,

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was set aside. St. Louis, I. M. & S. R. Co. v. Yarborough, 56 Ark. 613, 20 S. W. 515.

The measure of damages for injury occasioned by the overflowing of meadow lands, causing the destruction of hay thereon partly grown, let out on shares, is the net presumed value of the crop less its actual value in its damaged condition, and not the difference between the rental value of the premises had they not been injured and the rental value with the injury. Folsom v. Apple River Log Driving Co. 41 Wis. 602.

What a plaintiff whose crop has been destroyed by an overflow might have made had he planted another crop is too uncertain to base upon it any estimate as to the amount by which his damages should be reduced; although it appears that neighboring landowners raised crops after their first planting had been destroyed by the overlow, but the value of their crops and the expense of raising them is not shown. Gulf, C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

The destruction of crops planted when the owner knew that they would be flooded and destroyed cannot be included in the damages for flooding the land, although the rental value of the land flooded and the permanent injury thereof may be recovered. Willitts v. Chicago, B. & K. C. R. Co. 88 Iowa, 281, 21 L. R. A. 608, 55 N. W. 313.

Injury to mill privilege.

One in possession of mills may recover damages from another who throws water back on his wheels sufficient to indemnify him for the injury to his interest in the premises. Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406.

The damage suffered by a mill privilege subjected to flowage is the amount of deterioration in value which it has suffered therefrom. Woodward v. Webb, 65 Pa. 254.

The damage caused to an upper mill by the flooding of its water wheel by another's dam is measured by the actual damage caused by placing the obstruction in the river. Burnett v. Nicholson, 86 N. C. 99.

In a suit for damages by the owner of a mill against a lower owner who has injured his power by the erection of a dam, the measure of damages is not the loss occasioned by the stoppage of the mill, but only such damage as would have been occasioned by the back flowage had the upper owner supplemented his water power by steam, or in some other way continued the operation of his mill. Decorah Woolen Mill Co. v. Greer, 49 Iowa, 490.

The measure of damages for flowing water back on a mill wheel is the value of the use of the mill during the time it is necessarily idle and the amount it is permanently diminished in value by reason of the erection. Loss on product of the mill cannot be recovered. Walrath v. Redfield, 11 Barb. 368.

For the unlawful flowing of his privilege, the owner of a flouring mill may recover the real damage to the mill in ordinary events, and not according to what his profits would have been from an accidental rise in the price of rye. Schuylkill Nav. Co. v. Freedley, 6 Whart. 109.

In an action for damages to a mill and furnace by flowage, the damages to a tavern not appurtenant to either cannot be recovered. Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362.

The court will not set aside a verdict in plaintiff's favor for injuries by the backing of water on his mill wheels as excessive unless it can see that the jury fell into some important mistake of computation, or departed from some rule of law given them for their guidance, or made deductions from the evidence not warranted by it. Palmer v. Fiske, 2 Curt. C. C. 14, Fed. Cas. No. 10,691.

In a common-law action in Wisconsin by an upper mill owner for damages caused by the backwater from a lower mill, recovery can be had only for damages to the mill site, if any, and not for the mere flowage of the lands, since the passage of the milldam law taking away the common-law action for damages to lands flowed. Large v. Orvis, 20 Wis. 696.

Measure.

Where pasture and garden are destroyed by an overflow of water the measure of damages is the rental value of the overflowed land. Barrows v. Fox, 39 Minn. 61, 38 N. W. 777.

In general, a proper measure of damages for the loss of growing crops—annual crop of grass—is the value of the same standing on the ground, and not necessarily the rental value of the land,—so held where crops were overflowed. Byrne v. Minneapolis & St. L. R. Co. 38 Minn. 212, 36 N. W. 339.

The measure of damages for the destruction of crops, trees, and the covering of land with sand and clay by water is the value of the crops and trees destroyed, plus the difference in the value of the land immediately before and immediately after the sand and clay were deposited upon it. Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L. R. A. 417, 70 N. W. 263.

The damages for turning water upon property to the injury of house, grounds, and fruit trees is the difference in value of the property immediately before and immediately after the injury is done. Chase v. New York C. R. Co. 24 Barb. 273.

In an action to recover for overflowing lands and injuring mill property because of log jams caused by sorting works and booms, the measure of damages is the value of the premises immediately before and immediately after the injury, and these may be recovered by the equitable owner in possession under an executory contract of sale. Hueston v. Mississippi & R. River Boom Co. 76 Minn. 231, 79 N. W. 92.

Recovery in an action for damages from the overflowing of land by backwater is not confined to loss of rents or profits directly caused by the overflow, where the evidence shows permanent injury to the land itself. Baltimore v. Merryman, 36 Md. 584, 39 Atl. 98.

The rule as to the measure of damages in case of injury to land and property thereon by an overflow is that when the injury to the land is permanent the measure is the difference between the market value of the land before and after the injury; but when the injury is not permanent, it is the injury which the land and other property sustain from the successive overflows when they occur. Galveston, H. & S. A. R. Co. v. Bibb, 3 Tex. App. Civ. Cas. (Willson) § 271, p. 330.

When a landowner wrongfully destroys the land of a neighbor by flowage, the value of the land destroyed constitutes the measure of damages. Texas & P. R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. 902.

The damages for a flowage of agricultural lands are measured by their productive capacity as determined by observation of crops previously gathered thereon. Garrett v. Edenton, 74 N. C. 388.

Damages to agricultural land flowed or injured by sobbing are measured by the loss of net profits therefrom. Spilman v. Roanoke Nav. Co. 74 N. C. 675.

Rules for estimating.

In an action for flowing land, by one in pos-

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session under claim of title, he is entitled, prima facie, to compensation for the whole damage done to the property; but it may be shown what his interest really is for the purpose of reducing his recovery to his actual damages. Bassett v. Salisbury Mfg. Co. 28 N. H. 455.

Upon the question of damages for overflowing lands, the jury may consider the benefit caused to the land by its being overflowed. Avery v. Van Deusen, 5 Pick. 182.

In estimating the damages for flowing land, regard is to be had as to what would have been the condition of the land without the flowage. Bates v. Ray, 102 Mass. 458.

The damages to be paid for flowing land cannot be affected by what defendant paid a few years before for flowing land on the other side of the stream at about the same locality and level as that of the plaintiff. Kelliher v. Miller, 97 Mass. 71.

Damages cannot be recovered by reason of less drift wood coming to the shore of a riparian owner, when the only loss is the possible chance of the claimants taking what does not belong to them. Barrett v. Bangor, 70 Me. 335.

The recovery, so far as rents, issues, and profits are concerned, for the overflowing of land by water from a milldam, part of the land being uncleared, is not to be restricted to the net gain that the owner would derive from land in its condition; but the capabilities of the land for profitable production in a changed condition, if the change was rendered impracticable or more difficult by the nuisance complained of, are to be considered. Ellington v. Bennett, 59 Ga. 286.

Where the owner of land is deprived of the use of his pasture by reason of the overflow of the land, and such pasture would supply the requisite food for his stock, and he is forced, in order to preserve his stock, to remove them from the pasture which is rendered dangerous by the overflow, and to place them on other and more expensive pasture, he can recover the difference between the expense of keeping the stock on the land overflowed and on the more expensive pasture. Hughes v. Austin, 12 Tex. Civ. App. 178, 33 S. W. 607.

Th measure of damages for the flooding of the premises of another with water by the raising of a dam in a river is the depreciation in the market value of the premises, to be determined by a comparison of the market value of the same before and after the injury. Sterling Hydraulic Co. v. Galt, 81 Ill. App. 600.

An assessment of damages to the land of an owner by flooding, for the full value of the property, is unreasonable and exorbitant, where such injury is not such as to deprive the owner of the whole property, and will not do so in any event in the future. Bailey v. Heintz, 71 Ill. App. 189.

The damage to a tenement caused by water raised by a milldam setting back, through a drain, into the cellar, includes injury to the building from dampness and diminished rents. Willey v. Hunter, 57 Vt. 479.

The measure of a landowner's damages by reason of the destruction of his crop and pasture and injury to his realty by water turned back by a railway embankment is the fair value of the crop and pasture in its condition as destroyed, plus the difference in the fair market value of the real estate immediately before and immediately after the inundation. Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540.

The destruction of timber by the maintenance of a dam is a proper element of damages in an action for the injury, although the timber does not in fact die until after the commencement of the action. Hayden v. Albee, 20 Minn. 159, Gil. 143.

In an action for damages against a railway company for injury to plaintiff's house by an overflow caused by defendant's roadbed, the plaintiff may recover such an amount as would be required to restore his house to its former condition, with reasonable compensation for the loss of its use while in the course of repair; but he is not entitled to recover for the destruction of the house and contents by a storm which occurred seven months after the overflow, on the ground that such loss could be attributed to the weakened condition of the house caused by the overflow. In such a case the injury done by the storm cannot be regarded as damage which directly and necessarily resulted from the overflow. Galveston, H. & S. A. R. Co. v. Ware, 67 Tex. 635, 4 S. W. 13.

The jury, in estimating damages in an action for an injury to land from the construction and maintenance of a dam causing the water to "flow back and over" such land, may consider injury thereto from seepage caused by such backwater, and are not confined to damages caused by the actual overflowing of the banks. Marsh v. Trullinger, 6 Or. 356.

Impairment of the future utility of land overflowed by backwater from a milldam may be considered by the jury in estimating damages. *Ibid.*

The jury, in estimating the damages from the loss of the use of lands overflowed by backwater from a milldam, may consider the value of the land for cultivation, the condition thereof, and the cost of ditching and preparing it for cultivation. *Ibid.*

In determining the yearly value of land for the purposes of cultivation, it is proper to consider the crop which it would produce if free from the backing of water thereon. Georgia R. & Bkg. Co. v. Berry, 78 Ga. 744, 4 S. E. 10.

An owner of land bordering on a stream, whose title extends to highwater mark is, in case of the erection of a dam by a lower proprietor, entitled to recover for the injury to the land flowed thereby above the point where the stream impresses itself upon the soil for sufficient periods to deprive it of vegetation and destroy its value for agriculture, and not merely above the highest point that the water reached in times of freshet. Dow v. Electric Co. 69 N. H. 498, 45 Atl. 350.

Profits and interest.

In an action for backing water onto plaintiff's mill wheel, the profits which plaintiff has lost, and which he would have earned through the mill had the machinery not been impeded by backwater, may properly be allowed. Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914.

When a lower riparian mill owner wrongfully flows another's privilege to his damage, he is liable for the net profits which are reasonably certain to have accrued but for such flowage. National Fibre Board Co. v. Lewiston & A. Electric Light Co. 95 Me. 318, 49 Atl. 1075.

In an action by the owner and operator of a cotton mill, driven by water, against the owner of a mill on the same stream, to recover damages for the unlawful raising of a dam across the stream below, and interrupting the operation of the cotton mill by backwater, and thereby diminishing the profits of the plaintiff, evidence of the profits of manufacture, lost by the plaintiff from the interruption, may be submitted to the jury, to enable them to ascertain the loss and damage which the plaintiff had sustained. Simmons v. Brown, 5 R. I. 299, 73 Am. Dec. 66.

Where a lower riparian owner wrongfully raises his dam, and thereby flows the mill on

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another's privilege, he will only be liable for damage to the property, and not for lost profits, in an action brought by the owner of the mill which was operated by such owner and his cotenants. Plimpton v. Gardiner, 64 Me. 360.

The measure of damages to farm land wrongfully overflowed so as to prevent its cultivation is the fair rental value thereof, and not the possible, or even probable, profits that might have been made had not the land been overflowed. Chicago v. Huenerbein, 85 Ill. 594, 28 Am. Rep. 626.

Interest will not be allowed in computing unliquidated damages for flowing land. Lamar v. Charlotte & S. C. R. Co. 10 S. C. N. S. 476.

But, in an action against a railroad company to recover damages to crops by an overflow of lands which resulted from the negligent construction of defendant's embankment, the plaintiff may recover the interest on the value of the crops. Gulf, C. & S. F. R. Co. v. Dunlap (Tex. Civ. App.) 26 S. W. 655.

Costs and expenses.

In an action for the recovery of flowage damages expense of conducting the suit and establishing legal rights cannot be recovered. Good v. Mylin, 8 Pa. 51, 49 Am. Dec. 493.

An action for damages for injury to mill property by backwater from the waters of a milldam erected by another below is one for damages solely, not arising out of a contract, within the meaning of a statute providing that "in all actions for damages solely, not arising out of contract," recovery over a certain amount carries full cost. Sutherland v. Venard, 32 Ind. 483.

In an action for damages for overflowing adjacent land, caused by the erection of a milldam, it must appear in the record, or on the face of the judgment, that such mill was a grist mill or other water works of utility, to justify making an exception to the general law that costs must follow the event of a suit, and apportioning the same as provided in an act of legislature, providing that in actions for damages for overflowing from grist mills or other water works of utility the plaintiff shall recover no greater sum in costs than the damages awarded. McReynolds v. Cates, 7 Humph. 29.

Where an exception to the general law that costs follow the event of a suit is made by an act of legislature providing that in suits for damages for the overflowing of water from the erection of a grist mill or other water works of utility the plaintiff shall recover no greater sum in costs than is awarded in damages, it must appear in the record of a case that it falls within that exception, otherwise the general law will apply. Gray v. Tate, 11 Humph. 64.

Where the damages awarded for overflowage of lands, caused by the erection and maintenance of a milldam or other water works, is less than $5, a proviso in an act of the legislature allowing the successful party in such actions full cost, to the effect that if the judgment for damages does not exceed $5 the plaintiff shall not recover more costs than damages, but no provision being made as to the residue of costs in such cases, will be construed as rendering each party liable for his own proper costs, except so much thereof as equals the damage recovered, to which the plaintiff would be entitled. Gardenhire v. McCombs, 1 Sneed, 83.

The question of title is not in issue in an action for flowing lands by a milldam, which defendant claims the right to do under a license which plaintiff claims was subsequently revoked, within the meaning of a statute giving full 59 L. R. A.

costs in cases where the title is in issue. Otis v. Hall, 3 Johns. 450.

Other matters.

Where land is injured by overflow, but the amount of the damage to the land is not shown, only nominal damages can be recovered. St. Louis, A. & T. R. Co. v. Graham, 55 Ark. 294, 18 S. W. 56.

In a second action brought to recover damages for the continuance of a nuisance by flowing plaintiff's land, the damages should be limited to such as have been inflicted since the former action, as successive actions may be brought for future continuances of the nuisance. Bradley v. Amis, 3 N. C. (2 Hayw.) 399.

The measure of damages for injury to a tenant for a year, only, of land flooded by the obstruction of a stream is not the rental value of the land flooded, but should be confined to the value of the crops destroyed. McKee v. St. Louis, K. & N. W. R. Co. 49 Mo. App. 174.

If a railway company, by the negligent construction of its roadbed, overflows land, and the overflow proximately causes the drowning of cattle, the owner is entitled to recover their value, irrespective of the question as to whether they were drowned on his own land. Sabine & E. T. R. Co. v. Johnson, 65 Tex. 389.

VIII. *Who may sue.*

a. *In general.*

1. *Owner.*

The sale of all but a small parcel of a tract of land to which a right of way for a water course is appurtenant will not deprive the grantor of the right to maintain an action for obstruction of the water course. Watson v. Bloren, 1 Serg. & R. 227, 7 Am. Dec. 617.

The owner of land bordering on a great pond is injured by the maintenance of a dam which raises the water above its natural level on his property, and a sluiceway which draws it below its natural level so as to cut him off from access to the pond, by reason of which he suffers particular injury. Potter v. Howe, 141 Mass. 357, 6 N. E. 233.

One disseised of land may maintain an action on the case for nuisance against the grantee of the disseisor, who maintains on the land a dam whereby other lands of the disseisee are flooded. Fifield v. Bailey, 55 N. H. 380.

The owner of land who has leased it to a tenant for a share of the crop may sue a railroad company which has obstructed the flow of a water course, and thereby injured the crops growing on the land. Neal v. Ohio River R. Co. 47 W. Va. 316, 34 S. E. 914.

The owner of an estate in reversion in land is entitled to damages thereto from overflow caused by the obstruction by a railroad company of a natural water course and a diversion of the water therefrom upon such land, where the lesser estate consists in a tenancy at will, liable to be determined by the owner at any instant, subject only to the tenant's right to the emblements, in case of there being growing crops: and in such case the measure of damages will be the depreciation in the market value of said land by reason of such overflow. Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621.

A mill owner may maintain an action for backwater upon his wheel, although the mill is in possession of a tenant at will, where his rent has been reduced because of the injury. Sumner v. Tileston, 7 Pick. 198.

The owner of a mill may maintain an action for obstruction of the wheel, although the mill

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is in possession of tenants, if, by reason of their threat to quit, he has been compelled to make a reduction of rent. Baker v. Sanderson, 3 Pick. 348.

The owner of a reversionary estate, complaining of injuries to the soil, whether such as necessarily or inevitably injure the inheritance or not, resulting from flowing by a dam, is entitled to recover from the wrongdoer. Potts v. Clarke, 20 N. J. L. 536.

A reversioner may maintain an action for the throwing back of water upon his freehold by a dam, although there is no immediate and visible injury. Ripka v. Sergeant, 7 Watts & S. 11, 42 Am. Dec. 214.

Where a life tenant of land adjoining a stream conveyed the right to erect a dam across the same, he to receive power from the waters collected to run his mill, the remainderman subsequently coming into possession, by using the water power, was estopped from denying the validity of the conveyance. Townes v. Augusta, 46 S. C. 15, 23 S. E. 984.

The owner of land cannot recover from a railroad company for the destruction of crops from overflow caused by an obstruction by the company of a natural water way, where such land is leased to a tenant, the rent to be paid out of the proceeds of the crops after they have been marketed by the tenant, although the effect may be to deprive such owner of his rent. Ohio & M. R. Co. v. Hoeltman, 34 Ill. App. 429.

In a complaint for flowing land owned by tenants in common by means of a millidam, all the cotenants must join. Tucker v. Campbell, 36 Me. 346.

A tenant in common of land, who cultivates it under an agreement with others in interest that he is to be the sole owner of the crops, is entitled to maintain an action against the owner of a dam which set the water back upon the land to the injury of the crops. Thorn v. Maurer, 85 Mich. 569, 48 N. W. 640.

That the owner of land flowed by a millidam owns a part interest in the dam will not prevent his maintaining an action in his own name against his cotenant to determine the extent of the flowage right. Hutchinson v. Chase, 39 Me. 508, 63 Am. Dec. 645.

A tenant in common of a pond and millidam may recover damages from a cotenant for the flowing of his land whereby he lost the use of it, where the injury was due to the cotenant's management of the dam, of which he assumed full control. Griffin v. Bartlett, 55 N. H. 119.

The recovery by one of two tenants in common of damages for flowage from an unlawfully erected dam, after judgment, will stand as a recovery for both tenants, and the existence of the nuisance will be *res judicata*. Fell v. Bennett, 110 Pa. 181, 5 Atl. 17.

2. *One in possession.*

Tenant.

A tenant is as much entitled to recover the flowage damages done to his land during his tenancy as though he were a freeholder. Ellice Twp. v. Hiles, 23 Can. S. C. 429.

Where crops are destroyed by an overflow caused by the unskilful construction of a railway across a creek, the tenant on the land may recover against the railroad company,—especially where it appears that the landlord has assigned to the tenant all his interest in the claim for damages. Gulf, C. & S. F. R. Co. v. Jones, 3 Tex. App. Civ. Cas. (Willson) § 13, p. 33.

A tenant is not barred from recovering of a railroad company damages for injury to his crops by flooding caused by the negligently and improperly constructed roadway of such company over a natural water course, because he rented the premises after the road was built, and entered into possession with knowledge of the defective structure. St. Louis, A. & T. H. R. Co. v. Brown, 34 Ill. App. 552.

A tenant for years may maintain an action for trespass for the flowing of the lands leased by him by the maintenance of booms in a navigable river. Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

Where a parol contract for a life tenancy in land is made, but is taken out of the statute of frauds by part performance, the contract transfers a sufficient title on which the life tenant may base an action at law against a stranger to recover damages for an injury to the estate from an overflow. St. Louis, A. & T. R. Co. v. Graham, 55 Ark. 294, 18 S. W. 56.

A devisee of land to be held for the maintenance of herself and her children, with absolute control over it during her life, but in trust that if any shall remain at her death it will be divided among her children, may maintain an action in her own name for injury to the land by flowage. Howe v. Ray, 110 Mass. 298.

A tenant leasing land with knowledge of the existence of an unlawful and permanent obstruction of a stream which renders it liable to annually overflow the land is not thereby deprived of a right of action for injuries to his crops caused by it, unless the injuries, as originally inflicted by the obstruction, were so permanent in their character that they went to the entire value of the estate, entitling the owner of the freehold to maintain an action for all such damages before the tenant leased the land. McKee v. St. Louis, K. & N. W. R. Co. 49 Mo. App. 174.

But a railroad company is not liable to a mere tenant of land who voluntarily occupied it, subject, as it was, to the danger of overflow, for an injury to his crops and personal property from flooding growing out of the defective construction by the company of its embankments, culverts, and reservoirs. Chicago & A. R. Co. v. Smith, 17 Ill. App. 58.

Licensee.

A mere license to graze cattle upon the land of another confers no such right in the lands as to entitle the owner of the cattle to recover damages for an injury done to the lands by an overflow, or the cost of obtaining new pastures and driving the cattle to them. Sabine & E. T. R. Co. v. Johnson, 65 Tex. 389.

Possession generally.

One in actual possession of land may recover for injury to it by backwater from a dam without deraignment of title. Lorge v. Dennis, 5 Sneed, 595.

A person in possession of land may maintain an action for overflowing it, as possession raises a presumption of title. Kimbrall v. Walker, 7 Rich. L. 422.

One in possession of land wrongfully overflowed by the construction and maintenance of a dam is entitled, without proof of legal title, to recover damages in an action on the case. King v. Tarlton, 2 Harr. & M'H. 473.

When an upper riparian proprietor is injured by the obstruction of his water course by a lower proprietor, he may recover damages to the enjoyment of his possession, though he has not the freehold. Neal v. Ohio River R. Co. 47 W. Va. 316, 34 S. E. 914.

Recovery can be had for injury to the possession of a mill and dam by backwater from a lower dam, only by the person in possession:

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and injury to the freehold is an injury to the owner for which he, and not the occupant, can recover damages. Warring v. Martin, Wright (Ohio) 380.

It is no defense in an action against a tort feasor for damages to a mill by the backing of water on the wheels and machinery thereof that the plaintiff has only been injured and obstructed in the enjoyment of a right which it does not appear he had any authority to exercise. Hendrick v. Johnson, 5 Port. (Ala.) 208.

The surviving widow, as the head of a family, is entitled, during her lifetime, to the exclusive possession and enjoyment of the homestead, and may maintain, in her own name and right, an action to recover for damages to such homestead or the crops growing thereon by an overflow; and, although there may be surviving children of the deceased, they are not necessary parties plaintiff to such suit. Gulf, C. & S. F. R. Co. v. Jones, 3 Tex. App. Civ. Cas. (Willson) § 13, p. 33.

In an action against a railroad company for injuries to land,—among other things, for the flooding thereof caused by the changing and obstructing of water courses by the erection of an embankment,—if the plaintiff is allowed to testify to his purchase and ownership of the land without objection, this will be sufficient evidence of title in him to maintain the action, and will extend to, and embrace, the whole tract, although not actually in his possession, where there is no adverse possession. Cairo & St. L. R. Co. v. Woosley, 85 Ill. 370.

Damages for the overflowing of mining claims, caused by the erection of a dam, and the abatement thereof as a nuisance, cannot be recovered or had where the plaintiffs fail to prove title to the claims so overflowed, and, even if their title were established, it appears that defendants had the prior right to mine, and could not carry on their mining operations without such dam. Stone v. Bumpus, 40 Cal. 428. The injury sustained is *damnum absque injuria*. 46 Cal. 218.

The ownership of a homestead injuriously affected by the maintenance of a dam which is prejudicial to health is a sufficient special interest to entitle the owner to apply for equitable relief. Treat v. Bates, 27 Mich. 390.

The surviving wife has such an estate in the homestead, being part of the community estate of herself and her deceased husband, as will enable her to maintain an action in her own name for its injury by an overflow; and if the heirs of the deceased husband, who are not joined as plaintiffs, had also an interest in the land at the time of the injury, a party sued by her can only avail himself of that fact by plea in abatement, or by way of apportionment of damages. Houston & T. C. R. Co. v. Knapp, 51 Tex. 592.

Mere occupancy or possession of a tract of land, a portion of which was flowed by another at the time of such occupancy, does not entitle the occupant to maintain trespass therefor without showing title, or possession under a claim of title. Millerd v. Reeves, 1 Mich. 107.

The owner of a lower mill is liable if, without authority, he sets the water back into another's tail race, although on the land of a third party; and the right under which it is located there is immaterial as to that liability. Graver v. Sholl, 42 Pa. 58.

While the plaintiff must show title, or, at least, a possessory right, to submerged lands, to maintain an action for flooding them, it need not have been acquired any measurable time before bringing suit, for any delay whatever tends to ripen defendant's intrusion into right; hence, a deed made on the very day process beginning the action was served is presumed to be 59 L. R. A.

antecedent to the suit, and is sufficient. Hall v. Chaffee, 13 Vt. 150.

Proof of actual possession and occupancy of the whole of a tract of land when it was flowed is sufficient prima facie proof of title and ownership to enable such occupant to maintain an action for damages to the land and growing crops caused by the flowage. Boyington v. Squires, 71 Wis. 276, 37 N. W. 227.

Whether the riparian rights of an owner of land on a river extend only to the thread of the stream, or to the opposite bank, he is entitled to maintain trespass against a waterlot company for damages done by the overflowing of his water wheels by the erection and raising of a dam below. Jones v. Water Lot Co. 18 Ga. 539.

But one in possession of real estate cannot recover damages for injuries to the land by the backing of water onto it, if he shows that the legal title is in a third person. Morris v. McCamey, 9 Ga. 160.

In an action to recover damages for injury to land from backwater from a milldam, proof of possession is sufficient to maintain an action, where the complaint alleges that the plaintiff is the owner in fee of the land, and is in possession thereof; and no proof of title is necessary. Barber v. Barber, 21 Ind. 468.

Where a mill owner has only the right of using a reservoir and dam, he can recover, in case a lower riparian owner erects a dam which interferes with his, only for the injury to his easement. Robertson v. Woodworth, 42 Conn. 163.

Actual possession by the plaintiff is sufficient title to maintain an action against defendant for raising his dam so as to set the water back upon plaintiff's works. Branch v. Doane, 18 Conn. 233.

The fact that plaintiff's right to use the water of a stream is limited to such times as it may run over his grantor's dam above does not deprive him of a right of action against a lower proprietor who, by raising his dam, sets back the water upon the plaintiff's works, as such act was the exercise of a claim which, if continued for a sufficient length of time, would confer on the defendant a prescriptive right. *Ibid.*

He whose possession of land to which he has title of record, overflowed by a mill pond, dates from a writ of possession duly returned by the sheriff upon a judgment in ejectment, although the land then was and continued to be covered by the waters of the mill pond, has an unimpaired right of action against the mill owner for the flowage: and the mere overflowing of the lands does not amount to possession thereof by the latter, nor even to a trespass, but simply a nuisance created to the owner's injury. Perrine v. Bergen, 14 N. J. L. 355, 27 Am. Dec. 63.

The title of one in possession under claim of ownership, who brings an action for flowage, cannot be questioned by the one causing the flowage, for the purpose of defeating the action. Bassett v. Salisbury Mfg. Co. 28 N. H. 435.

One in possession of land under conditions in a bond may maintain an action for injuries to the soil by flowage caused by the stoppage of a river, due to an accumulation of logs and ice, through the negligence of the owner of the logs. George v. Fisk, 32 N. H. 32.

The possession by plaintiff of the tract of land of which that flowed by defendant was a part was sufficient possession of the land flowed to entitle him to maintain an action against defendant for such flowage, as defendant's possession arising from flooding the land did not affect the title to it, but was a mere easement. Mims v. Weathersbee, 2 Strobh. L. 184.

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In an action to restrain the erection of a dam of a height likely to cause the water to flow back on plaintiff's mill and dam constructed under an order of the court, made pursuant to statute, it is not a proper defense that plaintiff's title to the land on which the mill was erected is defective, in the absence of an adverse claimant to such land. Arnold v. Klepper, 24 Mo. 273.

In an action for damages for injuries caused to a spring and ford by backwater from a dam erected below, it is not necessary to show title to the lands injured,—actual possession is enough; and such possession need not be by inclosure, but a claim of ownership running back a number of years, coupled with a use for the ordinary purposes by his family and hands, is sufficient. Allen v. McCorkle, 3 Head, 181.

The fact that an upper riparian owner has not acquired a valid right in a tract of land which is used for a portion of his race does not prevent his collecting damages for injuries caused to him by the lower mill owner's dam. It is enough that he is in undisturbed enjoyment of the race at the time of the injury. Decorah Woolen Mill Co. v. Greer, 49 Iowa, 490.

The mere possession of land is sufficient to enable a plaintiff to recover damages for the building of a dam across a water course running through such land, by reason whereof the water is thrown back upon the land of the plaintiff. Norris v. Glenn, 1 Idaho, 590.

The equitable interest of one holding a bond for a deed and in actual possession of flooded lands is sufficient title, as against the builder of the dam causing the overflow, who constructed it under a mere parol license subsequently given by the landowner. Hough v. Patrick, 26 Vt. 435.

A person throwing back water on the upper owner by means of a dam is a wrongdoer against whom one in possession merely may maintain an action. Yeargain v. Johnston, 1 N. C. (Taylor) 80, 1 Am. Dec. 581.

One who builds a mill and a dam on a navigable stream under statutory permission is entitled to all the protection in its use which the law would give him if his works had been erected on a stream not navigable. An inferior proprietor has no more right to back the water on his wheel in the one case than in the other. Bigler v. Antes, 21 Pa. 288.

A person who owns only to the center of the stream, and has acquired no right to extend his dam to the opposite shore, which belongs to a lower mill owner, cannot maintain an action against the latter for flowing back the water in the stream so as to interfere with his dam. Jewell v. Gardiner, 12 Mass. 311.

One who constructed a mill race without authority over lands owned by the government, and as a mere trespasser, may not have the obstruction of the race by a purchaser from the government enjoined, where no right has arisen by prescription, although there may have been acquiescence therein for a long time. Sherwood v. Vliet, 20 Wis. 441.

The mere fact that a milldam erected in a river which is a public highway for floating rafts of logs and boards is a nuisance will not justify a mill owner in constructing a dam lower down, which will cover up the first one with water. Odiorne v. Lyford, 9 N. H. 502, 32 Am. Dec. 387.

Where a railroad company has constructed an embankment with insufficient culverts, and the buildings of a mill owner are injured from backwater because of the defective culvert, it is no defense, in an action against the company, that the buildings of the plaintiff, by reason of inaccurate measurement in laying off the city, encroach 5 or 6 feet on the street, where it appears that the location of the buildings in the street did not contribute to the injury. Houston & G. N. R. Co. v. Parker, 50 Tex. 330.

A person who is not a riparian proprietor, but who has acquired the right to use the water for propelling a mill, although he may not have acquired the right from the intermediate riparian owners to divert the water from a stream to his mill race, and as to them is a wrongdoer, may maintain an action in case a lower proprietor backs the water upon his tail race. Bristol Hydraulic Co. v. Boyer, 67 Ind. 236.

The failure of the New York Central & Hudson River Railway Company to obtain the permission of the canal commissioners to the construction of its road across the Black river does not prevent it from recovering for damages to its embankment due to the setting back of water by a canal storage dam across such river, since the act of 1834, chap. 276, § 17, requiring such permission before a railroad can be built within 10 rods of any canal or feeder, applied only to a specified corporation created by that act. New York C. & H. R. R. Co. v. State, 87 App. Div. 57, 55 N. Y. Supp. 685.

8. *Joinder of parties.*

The several owners of land along a stream may properly join in an action to enjoin the continuance of a pier in the stream by a lower proprietor, the effect of which is to cause the water to set back and overflow their lands. Gillespie v. Forrest, 18 Hun, 110.

In case of the obstruction of the outlet of a lake so as to create a nuisance by raising the water in the lake, all property owners affected thereby may join in a suit to abate it. Grant v. Schmidt, 22 Minn. 1.

Several landowners, whose premises are flooded by the maintenance of a dam, may unite in a suit for injunctive relief. Turner v. Hart, 71 Mich. 128, 38 N. W. 890.

Two or more persons owning separate and distinct tracts of land injured by the overflow of water from a natural water course obstructed by ditches and drains may, where such overflow is a common injury to all the lands, maintain a joint suit to abate and restrain the nuisance, and for damages to crops on such lands owned jointly by all, but not for damages to their lands, as to which they have no joint interest. Palmer v. Waddell, 22 Kan. 352.

One having an equitable interest in property injured by flowage may join the holder of the fee in a suit therefor. Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362.

But owners of separate tracts of land affected by a dam cannot join in an action for an aggregate amount of damages for the injuries caused to their respective property. Hellams v. Switzer, 24 S. C. 39.

A misjoinder of parties in uniting several persons as complainants in the same action, who are owners of different tracts of land affected by a dam, cannot be raised by a demurrer for misjoinder of causes of action. *Ibid.*

b. *Grantee.*

The general principle by which the question of the right of a grantee to maintain a suit is solved, is found in the character of the obstruction. If it is of a permanent nature, and one which the one constructing it may obtain the right to maintain, then the cause of action is complete when the structure is, and the grantee cannot maintain an action. On the other hand, if the obstruction is a nuisance, which the one constructing it has obtained no right to main-

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tain, then the grantee has a right of action for the injuries inflicted on him.

A purchaser of property, after the construction of a railroad over the same, cannot recover for injury thereto by flooding caused by the manner in which the railroad company had constructed its embankments, culverts, and reservoirs over and upon a natural stream, where the evidence shows that such works are permanent in their form and character. In such case the then owner has a cause of action which is not assignable, and does not pass to his grantee. Chicago & A. R. Co. v. Calkins, 17 Ill. App. 55.

A landowner cannot maintain an action against a railroad company for injury to his land by overflow caused by the manner in which the railroad embankment was constructed before he became the owner of such land, and to which no change has been made since his purchase. Chicago & A. R. Co. v. Henneberry, 28 Ill. App. 110.

A grantee can only take his meadows subject to a servitude of flowage, when the grantor has already deeded a mill and appurtenant rights of flowage on said meadows to a prior grantee; and he cannot recover flowage damages from the owner of said privilege for flowage to which his land was subject under the prior grant. Butler v. Huse, 63 Me. 447.

Purchasers of land from the state after the erection of dams and embankments thereon in aid of navigation take subject thereto, and have no right to interfere therewith on the ground that no compensation has been made therefor, where, under its charter, which provides for compensation for the taking of lands of private owners, but makes no provision as to state lands, it has the implied right to take state lands for such purpose without compensation. Black River Improv. Co. v. La Cross Boom. & Transp. Co. 54 Wis. 659, 41 Am. Rep. 66, 11 N. W. 443.

A corporation liable to the owner of lands for damages from flowage is liable when the damages are caused, and to the one who suffers a diminution of the value of his freehold. A conveyance of the land prior to bringing suit for the damages will not convey that right of action to the vendee. Zimmerman v. Union Canal Co. 1 Watts & S. 346.

Where land flowed by a mill pond is purchased for the purpose of bringing the owner of the dam to terms with respect to other lands claimed to be injured by the dam, but which injury it has been impossible to definitely establish at law, a very strong case of injury to the purchased land will be necessary to cause a court of equity to interfere. Bassett v. Salisbury Mfg. Co. 47 N. H. 426.

The grantee of one whose land was overflowed prior to the acquisition of title by the grantee may only recover damages for the increased injury to his lots occasioned by raising the water to an increased height after he became the owner of the lands, and not for the perpetual damages thereto by the keeping of the water at the height maintained when he purchased. Mead v. Hein, 28 Wis. 533, Practically Overruled in Sabine v. Johnson. 35 Wis. 185, 201, in which it is said that, although that question is not to be decided, the court will hold, when the question is again presented for determination, that the grantor of lands which are flowed at the time of sale, by means of a millidam lawfully erected and maintained, but in respect to which no proceedings to assess damages have been taken, is entitled only to such damages as have accrued at the time of the sale, unless he specially reserve future damages; and, in the absence of the reservation, the grantee is entitled to all damages which may accrue after the purchase of the land flowed.

The feoffee of a tract of land which was, at the time of the purchase, overflowed by a dam has a right of action against the person constructing the dam for continuing the same. Beswick v. Cunden, Cro. Eliz. pt. 1, p. 402.

One whose lands are damaged by an overflow caused by the obstruction of a water course by trestles along the line of a railroad right of way may recover damages against the company, although the trestles were erected before he had any interest in the property to which the injury was done. Mississippi & T. R. Co. v. Archibald, 67 Miss. 38, 7 So. 212.

Although a person did not become possessed of a parcel of land until after it had been flooded by the act of another in dumping loads of earth into a river and obstructing its flow, he may maintain an action against such person. Weshbourn's Case, 2 Leon. 103.

The surviving wife of a homesteader, in possession of the homestead, may maintain, in her own name, an action for the recovery of damages for injury to the land and crops by an overflow before she, by the partition of the estate of her husband, became the sole owner of the land, although it is objected that the representatives of the estate could, alone, maintain such suit. Houston & T. C. R. Co. v. Knapp, 51 Tex. 592.

The fact that a landowner did not purchase the same until after a railroad was built does not defeat his right of action against such company for injury to personal property thereon from flooding caused by the wrongful manner in which the railroad embankment and culvert were built. Ohio & M. R. Co. v. Wachter, 23 Ill. App. 415.

A writing, not under seal, by the owner of land, purporting to convey the right to flow it and to release all claims for damages therefrom, does not bind the land, nor estop a subsequent grantee to recover the future damages for flowage. Cobb v. Fisher, 121 Mass. 169.

A grantee of land upon which a railroad is improperly constructed, maintained, or operated, so as to cause such land to be overflowed, is not barred from a recovery for injury to his crops thereby, although he purchased with full knowledge of the liability to overflow, and the railroad company acquired its right of way over such land by condemnation proceedings, and had paid his grantor the damages awarded him. Ohio & M. R. Co. v. Elliott, 34 Ill. App. 589.

The present owner of lands overflowed by the works in aid of navigation of the Fox and Wisconsin rivers may recover damages therefor under the act of Congress of 1875, chap. 166, assuming liability therefor, and providing that the present owner of lands which had been overflowed by such works may proceed in the manner indicated by the state statutes to recover compensation, although such overflow occurred before he became the owner thereof. Sweaney v. United States, 62 Wis. 396, 22 N. W. 609.

One who becomes the owner of property already flowed with backwater from a millidam may recover for the damages caused him by such flowing and injury to the land, where no compensation in gross had been made to the former owner. Newell v. Smith, 15 Wis. 102.

A grantee of land affected by a nuisance not ripened into an easement, consisting of the obstruction of a stream by a dam so as to cause it to overflow and injure the land, may, notwithstanding he purchased with notice, bring an action for damages resulting from its continuance. Townes v. Augusta, 52 S. C. 396, 29 S. E. 851.

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The owner of land may have an action against one for obstructing the flow of a stream and flooding his land prior to his acquiring title, where the flooding continued afterward. Weshbourn's Case, 2 Leon. 103, 3 Leon. 174.

A railroad company is liable for injury to the owner of crops from an overflow of water caused by the wrongful manner in which a railroad embankment was constructed over a natural stream so as to obstruct the natural flow of water, although he purchased the land after the erection of the obstruction in question, and knew the probable danger of overflow upon his land, and notified the company of such danger, and requested an abatement. He is not bound to assume that the railroad company will maintain the nuisance after notice to abate it, nor to refrain from putting in crops because of the danger of overflow. Ohio & M. R. Co. v. Singletary, 34 Ill. App. 425.

The mere fact that the flowage of land by a dam, constituting a nuisance, existed at the time of the purchase thereof, creates no presumption that the purchaser took subject to the easement, so as to defeat his right of action for an abatement of the nuisance and for damages. Lohmiller v. Indian Ford Water Power Co. 51 Wis. 683, 8 N. W. 601.

The alienee of land sold subsequent to the creation of a nuisance by the erection of a milldam may maintain an action for damage by the overflowing of his lands by the continuance thereof after a special request to remove. Loftin v. M'Lemore, 1 Stew. (Ala.) 133.

It is no defense to an action for damages to an owner's land from flooding caused by backwater from a milldam on another's land on a stream below, that a prior decree of court had established the mill owner's right to a certain milldam and race, and enjoined the remote grantors of the present owner, their heirs, and all persons claiming under them, from molesting him in the full enjoyment of the water privileges attached and belonging to such premises, and that the present owner derived his title subsequently to the rendition of the decree. Myers v. Bell, 5 Blackf. 249.

A riparian owner whose land is overflowed because of the presence of a negligently constructed railway bridge in the river, may recover for the injury, although the bridge was built when his grantor owned the property. Omaha & R. Valley R. Co. v. Standen, 22 Neb. 343, 35 N. W. 183.

The damages to a landowner from overflow, arising from the improper and unskilful manner in which a railroad is constructed, are continuing damages which the grantee of the land may recover against a railroad company for continuing the improperly constructed embankment after such grantee acquired title. Cleveland, C. C. & St. L. R. Co. v. Nutall, 59 Ill. App. 639.

A subsequent grantee of land may maintain an action for damages for overflow occurring after his purchase, during a freshet, caused by the negligent manner in which a railroad bridge was constructed, prior to his purchase, over a natural stream flowing through the land, although the right of recovery for damages naturally and proximately resulting from a proper construction and operation of the road accrued to the then owner of the land at the time the bridge was erected, and does not pass to a subsequent grantee; since the cause of action for such injuries accrued only at the time of the overflow, and not when the bridge was constructed, and they are not such as could be recovered for by the former owner. Sherlock v. Louisville, N. A. & C. R. Co. 115 Ind. 22, 17 N. E. 171.

The purchaser of part of lands from one who has previously granted another part thereof on which a milldam is located, may recover for damages caused by an increased flowage thereof subsequent to his purchase. Sabine v. Johnson, 35 Wis. 185.

The purchase of land covered by a mill pond under a chain of title giving the mill owner the right to maintain the pond will not prevent the purchaser from objecting to it as a nuisance to other property owned by him in the vicinity. Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397.

Notice.

The question whether notice should be given before action brought should depend upon whether or not the flooding was by permission of the grantor. If it was, justice requires notice to be given before action brought. If the flowage was at all times adverse, the one maintaining it is not entitled to notice.

No notice to abate the nuisance is necessary to charge a person who built and maintains a dam with the unlawful flowage caused thereby, merely because the land flowed has in the meantime been conveyed. Eastman v. Amoskeag Mfg. Co. 44 N. H. 143, 82 Am. Dec. 201. Disapproving of Woodman v. Tufts, 9 N. H. 91.

When the grantor of premises unlawfully flowed by a dam acquiesces in the flowage, the grantee is required to request the abatement of the nuisance before he is entitled to maintain an action therefor. Woodman v. Tufts, 9 N. H. 88.

A notice given by a property owner to another person to remove a dam which he has erected and by which the former's land is overflowed inures to the benefit of the grantee of the person giving the notice, or of anyone claiming title under or through him. Caldwell v. Gale, 11 Mich. 77.

Recovery for damages to an upper mill by back water from a lower dam cannot be had by one who purchased the mill subsequent to the erection of the dam, against the grantee of the party who erected it, where no notice of the nuisance has been given by the purchaser to such grantee. Pickett v. Condon, 18 Md. 412.

c. *Survivorship.*

Actions to recover damages for injuries to lands caused by the overflow of waters from a milldam are founded on tort, and, in the absence of statutory enactment, abate by the death of the plaintiffs, and cannot be revived in the name of the executor or administrator; and a statute providing that no species of action for personal injuries, with certain exceptions, shall cease or die with the person, does not apply to actions of this character founded on injuries to the freehold. Kennedy v. M'Afee, 1 Litt. (Ky.) 169.

The executor cannot maintain an action for breach of an agreement between his testator and a third person that the third person would not flood testator's lands, where testator had devised the lands to his grandchildren, and the injury had occurred after his death. Webb v. Bennett's Branch Improv. Co. 161 Pa. 623, 29 Atl. 260.

A right of action for flowing lands cannot be maintained by the administrators of the deceased owners where an injury to the land is the only one complained of. Chalk v. McAlily, 10 Rich. L. 92.

A cause of action for injury to land by the maintenance of a dam whereby the premises are overflowed does not survive to an administrator, either at common law, or under the statute of New Hampshire; nor can he maintain an action

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for such injury since the death of the intestate, unless he shows that the intestate died seised of the land, that the estate is insolvent, and the administration not closed. Forist v. Androscoggin River Improv. Co. 52 N. H. 477.

IX. *Defenses.*

a. *Contributory negligence.*

While it is the duty of one whose land is wrongfully flowed to use ordinary and reasonable care to prevent an injury and the consequences of it, when the tort feasor relies upon such failure he must show such facts as would constitute a complete defense. Texas & P. R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. 902.

A riparian proprietor cannot recover for damages from a backing of water because of an insufficient railroad culvert, when, well knowing of that insufficiency, he so disposes of his property as to have strong reason to believe that it will be flooded and injured or destroyed, and thus contributes to his own damage. Emry v. Raleigh & G. R. Co. 109 N. C. 589, 15 L. R. A. 332, 14 S. E. 352.

When the use of riparian lands for agricultural purposes is not entirely destroyed by the unlawful damming back of the water by a lower owner, their owner is not guilty of contributory negligence because he plants crops on land subject to occasional overflow. This rule is not inconsistent with that in Emry's Case, 109 N. C. 589, 15 L. R. A. 332, 14 S. E. 352, as the manufacture of brick is exceptional, and in that case it did not appear that the work could not have been conveniently and profitably conducted on higher lands. Knight v. Albermarle & R. R. Co. 111 N. C. 80, 15 S. E. 929.

That plaintiff in an action for damages to land by the flooding thereof by water by reason of the insufficiency of a culvert in a railroad embankment contributed to his damage through failure to clean out a ditch thereon, will not prevent a recovery for such damage as resulted independently of his act. Georgia R. & Bkg. Co. v. Berry, 78 Ga. 744, 4 S. E. 10.

The owner of a pasture rendered dangerous for the use of his stock by partial flooding is not required to cease to use it in order to avoid damage to his stock, but can continue to use it, exercising diligence such as a man of ordinary prudence would adopt to prevent increase of the damages; and he can recover of the wrongdoer the value of the stock lost in using the premises, by reason of his trespass, and also the expense of reasonable efforts to prevent damage, including the cost of healing animals injured, and the cost of guarding the stock from danger, conveying them to a place of safety, and returning them when danger had ceased. Hughes v. Austin, 12 Tex. Civ. App. 178, 33 S. W. 607.

A riparian owner may recover damages arising from the building of a dam, the flowage from which destroyed his hay which was left as was customary on his meadow land, no lack of care to secure the hay being shown. Reynolds v. Chandler River Co. 43 Me. 513.

In an action to recover for injury immediately resulting to riparian lands by the construction by another of a dam, and not for any injury that might thereafter occur by reason of the freshets washing away the unprotected banks, it is immaterial whether or not the injured party made any effort to protect his land from erosion. Oldenburg v. Oregon Sugar Co. 39 Or. 564, 65 Pac. 869.

In determining the liability of a railway company for the flooding of a mill and destruction of a lumber yard caused by the insufficiency of a culvert and the giving way of an embankment after severe storms, the fact may be considered that the mill was constructed and the lumber yard placed in such positions that injury must result if the culvert and embankment were insufficient. Central Trust Co. v. Wabash, St. L. & P. R. Co. 57 Fed. 441.

When for drainage purposes a party has dug a ditch which in extreme high water causes waters penned up and held by the dam of a boom company to flow over his land to his injury, the doctrine of "avoidable consequences" is applicable when estimating damages. Consequences of an injury which one can avoid by acting as prudent men ordinarily act are not to be considered, for it is optional for him to suffer or avoid them. Guiadck v. Northwestern Improv. & Boom Co. 73 Minn. 87, 75 N. W. 894.

A mere want of reasonable care by owners of mining claims to prevent injury thereto from overflow by the water accumulated by a dam below does not impair their right to recover damages occasioned thereby. Fraler v. Sears Union Water Co. 12 Cal. 555, 73 Am. Dec. 562.

In an action against a railroad company to recover damages for the flooding of land, alleged by the plaintiff to have been caused by the railroad company's failure to keep open a ditch, but averred by the latter to be due to the plaintiff's failure to keep the run in proper condition on his own land, the doctrine of contributory negligence is not applicable, but each party is chargeable with the consequences of his own conduct. Philadelphia & R. R. Co. v. Smith, 27 L. R. A. 131, 12 C. C. A. 384, 28 U. S. App. 134, 64 Fed. 679.

b. *Estoppel.*

Where the owner of a milldam overflowing the lands above, belonging to a stranger, conveyed said milldam by warranty deed, he is estopped thereby from afterwards claiming damages against his grantees for the overflowing of such lands above, to which he acquires title from such stranger. Jarnigan v. Mairs, 1 Humph. 473.

One whose land has been flowed by back water from a dam may not have it abated as a nuisance, or its repair enjoined, when he has permitted valuable improvements to be made on the strength of the right to draw water therefrom, and has suffered numerous repairs to be made, acquiescing for several years in its maintenance. Cobb v. Smith, 16 Wis. 662.

Failure to object to the erection of a mill to be used in connection with a mill pond will not prevent an adjacent owner from complaining of the pond as a nuisance. Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397.

No recovery for injury to land by backwater from a dam can be had by owners of the land who encourage the erection of the dam, and afterwards voluntarily assist in repairing it and keeping it up for the sake of having a mill in their neighborhood, knowing at the time how it affected their premises, and without making objection for some years. Barlitt v. Woodside, 1 Ohio Dec. Reprint, 13.

A riparian owner is not barred from complaining of another's dam on the same stream by the fact that he was present when the present owner purchased it, and omitted to give notice of the injury for which damages are sought. Alexander v. Kerr, 2 Rawle, 83, 19 Am. Dec. 616.

That the owner of land above a dam stands by and sees the dam raised without objection or protest, is not such acquiescence as will bind him if he does nothing to induce or encourage the raising. Cooper v. Carlisle, 17 N. J. Eq. 525.

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A lower mill owner, who has permitted an upper proprietor to expend a large sum in the construction of a dam within the area in which the lower proprietor has a vested right of flowage, may be restricted in his right to use flashboards for flowage purposes in consideration of an award of damages. Cornwell Mfg. Co. v. Swift, 89 Mich. 503, 50 N. W. 1001.

The mere fact that expense has been incurred in procuring machinery to be used in connection with the millidam will not prevent the upper proprietor from objecting to the dam in case it floods his land. De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433.

No mere delay, or even acquiescence, unless under circumstances that would create an equitable estoppel, short of the period of twenty years necessary to give the owner of a dam the right by prescription to flow the land of an upper riparian owner, will bar the upper riparian owner's right of action to abate the dam as an existing nuisance. Mueller v. Fruen, 36 Minn. 273, 30 N. W. 866.

A warrant to abate a dam as a nuisance was refused in favor of mortgagees where the dam was built at about the same time that the dam as to which it constituted a nuisance was built, so that the erection of the mill in connection with such dam was prevented, while a mill was erected at a great expense at the nuisance dam, and no notice was given to the mortgagees of the action to abate the nuisance. Bemis v. Clark, 11 Pick. 452.

The proprietor of a shingle mill, who casts refuse into the stream so that it floats down into the mill pond of a lower mill proprietor, lessening the latter's supply of water and interfering with the operation of his mill, cannot recover, where the lower mill owner fells trees on his own land to intercept the refuse, the combined effect of which is to set back the water upon the wheel of the upper mill, since, when both parties commit acts in violation of law, the court will not interfere to determine which is the more culpable. Davis v. Munro, 66 Mich. 485, 33 N. W. 408.

The right of a landowner to damages sustained by back flow of water due to a culvert in a creek crossed by a canal is not defeated or impaired by his having conveyed other land at a different point, nor by the provisions of the statute as to compensation for taking land and constructing the canal, because such damages are not the natural and necessary result of such construction, but arise from the imperfect or defective culvert. Delaware & R. Canal Co. v. Lee, 22 N. J. L. 243.

Notice of an intention to raise a dam where upper riparian owners are injured will not of itself justify the act, nor will it deprive the injured parties of all claim for damages done to subsequent improvements made by them after such notice. Farnum v. Blackstone Canal Co. 1 Sumn. 47, Fed. Cas. No. 4,675.

A landowner whose property is flooded by water set back from a millidam is estopped from seeking equitable aid to abate it, where he refused to proceed with arbitration proceedings, and did not file his bill until four and a half years after the mill was running, and it was known how far the dam set back the water. Miller v. Cornwell, 71 Mich. 270, 38 N. W. 912.

An upper owner does not lose his right of action for a wrongful damming back of the water by submitting to the wrong and making the most of it rather than go into court, when he never communicated his acquiescence to the tort feasors, and they never changed their situation in reliance upon it, and the restoration of the stream to its original course will not affect their land or its use differently than it did originally. Beech v. Kuder, 15 Pa. Super. Ct. 89.

One who acquiesces in the construction by another, at large expense, of a dam, and exchanges deeds with him defining the boundaries, without notifying him that the dam flows back water upon his lands to his prejudice, is estopped from thereafter asserting such claim against the dam owner. Dean v. Benn, 69 Hun, 519, 23 N. Y. Supp. 708.

A riparian proprietor is not deprived of his common-law remedy from an unlawful flooding of his lands, either by estoppel or otherwise, by acquiescence for several years, or failure to notify the defendant of his injury. Knight v. Albemarle & R. R. Co. 111 N. C. 80, 15 S. E. 929.

The acquiescence of the grantor of the owner of premises in the obstruction of sloughs in carrying a canal across them so as to overflow such premises, constituting a nuisance, is no defense to the action for an injunction by such owner to prevent a continuance of such overflow. Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

A landowner is not precluded from recovering damages for the flooding of his premises by the raising of a dam across a river, by the mere fact of his signing an agreement, as president of a water company and the owner of another, that the directors of the hydraulic company owning the dam should raise the same, the cost thereof to be borne by the water companies in proportion to the water power respectively owned by each. Sterling Hydraulic Co. v. Galt, 81 Ill. App. 600.

Damages for injuries caused by the obstruction of a ditch cannot be mitigated by the fact that plaintiff might have gone upon defendant's land and removed the obstruction, and thereby lessened the injury. White v. Chapin, 102 Mass. 138.

The fact that the upper owner uses the water out of the regular channel of the stream does not change his right to be free of the back water of a lower dam, if he returns the water to the stream before it leaves his land. Webster v. Fleming, 2 Humph. 518.

An owner of realty subject to flowage will not be bound by the representation of the town that, in the event of the erection of the dam and mill, the right to recover damages for flowage will be waived. Stevens v. Morse, 5 Me. 26.

Taking ice from a pond with permission of the owner is not such an acquiescence in its maintenance as to prevent the obtaining of an injunction against it in case it becomes a nuisance. Adams v. Popham, 76 N. Y. 410.

A riparian proprietor may restrain a lower proprietor from damming the water back upon his mill, although his water privilege, while sufficient for the purpose of light machinery, is not sufficient to permit the profitable operation of a sawmill, the purpose to which he is devoting it, and to make it so he dams back the water above him so as to raise the stream at a point owned by the lower proprietor, but which does not contain a mill site. Graham v. Burr, 4 Grant Ch. (U. C.) 1.

c. *Contributing cause.*

A lower riparian proprietor will not be compelled to lower his dam across a river on the ground that back water from it obstructs the operation of an upper mill, where it is not clearly shown that such obstruction is due to the maintenance of the dam. Newland v. Hudson River Water Power & Paper Co. 42 N. Y. S. R. 45, 16 N. Y. Supp. 654.

In an action for damages to land, alleged to be caused by the defendant's millidam, if it appear that other and contingent circumstances

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preponderate largely in causing the injurious effects, such damages are too remote to be the basis of a recovery. Rucker v. Athens Mfg. Co. 54 Ga. 84.

Evidence as to the conformation of the banks of a stream below defendant's dam, causing the water below during freshets to rise higher than the top of the dam and flow back, is admissible in an action for damages for the overflowing of lands, on the question of whether such overflow was caused by defendant's dam, where it appears from the evidence that plaintiff's lands only suffered in times of high water. *Ibid.*

A verdict for nominal damages in an action for flowing lands alleged to have been caused by the obstruction of a culvert, the building of a dam, raising of banks above and below the dam, and extending an embankment, where it appears that there were other causes of almost all the injury, will not be disturbed. Phillips v. Phillips, 34 N. J. L. 209.

A railroad company building a bridge across a stream is not liable for obstructing the stream and flowing adjoining land, where, after the construction of the bridge, adjoining landowners constructed a levee, which greatly increased the volume of water passing through the stream, and raised it higher than the flood level, whereby it became dammed and choked up by drift catching onto the bridge. Coleman v. Kansas City, St. J. & C. B. R. Co. 36 Mo. App. 476.

Where the owners of land upon separate branches of a stream place obstructions therein so that waters flow from both branches upon the lands of a third person, one will not be liable for all the injury, if he had no connection with acts of the other. Wallace v. Drew, 59 Barb. 413.

Where, by reason of a dam on the property of a lower owner, a flood cuts a new channel through the land of the upper owner to the injury of him and a railroad company, and the railroad company, with the agreement of the other parties, undertakes to restore the stream to its old channel by means of a dam across the break in the banks, the owner of the dam will not, in case a subsequent flood carries out the new dam to the injury of the land of an upper owner, be liable for that injury, although he might have been liable for any injury caused by a similar flood before the course of the channel was changed. Jones v. Turner, 46 Barb. 527.

A landowner who maintains a culvert on his own land in such a manner as to safely carry the ordinary flow of water in times of ordinary freshets will not be liable for the increased flow of water on an upper owner's land by the obstruction of the channel by an owner farther down the stream. Bierer v. Hurst, 155 Pa. 523, 26 Atl. 742.

It is no defense to an action for damages from the flowage of land by the maintenance of the dam that another dam may have contributed thereto. Jones v. United States, 48 Wis. 385, 4 N. W. 519.

But if a part of an owner's land is overflowed by the construction of a dam by another, he is entitled to recover for the injuries sustained thereby, although other parts of his land were overflowed by reason of causes other than the building of the dam. Doud v. Guthrie, 11 Ill. App. 194.

It is no defense to an action to recover damages for flowing lands by a dam across one of the outlets of a lake that another dam higher than defendants' was subsequently erected across the other outlet, and that the two dams, operating together, set water back on plaintiff's lands and injured them. Arimond v. Green Bay & M. Canal Co. 35 Wis. 41.

One whose land is overflowed by the building of a dam may bring an action against the person building the dam without first removing natural obstructions that are causing the same injury, as an act which occasions no other damages than putting in hazard those rights, which, if the act were acquiesced in, would be lost by lapse of time, is a sufficient ground of action. Chapman v. Thames Mfg. Co. 13 Conn. 269, 33 Am. Dec. 401.

One obstructing the flow of a stream is liable, although others are obstructing it at points lower down. Culver v. Chicago, R. I. & P. R. Co. 38 Mo. App. 130.

A mill owner who partially obstructs the flow of water from his mill is not thereby precluded from maintaining an action against a lower owner for further obstruction. Brown v. Dean, 123 Mass. 254.

A railroad company is liable in damages to an owner whose land has been injured by the overflowing of the waters of a creek thereon due to several causes, one being the obstruction thereto created by the filling of a trestle of the railroad company; and in such case it is for the jury to determine how much of the whole damage was occasioned by such act. Ohio & M. R. Co. v. Combs, 43 Ill. App. 119.

It is no defense to an action against a railroad company by a landowner to recover damages for overflowing his lands, occasioned by the manner in which a bridge was constructed by the company over a natural stream, that the existence of a levee maintained by such landowner increased the danger of overflow, where such levee was there at the time the bridge was built. Chicago, B. & Q. R. Co. v. Schaffer, 26 Ill. App. 280.

One who maintains booms in a river whereby the water is set back upon the land of an upper riparian owner is liable for the resulting injury, although logs other than his own are stopped by the booms, and form the jams which raise the water, or even where the rise is caused by flood trash. Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

d. *Right to repair injury.*

A mill owner who raises his dam at the outlet of a pond to a height greater than he is entitled to, and thereby causes the water to break through the banks and overflow a neighbor's land adjoining on the pond, cannot claim the privilege of constructing an embankment on the land flooded at the outer margin of the pond thus extended to prevent the escape of the increased amount of water in that direction as a right necessary for the preservation of his water privilege. Fessenden v. Morrison, 19 N. H. 226.

But one who erects a dam after lawful condemnation proceedings will be liable for his negligence in not erecting and maintaining his works in a skilful and reasonable manner, in consequence of which a guard bank breaks and floods lands adjoining the pond. Chesapeake & O. R. Co. v. Chambers, 95 Va. 503, 28 S. E. 872.

In an action to recover for the flowing of land by the negligent construction of a dam, an agreement between the parties that the defendant shall have a right to enter on the plaintiff's land and to fill in and grade the same so as to prevent the water from overflowing it constitutes no defense to the action. Penfield v. New York & Mt. V. Water Co. 2 Silv. Sup. Ct. 495, 6 N. Y. Supp. 150.

The owner of land across which flows a water course is not relieved from liability for injuries inflicted upon adjoining land by an obstruction in the stream which caused the water to flood such land, upon the ground that he removed the obstruction, which consisted of a fallen wall, as

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soon as he discovered its existence, as the action is for a compensation for damage sustained by neglect of a legal duty to keep the stream free from obstructions, and the fact that he promptly repaired his fault does not relieve him from the damages already accrued. Bell v. Twentyman, 1 Q. B. 766, 1 Gale & D. 223, 6 Jur. 336.

H. P. F.

PENNSYLVANIA SUPREME COURT.

Herman SCHMALTZ, *Appt.*,
v.
YORK MANUFACTURING COMPANY *et al.*

(204 Pa. 1.)

1. **A court of equity sitting in one state has jurisdiction of a suit by one of its citizens** holding a mortgage on property in another state, to enjoin another citizen from removing from the property alleged fixtures which he had furnished under a conditional contract,—at least where the nonresident mortgagor voluntarily comes in and submits to the jurisdiction.
2. **The construction of a statute** by the lower courts of the state of its enactment is not binding on the courts of another state.
3. **Failure to record a contract of conditional sale** reserving title to a machine which becomes a fixture in a manufacturing plant will make it of no effect as against a subsequent bona fide mortgage of the whole plant, under a statute making conditional sales of property placed in possession of the buyer void as against subsequent mortgages in good faith, unless the contract is recorded.
4. **The construction of notices given by a conditional seller** of a machine of intention to remove it from the plant in which it was incorporated is for the court.
5. **An intention to take forcible possession** of a machine is shown by notices that the one giving them intends to remove it immediately by his employees, and asking the stoppage of work to facilitate the removal.
6. **An injunction to prevent irreparable injury** is authorized upon showing an intention to remove from a brewery plant a refrigerator which is a constituent part of, attached to, and necessary for the operation of, it.

(October 13, 1902.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for York County in favor of defendants in a suit to enjoin the removal of fixtures from a brewery. *Reversed.*

The facts as found by the trial court were as follows:

(1) The York Manufacturing Company is a corporation incorporated under the laws of the state, doing business in the city of York. The corporation is, and was in the year 1900, engaged in the manufacture of ice machines, refrigerating apparatus, and other machinery. The Deer Park Brew Company is a corporation incorporated under the laws of the state of New York, engaged in the brewing of beer at Port Jervis, New York, and was so engaged at the filing of the bill in this case, as a reorganization of the corporation of the Deer Park Brewing Company, a bankrupt corporation closed out under the United States bankrupt laws. No service of the bill was made on the Deer Park Brew Company, but the said defendant has filed an answer.

(2) The York Manufacturing Company, through its agent, G. E. Berna, sold an ice machine and refrigerating apparatus to Kurt Rudolph Sternberg, then a resident of Baltimore, in the month of April, 1900, to be shipped to Port Jervis, New York, there to be erected in a brewery of the Deer Park Brewing Company, owned and operated by said Sternberg and some associates who were in business with said Sternberg, but without any knowledge by the York Manufacturing Company that the machine was being purchased for the Deer Park Brewing Company. Specifications and the agreement were afterwards signed by said agent for the York Manufacturing Company and by Sternberg, in Baltimore, *viz.*, on April 5, 1900. Afterwards said agreement was approved on April 10, 1900, by the York Manufacturing Company, at York, Pennsylvania, and a duplicate sent to said Sternberg, in Baltimore, Maryland.

(3) The said agreement, referring to the preceding specifications and general agreement, with the York Manufacturing Company's approval, is as follows:

Agreement

Between the York Manufacturing Company, a corporation organized under the laws of the state of Pennsylvania, of York, York county, Pennsylvania, U. S. A., party of the first part, and Kurt Rudolph Sternberg, Esq., of Baltimore, county of Baltimore, state of Maryland, party of the second part, as follows: The York Manufacturing Company agrees to furnish the said party of the second part, for use in brewery situated

NOTE.—As to right to maintain suit with respect to some right connected with real property in other state or injuries to such property, see also, in this series, Allin v. Connecticut River Lumber Co. (Mass.) 6 L. R. A. 416; Missouri P. R. Co. v. Cullers (Tex.) 13 L. R. A. 542; Little v. Chicago, St. P. M. & O. R. Co. (Minn.) 33 L. R. A. 423; and Rogers v. Barnes (Mass.) 38 L. R. A. 145.

As to effect on mortgage of agreement between mortgagor and another as to character of improvements to be attached to realty, see, in this series, cases in *note* to Muir v. Jones (Or.) 19 L. R. A. 444; also McFadden v. Allen (N. Y.) 19 L. R. A. 446; German Sav. & L. Soc. v. Weber (Wash.) 38 L. R. A. 267; Fuller-Warren Co. v. Harter (Wis.) 53 L. R. A. 603, and Anderson v. Creamery Package Mfg. Co. (Idaho) 56 L. R. A. 554.

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in the city of Port Jervis, county of ——, and state of New York, at No. — —— street, one York refrigerating machine, of the standard York style and patented system, together with the apparatus mentioned and described in the attached specifications; said machine and apparatus to be in all respects in accordance with said specifications, which, together with all the agreements and guaranties contained therein, are made a part of this agreement, and will deliver and have same ready for operation about the —— day of ——, 189–, for the sum of fifteen thousand ($15,000.00) dollars. The said party of the second part agrees to pay for the said machine and apparatus as follows, to wit: $3,000.00 cash with order. Balance in four equal, six per cent interest-bearing, bankable notes, to be dated and delivered when plant is ready to operate. First note to become due in four months. Second note to become due in seven months. Third note to become due in ten months. Fourth note to become due in thirteen months. The title to said machine and apparatus shall not pass from, but shall remain in, the York Manufacturing Company, until full settlement is made for the same,—until the same is fully paid for; and in the meantime the party of the second part agrees to fully indemnify the York Manufacturing Company against any and all loss or damage to said machine and apparatus by fire or other cause whatsoever, and also agrees to keep the same fully insured for the benefit of the York Manufacturing Company, as its interest may appear, until fully paid for. In case of failure or refusal to make any of the payments when due, or to make settlement as agreed, or to pay any note that may be given when it falls due, the whole of the unpaid indebtedness arising under this agreement shall thereby, at the option of the York Manufacturing Company, become immediately due and demandable. Witness the following signatures and seals, the fifth day of April, 1900:

York Manufacturing Company,
by G. E. Berna.

Approved by the York Manufacturing Company, at York, Pa., tenth day of April, 1900. York Manufacturing Company,
by P. H. Glatfelter, Prest.
[Seal] W. L. Glatfelter, Secy.

(4) The York Manufacturing Company, in pursuance of the contract, during some three months after the execution of said agreement manufactured the different parts of the refrigerator and ice machine so contracted for, and purchased pipes for the completion of the same, and, when finished, shipped the machine to Port Jervis, New York, and, by its workmen, set up and installed in the brewery of the Deer Park Brewing Company the said machinery, placing it upon proper foundations, affixing its parts to the building, and placing the boilers, walled in, in an adjoining building, and put said brewery in operation.

(5) The cash payment of $3,000 was paid to the York Manufacturing Company as provided in the agreement by said Sternberg, and, after the completion of the erection of said refrigerating plant and apparatus, there were executed and delivered on the dates thereof, respectively, to the York Manufacturing Company, by Kurt Rudolph Sternberg, promissory notes of said Kurt Rudolph Sternberg, to the order of the York Manufacturing Company, bearing the following dates, and drawn in the following amounts, respectively, to wit: Note for $2,843.69, dated August 27, 1900, payable four months after date at the First National Bank of Port Jervis, New York, which note was paid by the maker at maturity. Note for $2,343.69, dated August 27, 1900, payable seven months after date at the First National Bank of Port Jervis, New York, which was unpaid at maturity and duly protested, and which note, with principal, interest, and protest charges, still remains unpaid. Note for $2,068.69, dated August 27, 1900, payable ten months after date at the National Bank of Port Jervis, New York, which was unpaid at maturity, and which note, with principal and interest, still remains unpaid. Note for $2,068.69, dated August 27, 1900, payable thirteen months after date at the National Bank of Port Jervis, New York, and was unpaid at maturity, and which note, with principal and interest, still remains unpaid. Note for $1,896.93, dated February 27, 1901, payable six months after date at the National Bank of Port Jervis, New York, which note was unpaid at maturity, and, with principal and interest, still remains unpaid. Upon the above-mentioned notes there remains due to the York Manufacturing Company the sum of $6,481.07, and $1.85 protest fees, with interest thereon from August 27, 1900, and the additional sum of $1,896.93, with interest from February 27, 1901; the balance of the purchase price of $15,000 having been paid by said Kurt Rudolph Sternberg, the purchaser.

(6) At the time of the execution of the said agreement, and at the time of the delivery of said machinery, so set up in said brewery, by the York Manufacturing Company, the said Kurt Rudolph Sternberg was the president and manager of the said Deer Park Brewing Company.

(7) After the said refrigerating plant and apparatus was installed and put in operation at the brewery of the Deer Park Brewing Company at Port Jervis, New York, to wit, October 25, 1900, the said Deer Park Brewing Company made and delivered its mortgage to the National Bank of Port Jervis, of Port Jervis, New York, for the purpose of securing a certain bond, of even date with the said mortgage, made by the said Deer Park Brewing Company, and delivered to the said National Bank of Port Jervis, and by said mortgage transferred to the said National Bank of Port Jervis all the property therein described, including the refrigerating plant and apparatus purchased as aforesaid from the York Manufacturing Company and installed in the brewery of the said Deer Park Brewing Company, which said

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mortgage was afterwards duly recorded in the proper offices for said purposes in the proper county where the property was situated when mortgaged, both as a real and chattel mortgage. Said mortgage was executed to said national bank as collateral security for moneys to be advanced to said Deer Park Brewing Company on notes to be discounted.

(8) After the execution and delivery of the bond and mortgage hereinbefore described by the Deer Park Brewing Company to the National Bank of Port Jervis, the said Deer Park Brewing Company became indebted to the said National Bank of Port Jervis, by reason of notes made or indorsed by the said Deer Park Brewing Company and discounted by the said National Bank of Port Jervis, in a sum in excess of the amount named in the said bond and mortgage, and intended to be secured thereby.

(9) At the time the said Deer Park Brewing Company was adjudicated a bankrupt as aforesaid, to wit, May 25, 1901, the said Deer Park Brewing Company was indebted to the said National Bank of Port Jervis in a sum exceeding the amount named in said bond and mortgage, which said indebtedness was secured, and intended to be secured, by the said bond and mortgage; and the said Deer Park Brewing Company had failed to meet and pay the indebtedness so created, secured as aforesaid by said bond and mortgage, and on May 25, 1901, had been in default for a period of more than sixty days, and is still in default.

(10) On or about January 10, 1902, the said bond and mortgage described in paragraph 7 were duly assigned, transferred, and set over by the said National Bank of Port Jervis to Herman Schmaltz, the plaintiff, of the city of Philadelphia, and are now owned by him, and at the time of said last-mentioned transfer the debt secured and intended to be secured by the said bond and mortgage, remaining due and unpaid, aggregated $26,124.06; and there was, at the time of the filing of the bill, due and owing to the said Herman Schmaltz, assignee of the said bond and mortgage aforesaid, the sum of $26,124.06, as appears from said bond and mortgage and evidence filed.

(11) That on January 20, 1902, the law firm of Hastings & Gleason (the said H. A. Gleason, of said firm of attorneys at law, of New York City, being the counsel of the York Manufacturing Company in New York, with general authority to act there for the said company) gave the following notice to Herman Schmaltz, the plaintiff:

New York, January 20, 1902.

Re Deer Park Brewing Co.

Mr. Schmaltz,

207 Buttonwood St., Philadelphia, Pa.

Dear Sir:—

We understand you are interested in this matter. We represent the York Manufacturing Company, which owns the ice plant, and beg to notify you that, unless this transaction is closed at once, we shall be compelled to remove the plant immediately.

Very truly yours,

Hastings & Gleason.

On February 15, 1902, the same attorneys served the following notice on the owners of Deer Park Brew Company:

New York, February 13, 1902.

Owners Deer Park Brewing Co.,

Port Jervis, New York.

Gentlemen:—

You are hereby notified that during the week commencing February 17th the ice plant belonging to the York Manufacturing Company will be removed by their employees. We would ask you to have work stopped, to facilitate such removal, as their workmen will be there during the week named. Very truly yours,

Hastings & Gleason.

(12) Said refrigerator was a constituent part of the said brewery plant of the Deer Park Brewing Company (afterwards Deer Park Brew Company), attached to, and necessary for the operation of, the same. It was capable, however, of being removed without serious permanent injury to the walls and other parts of the brewery; and, by the substitution of another refrigerator of the same or other manufacture, operations could be continued, as conducted before removal of the refrigerator in question.

(13) Neither the agreement, nor a copy thereof, providing that the refrigerator should remain the property of the York Manufacturing Company until settled and paid for, was filed in the office of the town clerk at Port Jervis, New York, as required by the New York statute of 1897, at the time of the execution of the mortgage by said Deer Park Brewing Company to the said Port Jervis National Bank, or previously. The said bank had no notice, actual or constructive, of the said agreement. The bank, in good faith, without notice, took said mortgage, and advanced the moneys heretofore mentioned on discounted notes, on the credit of said mortgage, as collateral security; and the mortgage was assigned to the plaintiff by the bank, in good faith, for a valuable compensation.

(14) In the proceedings in bankruptcy of the Deer Park Brewing Company, Kurt Rudolph Sternberg reported in the statement filed in said bankruptcy proceedings the said refrigerator as held by the York Manufacturing Company on an agreement of conditional sale.

Messrs. **Joseph De F. Junkin** and **J. S. Black**, for appellant:

The contract constitutes a conditional sale, and, if it is a Pennsylvania contract, the title attempted to be reserved cannot be insisted upon as against creditors or bona fide purchasers.

Farquhar v. *McAlevy*, 142 Pa. 233, 21 Atl. 811; *Ott* v. *Sweatman*, 166 Pa. 217, 31 Atl. 102.

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The contract is a Pennsylvania contract because it was made in Pennsylvania.

Beach, Contr. § 66.

In the absence of proof, the conclusive presumption is that the law of Maryland is the same as the law of Pennsylvania.

Bennett v. *Cadwell*, 70 Pa. 253; *Van Auken* v. *Dunning*, 81 Pa. 464; *Bollinger* v. *Gallagher*, 144 Pa. 205, 22 Atl. 815.

This contract, as to matters bearing upon its execution, interpretation, and validity, must be governed by the law of the state of Pennsylvania.

Scudder v. *Union Nat. Bank*, 91 U. S. 406–412, 23 L. ed. 245–248; 1 Beach, Contr. § 590.

The promissory notes of the purchaser will be considered as absolute payment when the parties have agreed that they shall be so received.

League v. *Waring*, 85 Pa. 246; *McCord* v. *Durant*, 134 Pa. 184, 19 Atl. 489.

A contract involving a forfeiture upon the happening of a certain contingency will be strictly construed in favor of him against whom the forfeiture is stipulated. If any reasonable construction can be placed upon the contract that will avoid the forfeiture, it will be adopted.

West Moreland & C. Natural Gas Co. v. *De Witt*, 130 Pa. 254, 5 L. R. A. 731, 18 Atl. 724.

A refrigerating plant erected in a brewery becomes a part of the real estate.

Ott v. *Sweatman*, 166 Pa. 217, 31 Atl. 102.

Where the owner of the land wrongfully fixes the chattels of another, it is a conversion of them into the realty, and by the change of their nature leaves the remedy of the owner only in damages.

Hill v. *Sewald*, 53 Pa. 271, 91 Am. Dec. 209.

A bona fide mortgagee of real estate, or one claiming title under such mortgagee, is not liable to be affected by any secret trust or equity if he is without notice thereof.

Bigley v. *Jones*, 114 Pa. 510, 7 Atl. 54; *Crest* v. *Jack*, 3 Watts, 238, 27 Am. Dec. 353; Beach, Contr. § 156.

Where the mortgagor is insolvent, a court of equity will restrain the severance of machinery affixed to real estate in a building, upon the petition of the mortgagee.

Witmer's Appeal, 45 Pa. 455, 84 Am. Dec. 505; *Morris's Appeal*, 88 Pa. 368.

Where damages are incapable of measurement at law, or are estimable only by conjecture, and not by any accurate standard, although there is no irreparable injury, an injunction will be granted.

West Moreland & C. Natural Gas Co. v. *De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Com.* v. *Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372.

Or where the injury threatened is of a permanent nature.

Sterling's Appeal, 111 Pa. 35, 56 Am. Rep. 246, 2 Atl. 105.

That it is within the power of the court, and that, in a proper case, it is the duty of the court to restrain legal proceedings in another state, is not open to question.

Kendall v. *McClure Coke Co.* 182 Pa. 1, 37 Atl. 823.

Messrs. **George S. Schmidt** and **Henry C. Niles**, for appellees:

A mere possibility, or anything short of a reasonable probability, of injury to the plaintiff, is insufficient to warrant an injunction in his favor against any proposed use of property by its owner.

1 Beach, Inj. § 17.

An injunction will not be granted to allay the apprehensions of individuals.

Gaw v. *Philadelphia & B. Pass. R. Co.* 6 Pa. Dist. R. 740; *Heiser* v. *Leid*, 11 Lanc. L. Rev. 265.

If the defendant is solvent, the remedy at law is necessarily adequate.

10 Enc. Pl. & Pr. pp. 956, 957.

Courts may restrain acts contrary to law, but not when they are according to positive law. When a positive statutory remedy exists and may be pursued, equity cannot interfere on the ground of irreparable mischief.

Brown's Appeal, 66 Pa. 157; 1 Beach, Inj. § 20; *Rhea* v. *Forsyth*, 37 Pa. 503, 78 Am. Dec. 441; *Washburn's Appeal*, 105 Pa. 480; *Philadelphia's Appeal*, 78 Pa. 33.

If the manufacturer, instead of making a conditional sale of the machine, had leased it; and if, after it was built into the building and made a part of the real estate, the bank had loaned its money upon the security of a mortgage covering it,—nevertheless, the manufacturing company would have had, even in Pennsylvania, a perfect legal right, as against the mortgagee, to retake possession.

Hill v. *Sewald*, 53 Pa. 271, 91 Am. Dec. 209.

The New York act, as clearly as language can be, limits its operation only to contracts for the sale of goods accompanied by an immediate delivery.

Graves Elevator Co. v. *Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930.

The validity of a contract is to be determined by the law of the place where it was made, unless it appears on its face that it was to be performed in, or made in reference to the laws of, some other place, in which case it will be governed by the laws of the place of performance.

3 Am. & Eng. Enc. Law, pp. 543, 544.

The contract was to be performed in the state of New York.

An agreement to perform an act at a particular place is made in reference to the laws of that place.

3 Am. & Eng. Enc. Law, p. 546; Story, Confl. L. 8th ed. p. 376; *People's Bldg. & Loan & Sav. Asso.* v. *Berlin*, 201 Pa. 1, 50 Atl. 308; *Bennett* v. *Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684; *Baum* v. *Birchall*, 150 Pa. 164, 24 Atl. 620.

The decisions of the New York courts in construing the statutes of their own state should be binding upon courts of other states.

American Print Works v. *Lawrence*, 23

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N. J. L. 9; *Case* v. *Cushman*, 3 Watts & S. 544, 39 Am. Rep. 47.

Where there are disputes in regard to the rights of the parties under the contract which is sought to be enforced, especially where the disputes involve the very terms and obligations of the contract, an injunction ought not to be awarded until the rights of the parties are ascertained and settled.

Brown's Appeal, 62 Pa. 17; *Mammoth Vein Consol. Coal Co.'s Appeal*, 54 Pa. 183.

Mestrezat, J., delivered the opinion of the court:

The trial judge has found and stated the facts very fully in his opinion, and a summarized restatement of them here will be sufficient: By an agreement in writing, dated April 5, 1900, the York Manufacturing Company, one of the defendants, the appellee, and a corporation of this state, agreed with Kurt Rudolph Sternberg, a resident of Maryland, and president and manager of the Deer Park Brewing Company, a New York corporation, to furnish him, for use in a brewery situate in the state of New York, "one York refrigerating machine, of the standard 'York' style and patented system, together with the apparatus mentioned and described in the attached specifications." The consideration was $15,000, of which $3,000 were to be paid in cash with the order, and the balance "in four equal, 6 per cent interest-bearing, bankable notes." The agreement contains the following: "The title to said machine and apparatus shall not pass from, but shall remain in, the York Manufacturing Company, until full settlement is made for the same,—until the same is fully paid for; and in the meantime the party of the second part agrees to fully indemnify the York Manufacturing Company against any and all loss or damage to said machine and apparatus by fire or other cause whatsoever, and also agrees to keep the same fully insured for the benefit of the York Manufacturing Company, as its interests may appear, until fully paid for. In the case of failure or refusal to make any of the payments when due, or to make settlement as agreed, or to pay any note that may be given when it falls due, the whole of the unpaid indebtedness arising under this agreement shall thereby, at the option of the York Manufacturing Company, become immediately due and demandable." The agreement was signed by Sternberg and the agent of the York Manufacturing Company in Maryland, and was subsequently approved by the company at York, Pennsylvania, and a duplicate sent to Sternberg, in Maryland. During the three months succeeding the agreement, the York Manufacturing Company manufactured the different parts of the refrigerator, purchased pipes for the completion of the machine, and, when finished, shipped it to Port Jervis, New York, and installed it in the brewery of the Deer Park Brewing Company, "placing it upon proper foundations, affixing its parts to the building, and placing the boilers, walled in, in an adjoining building, and put said brewery in operation." The cash payment was made and the notes were given by Sternberg as provided in the agreement. After the refrigerating machine had been installed and the brewery put in operation, the brewing company, on October 25, 1900, mortgaged the plant, including the refrigerator, to the National Bank of Port Jervis, to secure a bond of even date with the mortgage, which, with the bond, was given as collateral security for moneys to be advanced to the brewing company on notes to be thereafter discounted. The mortgage was duly recorded as a real estate and chattel mortgage in the county where the property was situated. After the delivery of the collateral security, the National Bank of Port Jervis discounted the brewing company's notes to an amount exceeding the sum named in the bond and mortgage; and said amount is unpaid, and is due to Herman Schmaltz, the plaintiff, a citizen of this state, by virtue of an assignment of the bond and mortgage dated January 10, 1902. The Deer Park Brewing Company became bankrupt, was closed out under the United States bankrupt law; and, as a reorganization, the Deer Park Brew Company, a New York corporation, and one of the defendants, owns its plant, and is engaged in the brewing business at Port Jervis, New York. The brew company was not served with the bill in this case, but filed an answer, and submitted itself to the jurisdiction of the court. On January 20, 1902, the York Manufacturing Company, by its agent, gave to the plaintiff the following notice: "We represent the York Manufacturing Company, which owns the ice plant, and beg to notify you that, unless this transaction is closed at once, we shall be compelled to remove the plant immediately." On February 15, 1902, it also gave to the owners of the Deer Park Brew Company this notice: "You are hereby notified that during the week commencing February 17, the ice plant belonging to the York Manufacturing Company will be removed by their employees. We would ask you to have work stopped, to facilitate such removal, as their workmen will be there during the week named." The trial judge found that the "said refrigerator was a constituent part of said brewery plant of the Deer Park Brewing Company (afterwards Deer Park Brew Company), attached to, and necessary for the operation of, the same."

The statutes of the state of New York provide that all conditions and reservations in a contract for the sale of personal property, accompanied by immediate delivery and continued possession, shall be void as against subsequent mortgages in good faith, and as to them the sale shall be deemed absolute, unless such contract, or a copy thereof, shall be filed in the office of the proper clerk of the town or city where the vendee resides, or, if he is a nonresident of the state, of the town or city where the property is situate at the execution of the agreement. Neither the contract involved in this litigation, nor a copy thereof, was filed at

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Port Jervis, New York, as required by the statutes of that state. The bank, in good faith, without notice of the contract, took the mortgage and advanced the money, and assigned the mortgage, in good faith for a valuable consideration, to the plaintiff. After the service of the notice above referred to, the plaintiff filed this bill. It prays that the York Manufacturing Company be enjoined from removing the refrigerating plant and apparatus from the brewery, and that the Deer Park Brew Company be enjoined from permitting it to be removed. In its answer the York Manufacturing Company avers that the notes given in part payment of the refrigerating plant had not been paid, and that therefore, by reason of the provisions of the contract, the title to the machine did not pass to the purchaser, and the manufacturing company was entitled to the possession of it. The brew company filed an answer submitting itself to the jurisdiction of the court, and denying the right of its codefendant to the property in dispute. The learned trial judge refused an injunction on the ground, as we understand from his opinion, that, under the defendant's testimony, the York Manufacturing Company had no intention of removing the refrigerating plant from the brewery by any means other than the legal process of the state of New York, and because "the manager of the defendant company testified that the company never intended forcibly, without resort to the court, to remove said plant from the said brewery."

The plaintiff and one of the defendants, the York Manufacturing Company, are residents of this state; and the Deer Park Brew Company, the other defendant, although not served with the bill, voluntarily submitted itself to the jurisdiction of the court. The important and a controlling question in the case is one of jurisdiction, which received but little consideration at the hands of the trial court and the counsel. It is not free from doubt, but reason and the weight of authority sustain the jurisdiction. The plaintiff is the assignee of a mortgagee, and the principal defendant, who resists the relief prayed for, is a claimant to a part of the mortgaged premises, found by the court below to be a fixture. The other defendant is the owner in possession of the premises, whose interests in the controversy are not antagonistic to the plaintiff. While the situs of the property in dispute is in another state and a decree of a court of this state cannot operate upon or directly affect it, yet we think that a court of equity in this state, having jurisdiction of all the parties, can determine their rights to the property, and, by proper process, enforce them *in personam*. *Penn* v. *Baltimore*, 1 Ves. Sr. 444; *Carroll* v. *Lee*, 3 Gill & J. 504, 22 Am. Dec. 350; *Mitchell* v. *Bunch*, 2 Paige, 606, 22 Am. Dec. 669; *Hayden* v. *Yale*, 45 La. Ann. 362, 12 So. 633; *Massie* v. *Watts*, 6 Cranch, 148, 3 L. ed. 181; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Phelps* v. *McDonald*, 99 U. S. 298, 25 L. ed. 473. In the last-cited case it is said: "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*." In *Allen* v. *Buchanan*, 97 Ala. 399, 11 So. 777, it is held that a suit in equity may be maintained, and remedies granted which affect and operate upon the person of defendant, and not upon the subject-matter, when it is situated in another state or country; but the parties are within the jurisdiction of the court, although such subject-matter is referred to in the decree, and the defendant is ordered to do, or to refrain from doing, certain acts towards it, and it is thus ultimately, but indirectly, affected by the relief granted. In *Carroll* v. *Lee*, 3 Gill & J. 509, 22 Am. Dec. 352, Earle, J., speaking for the court, says: "Where property in controversy is within the limits of the state, and the claimant resides abroad, the chancery court has an undeniable jurisdiction over the case. . . . So where the party defendant is within the state, and the land or other property in contest is beyond its limits, although the proceeding is *in rem*, we apprehend there is no want of jurisdiction in the chancellor. To enforce a decree in a case of this kind, the proceedings may be *in personam*, as well as by injunction, to recover the possession of the thing disputed." In *Jennings Bros.* v. *Beale*, 158 Pa. 283, 27 Atl. 948, it is held that, where a court of equity has jurisdiction of a person, it may issue an injunction against him to prevent trespass upon lands in another county. In *Clark* v. *Clark*, 180 Pa. 186, 36 Atl. 747, a party held the title to real and personal estate as trustee, and was required to account in a court having jurisdiction over him, but not over the property. Our Brother Mitchell, speaking for the court, said: "By it [the writing] the appellant clearly constituted himself a trustee, and became liable to account in any court having jurisdiction over him, not by virtue of any statute as to tenants in common, but by the general jurisdiction of chancery to compel performance of equitable duties or the enforcement of equitable rights, wherever the party may be found, without reference to the locality of the land." In *Clad* v. *Paist*, 181 Pa. 148, 37 Atl. 194, it was held that a court of equity in Philadelphia county, at the instance of a resident of Chester county, might restrain the obstruction of a right of way in Chester county by a resident of Montgomery county. The present Chief Justice, delivering the opinion, and citing many authorities, English and American, in support of the rule, said: "The parties being within the jurisdiction of the court, the court will, under ordinary circumstances,

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grant relief, even in reference to a subject-matter beyond the territorial cognizance of the court." It was held in *Vaughan* v. *Barclay*, 6 Whart. 392, that this court had jurisdiction of a bill brought to compel the conveyance, by a trustee residing within the state, of the outstanding legal estate in lands situate in other states. And in *Kendall* v. *McClure Coke Co.* 182 Pa. 1, 37 Atl. 823, it was held that a court of equity in this state will enjoin a creditor of an insolvent estate, who proves his claim and files exceptions to the assignee's account, from prosecuting a suit instituted in another state to secure a preference over other creditors as to the lands there situated, although the question of the validity of the assignment in such other state involves the law of the situs of the property. In *Sutphen* v. *Fowler*, 9 Paige, 280, the bill was filed for specific performance of the contract for sale of land in another state. It was held that the court had jurisdiction, not only to decree specific performance of the contract, and to authorize the plaintiff to take and hold possession of the land until the transfer to him of the legal title, but also, in the meantime, the court could grant a perpetual injunction restraining the defendant from disturbing the plaintiff in such possession, or from doing any act whereby the title should be transferred to any person, or in any way impaired or encumbered.

The case of *Great Falls Mfg. Co.* v. *Worster*, 23 N. H. 462, is directly in point, and sustains the jurisdiction of the court below. The plaintiff company in that case was a New Hampshire corporation and had its cotton mills on the Salmon river, which at this point was the dividing line between that state and Maine. It used the waters of the river to operate its mills, and for this purpose it maintained a dam across the river, a part of which was in each state. The defendant, also a citizen of New Hampshire, claimed an interest in some land in Maine which was flowed by the water of the pond created by the dam. The plaintiff company denied the defendant's claim to the land. He destroyed a part of the dam, and threatened to remove the whole of it, above a certain height, so that it would not cause the water to flow his land. The bill prayed for an injunction, and, as stated in the report of the case, "the only question now raised being whether the court had jurisdiction to restrain a citizen of this state from going into another state and committing acts injurious to the property of the orators situated there." It was held that the court had jurisdiction to issue an injunction restraining the defendant from destroying the plaintiff's dam in Maine. Chief Justice Gilchrist delivered the opinion of the court, in which he cites and reviews the numerous authorities, English and American, on the subject. Of the relief sought by the plaintiff, he says: "Nothing more is asked than that the respondent, a citizen of New Hampshire, and residing within her limits, shall be subject to her laws, and that, being within reach of the process of this court, he shall be forbidden to go elsewhere and commit an injury to the property of other citizens, situated here, and entitled to the protection of our laws." The chief justice concludes his opinion as follows: "It would be a great defect in the administration of the law if the mere fact that the property was out of the state could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this state, by going out of the jurisdiction and committing a wrong, as by staying here and doing it. The injustice does not lose its quality by being committed elsewhere than in New Hampshire, and, as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here has been recognized for nearly two hundred years, we have no hesitation in holding that the court has jurisdiction to issue the injunction prayed for." The same principle is laid down by text-writers. "Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court," says Mr. Pomeroy (3 Pom. Eq. Jur. § 1318), "any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately, but indirectly, affected by the relief granted."

The rule thus announced by the text-writers, supported by the decisions of the courts, sustains the authority of the court below in protecting the rights of the mortgagee or his assignee against their infringement by the York Manufacturing Company, if the facts warranted the intervention of a chancellor. All the parties were within the jurisdiction of the court. *Æquitas agit in personam.* This maxim is the basic principle of equitable jurisdiction. The decree operates upon, and is enforced against, the person, and not the property. The purpose of the decree here is to control the action of the defendant the York Manufacturing Company, a citizen of this state and amenable to the process of its courts, and to prevent it from doing an act which is illegal, and would result in irreparable injury to the plaintiff, also a citizen of the state. For a chancellor in this jurisdiction to deny aid under the circumstances would be to refuse to enforce the law in a contest between citizens of this commonwealth, and therefore for the state to abdicate its sovereignty. So long as an individual is a citizen of a state, he is subject to the process and decrees of its courts of equity, regardless of the *locus* of the subject-matter indirectly affected by the litigation. It is conceded that the decree here will not affect the mortgaged premises in New York, nor could an officer acting in obe-

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dience to our process redeliver the property to the plaintiff if the defendants should violate the injunction. The lack of such authority, however, does not oust the jurisdiction. As held in all the cases, the remedy for disobedience of the restraining order would be directly against the defendants, as in other cases where the commands of a court of equity are disregarded. In *Penn* v. *Baltimore*, 1 Ves. Sr. 444, a bill for the specific performance of a contract executed in England, concerning the line between the colonies of Pennsylvania and Maryland, Lord Hardwicke said in reply to the argument that the decree could not be enforced: "If they could not at all, I agree it would be in vain to make a decree, and that the court cannot enforce their own decree *in rem* in the present case; but that is not an objection against making a decree in the cause for the strict primary decree in this court, as a court of equity, is *in personam*."

We are inclined to agree with the court below, although it is not necessary to determine the question here, that this is a Pennsylvania contract, to be performed in the state of New York, and that the law of that state must prevail in ascertaining the rights of the parties under the conditional sale and mortgage. Story, Confl. L. 7th ed. § 280, and authorities cited to sustain the text. *Knowles Loom Works* v. *Vacher*, 57 N. J. L. 490, 33 L. R. A. 305, 31 Atl. 306, is similar in principle to this case, and it sustains the ruling of the trial court. There it is said: "The situs of the property, and not the *lex loci contractus*, determines the validity of such sales. The contract in this case was made in New York, but the property was to be delivered and was delivered to, and held by, the purchaser in this state. Great contention and uncertainty as to the title to personal property would be produced if purchasers and mortgagees were bound to ascertain whether the vendor or mortgagor acquired title in another state, before they could contract with safety in reference to it." It is unquestionably true that under the law of Pennsylvania the conditions imposed by the contract would be void as against the mortgagee, and that the York Manufacturing Company could not enforce them here. *Forrest* v. *Nelson*, 108 Pa. 481. Were the property in this state, the refrigerator would be a fixture, a part of the brewery, and consequently bound by the mortgage. *Ott* v. *Sweatman*, 166 Pa. 217, 31 Atl. 102.

Nor do we think the conditions imposed by the contract are valid and can be asserted against the mortgagee under the New York statute. We agree with the learned trial judge in his conclusion on this point. The decisions of the lower courts of New York, holding a contrary view, are not binding upon us in the absence of a decision of the court of last resort of that state. The construction of a statute of a state by its highest tribunal will ordinarily be received as conclusive in the courts of other states. *Van Matre* v. *Sankey*, 148 Ill. 536, 23 L. R. A. 665, 36 N. E. 628; *Walker* v. *Commissioners*, 17 Wall. 648, 21 L. ed. 744. New Jersey has a statute similar to the New York statute involved in this controversy, requiring contracts for the conditional sale of personal property to be recorded. In construing the statute the supreme court of New Jersey, in *Knowles Loom Works* v. *Vacher*, 57 N. J. L. 490, 33 L. R. A. 305, 31 Atl. 306, says: "The manifest purpose of the act is to render inefficacious the conditional sale of all goods held in this state, where the contract of sale is not recorded. . . . The object of the statute is to get rid of secret and latent equities. Public policy, as asserted in the extension of the registry laws, requires that the public record should show the ownership of personal property, and a construction which is favorable to that end should be given to the act." Such is clearly the purpose of statutes requiring a public record to disclose the ownership of personal property. Here the property was a refrigerating machine, which was to be manufactured and delivered by the York Manufacturing Company to Sternberg at Port Jervis, New York. So far as appears by the evidence, it was delivered immediately after it was made, and its possession has since been in the purchaser, or those holding under him. It was installed in the brewery, and became a part thereof, prior to the date and recording of the mortgage given the National Bank of Port Jervis. By the failure to observe the recording act of New York, the York Manufacturing Company misled the mortgagee, which advanced its money on the faith of the brewing plant; an important and necessary part thereof being the refrigerator. If the contention of the appellee is to prevail, the very purpose of the New York statute requiring notice of conditional sales of personal property to be given by the records will be defeated as to the title to a large class of personal property in that state. Public policy and the rights of creditors, as well as the plain intention of the legislature in the enactment of the act in question, forbid such a construction of it; and, until the court of last resort in New York so decides, we will adhere to a contrary construction.

The interpretation we have given the New York statute makes the law of that state the same as that of Pennsylvania as to the effect of the conditional sale. In neither state were the conditions or reservations in the contract effective against the mortgagee or its assignee, and hence it is immaterial whether the contract be construed by the laws of New York or Pennsylvania.

This is not a bill to restrain the York Manufacturing Company from bringing suit in the state of New York for the recovery of the refrigerating machine, but the object of the bill is to enjoin that company from removing the machine from the brewery. The learned judge seemed to think that the York Manufacturing Company did not intend to remove the refrigerator by force, but only by legal proceedings, and therefore held there was no "imminent danger of the violation of the rights of the plaintiff," or of irreparable injury to him, which required the interven-

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tion of a court of equity. In this we think the court erred. The written notices given the plaintiff and the owners of the brewing plant were not denied by the manufacturing company. Their construction was for the court. They clearly and positively assert the intention of the York Manufacturing Company "to remove the plant immediately;" that the plant "will be removed by their employees" during the week commencing February 17, 1902; and that "we would ask you to have work stopped to facilitate such removal, as their workmen will be there during the week named." There is not even an intimation in either of the notices that legal proceedings were to be resorted to for the removal of the refrigerator. On the contrary, the intention of the manufacturing company, as plainly stated in the notices, was to remove it by their workmen without any prior legal proceedings. This intention is reasserted in the answer in the following language: "The York Manufacturing Company claims and intends to assert its legal title to, and will remove or cause to be removed, said refrigerating plant and apparatus from the place where it was erected." It is idle for the York Manufacturing Company to say, in the face of these positive declarations, that it had no intention of removing the refrigerator until its right to do so had been legally determined. The courts of New York have been and are open to it, and, so far as appears in this record, no action has yet been commenced there to determine its rights to the property. We must therefore regard the declarations and acts of the company as evincive of an intention to forcibly take possession of the property in dispute, which would invade the clear legal rights of the plaintiff, and entitle him to injunctive relief.

The other reason assigned by the court for refusing equitable interference is that the removal of the refrigerator would not cause irreparable injury to the plaintiff. In view of the finding of the trial judge that the refrigerator was a constituent part of the brewery plant, and was attached to, and necessary for the operation of, the same, we are unable to see by what method of reasoning he reaches his conclusion. Equally untenable, we think, is his finding that "it [the refrigerator] was capable, however, of being removed without serious permanent injury to the walls and other parts of the brewery, and, by the substitution of another refrigerator of the same or other manufacture, operations could be continued as conducted before the removal of the refrigerator in question." The same could be said with equal force of any other part of the machinery necessary for the operation of the brewery. Any or all of the different parts constituting the plant could be supplied, and hence, on this theory, all the machinery might be removed, and no irreparable injury be done to the plant or to the owner. The same logic would permit the destruction of any building or manufactory by force, as restitution would prevent irreparable injury. Removing a constituent and necessary part of the plant prevents its operation, and results in a loss of the business, compensation for which would be determinable solely by conjecture. In one sense, this may not be irreparable injury; but in the legal sense it is, and will authorize the interference of a chancellor. Equity will interfere when the injury threatened would occasion damages estimable only by conjecture, and not by any accurate standard (*Com.* v. *Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372), or would be ruinous to the property in the manner in which it has been enjoyed, and would permanently impair its future enjoyment (*Jerome* v. *Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 434; *Echelkamp* v. *Schrader*, 45 Mo. 505; *Frederick* v. *Groshon*, 30 Md. 436, 96 Am. Dec. 591; *Ryan* v. *Brown*, 18 Mich. 196, 100 Am. Dec. 154).

We have discussed the controlling questions in the case, and our conclusion is that the plaintiff is entitled to the relief he seeks in this suit. The trial court had jurisdiction, and was invested with ample power to determine and enforce the rights of the parties. The refrigerator plant, being a constituent part of, and necessary to the operation of, the brewery, is unquestionably subject to the mortgage now held by the plaintiff; and its removal by the defendants would result in irreparable injury, which could not be adequately compensated in damages. It therefore follows that the prayer of the plaintiff's bill should have been allowed.

The decree is reversed, the bill is reinstated, and the court below is directed to issue the injunction in accordance with the prayer of the bill; the costs to be paid by the York Manufacturing Company, the appellee.

NEBRASKA SUPREME COURT.

STATE of Nebraska, *Plff. in Err.*,
v.
John Henry LOECHNER.

(.....Neb.....)

***A member of a board of education of a school district in a city having a population of over 1,500, organized under the provisions of subdivision 14, chap. 79, Comp. Stat., is a ministerial officer within the meaning of the term as used in § 180, Crim. Code, providing for the punishment of certain public officers for malfeasance in office.**

(October 9, 1902.)

ERROR to the District Court for Douglas County to review a judgment sustain-

*Headnote by HOLCOMB, J.

NOTE.—As to who are public officers, see also, in this series, Trainor v. Wayne County (Mich.) 59 L. R. A. 15 L. R. A. 95; McCornick v. Pratt (Utah) 17 L. R. A. 248, and *note;* State *ex rel.* Childs v.

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ing a demurrer to an indictment charging defendant with malfeasance in office. *Reversed.*

The facts are stated in the opinion.

Messrs. **George W. Shields, Elmer E. Thomas,** and **Harry E. Burnham,** for plaintiff in error:

A member of the board of education of the school district of the city of South Omaha is a ministerial officer under the provisions of § 180 of the Criminal Code of Nebraska.

Mechem, Pub. Off. § 21, p. 10; Throop, Pub. Off. § 533; *Jackson* v. *State ex rel. Majors*, 57 Neb. 187, 42 L. R. A. 792, 77 N. W. 662; Walker, American Law, p. 93; *State ex rel. Drake* v. *Doyle*, 40 Wis. 188, 22 Am. Rep. 692; *State ex rel. Allen County Orphans' Home* v. *Schmetzer*, 156 Ind. 529, 60 N. E. 269; *Com.* v. *Woelper*, 3 Serg. & R. 33; *People ex rel. Atty. Gen.* v. *Detroit*, 29 Mich. 113; *Benjamin* v. *Manistee River Improv. Co.* 42 Mich. 640, 4 N. W. 483; *Flournoy* v. *Jeffersonville*, 17 Ind. 170, 79 Am. Dec. 468; *Waldo* v. *Wallace*, 12 Ind. 570; *Wolfe* v. *State ex rel. Kennard*, 90 Ind. 16; *Howe* v. *State*, 53 Miss. 59; *Boner* v. *Adams*, 65 N. C. 639; *Diggs* v. *State*, 49 Ala. 311; *People ex rel. Williamson* v. *McKinney*, 52 N. Y. 374.

Mr. **Ed. P. Smith,** for defendant in error:

The court should take into consideration the general character of the duties to be performed by these officers, the general scope of their authority, and, from all these, determine whether or not they become ministerial officers. Applying that rule, members of the board of education are not ministerial officers.

Throop, Pub. Off. § 23; *Morton* v. *Comptroller General*, 4 S. C. N. S. 430; Bishop, Non-Contract Law, § 785; *Raines* v. *Simpson*, 50 Tex. 495, 32 Am. Rep. 609; *Grider* v. *Tally*, 77 Ala. 422, 54 Am. Rep. 65; Mechem, Pub. Off. § 657; *State* v. *Womack*, 4 Wash. 19, 29 Pac. 939; *Heald* v. *Polk County*, 46 Neb. 28, 64 N. W. 376; *State ex rel. Franklin County* v. *Vincent*, 46 Neb. 408, 65 N. W. 50; *State ex rel. Wyckoff* v. *Merrell*, 43 Neb. 575, 61 N. W. 754; *Douglas County* v. *Keller*, 48 Neb. 317, 67 N. W. 195; *Stenberg* v. *State ex rel. Keller*, 48 Neb. 299, 67 N. W. 190; *State ex rel. Sayre* v. *Moore*, 40 Neb. 854, 25 L. R. A. 774, 59 N. W. 755.

Holcomb, J., delivered the opinion of the court:

This cause comes here for review on exceptions by the county attorney to an order of the district court sustaining a demurrer interposed by the defendant to an indictment returned against him by the grand jury, charging him with the offense of malfeasance in office. The defendant, Loechner, was a member of the board of education of the school district of South Omaha, Douglas county, Nebraska. In the indictment it is charged that he "unlawfully, wilfully, and corruptly, as such member of the board of education, caused to be given away out of the funds of said school district aforesaid to Ed. Munshaw & Co., a copartnership, the sum of $100, of the value of $100, the money of said school district aforesaid, without any consideration therefor." The indictment was demurred to on the grounds that "the facts stated in said indictment and charges contained therein, and in each and every count thereof, are not sufficient to constitute an offense against the laws of the state of Nebraska," and that "the defendant, as a member of the school board of the city of South Omaha, is not a ministerial officer, and cannot be placed on trial for malfeasance in office." The offense charged in the indictment returned by the grand jury is defined by § 180 of the Criminal Code, and the specific reason for the interposition of the demurrer is found in the second paragraph thereof, above quoted. It is insisted that the defendant, as a member of the board of education of the school district of South Omaha, is not a ministerial officer within the meaning of the term as used in § 180 of the Criminal Code, above referred to. That portion of the section material to the present inquiry reads as follows: "Any clerk, sheriff, coroner, constable, county commissioner, justice of the peace, recorder, county surveyor, prosecuting or district attorney, or any ministerial officer who shall be guilty of any palpable omission of duty, or who shall wilfully or corruptly be guilty of malfeasance or partiality in the discharge of his official duties, shall be fined," etc. While several different officers are specifically enumerated in the foregoing section against whom the penalties of the statute are visited for violating its provision, the office held by the defendant as a member of the school board is not included in the enumeration, and, unless his office is of such character as to bring him within the classification included within the phrase, "or any ministerial officer," the demurrer was rightly sustained, and the defendant cannot be held to answer for violating the provisions of this section of the Criminal Code. The question, therefore, presented to us for determination, is whether the defendant, as a member of the board of education of the city of South Omaha, in the performance of his duties as such, may properly be said to be a ministerial officer within the meaning of the words as used in the section of the Criminal Code heretofore quoted. In the presentation of the case the state insists that the defendant, as a member of the board of education, is a ministerial officer, within the meaning of the criminal statute; while defendant's counsel is content to argue that defendant does not belong to this particular class of officers, without any attempt to point out the class to which he does belong. It may, we think, be fairly said that the legislature intended,

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Kilchli (Minn.) 19 L. R. A. 779; State *ex rel.* Lamar v. Dillon (Fla.) 22 L. R. A. 124; *Re* Ricker (N. H.) 24 L. R. A. 740; Davock v. Moore (Mich.) 28 L. R. A. 783; Brown v. Russell (Mass.) 32 L. R. A. 253; Todd v. Johnson (Ky.) 33 L. R. A. 399; Baltimore v. Lyman (Md.) 52 L. R. A. 406.

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after specifically enumerating the several officers mentioned, by the use of the words "or any ministerial officer," to include within the latter classification all officers which are properly designated and included in the word "ministerial" as contradistinguished from other recognized divisions of officers into classes, such as judicial, legislative, and executive. The import of the words obviously indicates an intention on the part of the legislature, aside from the officers enumerated, to broadly cover, comprehend, and include all officers properly denominated ministerial in the general classification of public officers. Like all criminal statutes, the language is not to be broadened or extended by construction so as to include within its terms offenses, or a class of persons against whom the statute operates, not fairly warranted by the language used. In this connection, attention may properly be called to the provisions of § 251 of the Criminal Code, which are quite pertinent to a correct understanding and construction of the section under consideration. It is there said: "This Code and every other law upon the subject of crime which may be enacted shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects, and no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit." Members of a board of education in cities and towns, like school district officers, are undoubtedly public officers, and must come within some of the recognized definitions of the different classes in which such officers are usually divided. In a general way it may be said that the affairs of state government and the method of administering its laws are divided into three distinct branches,—executive, judicial, and legislative; and officers chosen to conduct the affairs of government in either of the different branches mentioned are easily classified. The judicial branch pertains to the administration of justice, the adjudication of controversies, and the interpretation of the laws, and, declares the Constitution, shall consist of a supreme court, district courts, justices of the peace, police magistrates, and such other courts inferior to the district court as may be created by law for cities and incorporated towns. The defendant clearly is not a judicial officer, and that classification may be eliminated. It is equally obvious that he does not come within the classification of legislative officers, who have to do with the enactment of laws, and we need not further consider that branch with a view of classifying the defendant as being possibly a legislative officer. This brings us to those offices which are created for the purpose of conducting that branch of government which, in the general classification we have made, is classed as executive.

At the threshold of the inquiry we are met with difficulty because of no very well recognized mark of distinction by which to determine the different classes of officers belonging to the executive branch of the government. Mr. Mechem, in his work on Public Officers, divides public officials into the three general classes mentioned, and adds a fourth classification, known as "ministerial officers." At § 655 he says: "This class of officers is known by different names. They are sometimes called executive officers, sometimes administrative, sometimes ministerial, and with slight shades of distinction. But for convenience sake, and as may properly be done, they will all be treated here under the general head of ministerial officers, and there will be included all officers whose duties are wholly or chiefly ministerial." And in Throop, Pub. Off. § 22, on the same subject, quoting from a case decided by the United States Supreme Court, he divides the several public officers into three classes, denominated "political," "judicial," and "ministerial." Of political officers it is said that they are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior,—as the president or head of a department. *Twenty Per Cent. Cases*, 13 Wall. 568, 575, *sub nom. United States* v. *Fitzpatrick*, 20 L. ed., 701, 707, 7 Ct. Cl. 293. Ministerial offices, it is said, are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior. An executive officer, in the proper sense of the term, is one whose duties are mainly to cause the laws to be executed; such as the President, the governor of a state, or the chief executive officer of a city. It pertains to the execution and enforcement of the laws by one charged with that particular duty. Says the supreme court of California: "An executive officer is one in whom resides the power to execute the laws." *People ex rel. Thorne* v. *Hays*, 4 Cal. 146. On the same subject, it is observed by the supreme court of Indiana in a cause brought against the governor and others, constituting a state board with certain powers and duties: "The duty of the governor, in connection with the other officers named in the act, is not executive. The executive power of the state is vested solely in the governor. . . . Any power or authority vested by legislation in the governor, together with other officers or persons in which they are to have an equal voice with him, cannot be executive, as he alone is vested with the executive power of the state." *Gray* v. *State ex rel. Coghlen*, 72 Ind. 576–578. "A ministerial act," says the same court, "is defined to be 'one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done.'" *Flournoy* v. *Jeffersonville*, 17 Ind. 169–174, 79 Am. Dec. 468. The defendant cannot be said to be an executive officer within the meaning of that term when used to classify the officer or describe the functions chiefly to be

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performed by an officer designated and styled as executive. It would be just as permissible to describe district school officers as belonging to the executive class. By subdivision 14, chap. 79, Comp. Stat., school districts in cities having a population of over 1,500 are declared to be bodies corporate, and to possess all the usual powers of a corporation for public purposes; and it is provided that the board of education shall have exclusive control of all the property of the school district for all the purposes therein contemplated, and that all schools organized within such district shall be under the control of the board of education. Provisions are then made as to the powers belonging to the board, the duties to be by it discharged, and the manner in which the affairs of the school district shall be managed and conducted. The members of the school board are unquestionably regarded by statute as the servants or agents of the corporation, selected for the purpose of conducting and managing its affairs in the manner and under the restrictions pointed out by statute. They are an administrative body, charged with the duty of administering the law governing the public schools within the city composing the school district of which they are officers. It is their duty to administer the affairs of the corporation as directed by statute in the exercise of such powers and authority as are vested in them. Doubtless in many instances in the performance of their duties they may exercise a discretion or judgment quasi judicial in character, but this fact alone cannot determine the class to which they belong, or bring them in the category of judicial officers. There is scarcely a ministerial officer but that, in the performance of some act required to be done, exercises a discretion quasi judicial in its nature, and regarding which the act itself cannot rightfully be classed as ministerial. There is a marked distinction between a ministerial act or function when considered as an independent transaction, and the general nature of the office and the functions to be performed therein, which, when considered together, make the incumbent a ministerial officer. A sheriff is a ministerial officer, and so recognized by all. Yet in a sense he is the executive officer of the court, whose duty it is to obey and carry into execution its mandates, and all valid processes issued therefrom. He also, in the performance of his duties, in many instances must and does exercise discretion and judgment of a quasi judicial nature; but this fact alone cannot transform him into a judicial officer. If ministerial officers can perform nothing but ministerial acts, then it is hard to conceive of such officer, for some of the acts of every ministerial officer must require the exercise of judgment and discretion, which is the very antithesis of a ministerial act. Whether the person is or is not a ministerial officer depends, not on the character of the particular act which he may be called upon to perform, or whether he exercises judgment and discretion with reference to such act, but whether the general nature and scope of the duties devolving upon him is of a ministerial character, as distinguished from other classes of which we have made mention. Webster defines "minister," v. t., "to administer," and "ministerial," of or pertaining to ministry or service. In Worcester "ministerial" is defined as acting at the commands of another, or acting as the agent for another, or under superior authority. "Administrative," in the Century Dictionary, is spoken of by way of illustration, "as to administer the laws of the government or a department of the government." In Webster "administer" is defined as "ministrare, to serve, to manage, or conduct as public officers; as, to administer the government of the state;" and in Mechem on Public Officers (§ 21) a ministerial officer is defined as one whose duty it is to execute the mandates lawfully issued by their superiors. In *Jackson* v. *State ex rel. Majors*, 57 Neb. 187, 42 L. R. A. 792, 77 N. W. 662, this court has used the word "ministerial" as synonymous with the word "administrative," and it seems that the two words are so closely allied in meaning that they may be, and frequently are, used interchangeably. An administrative officer is frequently classed as a ministerial officer, and *vice versa*. Anderson's Law Dictionary defines "administer" to mean: "To dispense, direct the application of; as to administer the law, justice." Bouvier speaks of administrative as synonymous with "executive; a ministerial duty, one in which nothing is left to the discretion." Many of the duties devolving upon a member of a board of education are purely ministerial, while others involve acts in which judgment and discretion must be exercised. While this latter gives to the officer some of the characteristics belonging to the judicial, it is altogether clear that such acts do not bring the officer performing them properly within the classification of judicial officers, and do not determine the character of the office held by such person. In *Waldo* v. *Wallace*, 12 Ind. 570, it is said: "A judge will be not the less a judicial officer because some duties he may have to perform are administrative in their character; nor will an administrative officer become a judicial officer simply because some of his duties may be to some extent judicial in their character." In the state of Alabama, a county solicitor — an office similar to the office of county attorney in this state—was being prosecuted for an offense under a statute punishing a ministerial officer for receiving a bribe. It was there contended by the defense, as in the case at bar, that the defendant was not a ministerial officer. The supreme court says: "If a county solicitor is not a ministerial officer, it would be difficult, if not impossible, to define his character. All the duties with which he is charged pertain to the protection of the state and the general administration of the criminal laws. He attends on the grand jury as their legal adviser; draws the indictments they may find; prosecutes all indictable offenses, or prosecutes

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or defends any civil action to which the state is a party, pending in the circuit court. . . . No one of these duties involves executive or judicial functions. They are purely ministerial." [*Diggs v. State*, 49 Ala. 311.] Certainly, the duties of a county attorney are no more clearly ministerial in character than are those of a member of a school district board, or a member of a board of education in school districts in cities. There is more latitude and discretion in the discharge of official duties given the former than the latter. A member of the board of education is required to act in obedience to the mandates of the law, which guides and directs his action in certain channels, and regarding which there is left to him no discretion. He must act at the time and in the manner prescribed by statute, which defines and limits his authority. As to all such matters he is left no discretion. He administers the law as he finds it, and discharges the duties of the office in conformity with the law, and not according to his own judgment and discretion. It is true that in many of the acts he is called upon to perform he is given a certain latitude or discretion of a quasi judicial character, but this, as we have seen, does not take him out of the class of ministerial officers, and place him in the class denominated judicial.

The reports of the opinions of this court are numberless wherein officers and boards having functions to perform of a nature similar to those incumbent on the defendant as a member of the board of education are classed as ministerial or administrative officers vested with certain powers requiring the exercise of discretion and judgment of a quasi judicial character; and yet it will not be seriously contended, we apprehend, that the idea was ever entertained by the court, or any member thereof, that such officers would be properly classed as judicial officers. The court has done nothing more than to describe the nature of the authority and power possessed by such officers, and made no attempt to classify them as belonging to the judicial department of government. "When the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in any way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi judicial." Bishop, Non-Contract Law, § 786. The author is speaking, not for the purpose of classifying officers, but in regard to liability for the act performed. He is discussing those acts of public officers which lie between the purely judicial and the purely ministerial. The quasi judicial acts are performed, not by judicial officers,— for their acts in the discharge of official duties are purely judicial, with possible exceptions when they become ministerial,— but by ministerial and other officers not judicial, such acts being in a degree and to a certain extent of a judicial nature. The ministerial officer may, therefore, very properly be invested with power and authority of a quasi judicial character without at all affecting the general classification into which all civil officers are divided.

From a careful consideration of the subject in its different aspects, we are constrained to the view, as appears from what has been said, that the defendant belongs to the class of officers denominated "ministerial," and for that reason is included within the fair import of the language of the section of the Criminal Code under which the indictment was found.

It is urged by the defendant that the question we are considering has been decided by the supreme court of Washington (*State v. Womack*, 4 Wash. 19, 29 Pac. 939) adverse to the conclusion we have just reached. We have given that case careful consideration, and do not regard it as conflicting with the views herein expressed. In that case the prosecution was for an attempted bribery of a member of the state board of education, composed of the superintendent of public instruction and four other persons, appointed by the governor, whose duty it was, among other things, to adopt a uniform series of text-books for the use of common schools of the state, and to enter into a contract with the proper parties to supply the same. The criminal statutes of that state provided for the punishment of bribery, or attempted bribery, of any executive, judicial, or ministerial officer. The case was considered with reference to the question of whether a member of the state board of education of that state was an executive officer, and it is held that he was such officer, charged by law with certain executive functions, and that, under the Constitution of that state, establishing an executive department, the executive officers of the state were not limited to those therein mentioned. The decision of the case hinged on the proposition of whether the officer on whom bribery was attempted was an executive officer, as distinguished from an administrative or ministerial officer, and it was held that he was. In the case at bar, under all the holdings and definitions which we have examined, it cannot be said, we think, that a member of the board of education of a school district in a city is an executive officer charged with executive functions similar to those pertaining to the duties of the officer of a state executive board of education, as decided by the supreme court of Washington. After all, there is a very close relation between the duties and functions to be discharged by executive and ministerial officers. In both classes are involved official action of a ministerial character, rather that that belonging to the legislature or judicial. Officers which may be classified as ministerial, it occurs to us, may be regarded as in the nature of a subdivision of that class of officers which in a general way belong to the executive branch of government. *French v. State ex rel. Harley*, 141 Ind. 618, 29 L. R. A. 119, 41 N. E. 2. In the case last cited it is said the Constitution of Indiana divides the powers of government into the legislative department, the executive depart-

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ment (including the administrative), and the judicial department. Our Constitution recognizes the same general divisions of power and separates the government into the same departments. In the case just cited it is said by the court, with reference to the character of the office of warden of the penitentiary: "The only official existing, at the adoption of the present Constitution, having a voice in the control, and whose position was by political choice, was a warden, who was chosen by the legislature; and at the same time the institution was necessarily, as it is now, one of the administrative agencies of the state, falling under the executive department of the government. Its management was not through purely executive agencies, nor were they legislative, and they were in no sense judicial. They were of the administrative agencies of the state, subject to executive authority only so far as executive duties required the laws to be enforced by the governor. Nothing exists in the present Constitution to change this unity of interest in the institution, or to take it from the list of administrative agencies of the state." Ministerial officers, while not executive or political within the meaning of the words as used by those seeking to classify the different civil offices according to the nature of the functions performed, are obviously more nearly related to the executive than to the legislative or judicial. The section of the Criminal Code first quoted includes and comprehends within its terms, we are satisfied, all that numerous class of officers which may be described as administrative or ministerial, and who have to do with administering the law in some branch of the state government, and whose duties and authority are defined and regulated by statute; and the functions which are to be by them performed are in the main ministerial, as contradistinguished from executive, legislative, or judicial. The exceptions of the county attorney to the ruling complained of are well taken, and should, accordingly, be sustained.

Exceptions sustained.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, *Plff. in Err.*,

v.

Leo KRAYENBUHL, by Next Friend.

(.....Neb.....)

*1. **Petition examined**, and *held* good, as against a demurrer *ore tenus*.

2. **When the owner of dangerous premises knows**, or has good reason to believe, that children so young as to be ignorant of the danger will resort to such premises, he is bound to take such precautions to keep them from such premises, or to protect them from injuries likely to result from the dangerous condition of the premises while there, as a man of ordinary care and prudence, under like circumstances, would take.

3. **In such cases, in the determination of the question of negligence**, regard must be had to the character and location of the premises, the purpose for which they are used, the probability of injury therefrom, the precautions necessary to prevent such injury, and the relation such precautions bear to the beneficial use of the premises. If, under all the circumstances, the owner omit such precautions as a man of ordinary care and prudence would take, under like circumstances, he is guilty of negligence.

4. **Ordinarily the question of negligence is one of fact** for the jury, to be determined from all the facts and circumstances shown in evidence, and it is error for the court to group certain facts in evidence together, and instruct the jury that they constitute negligence.

5. **In an action by an infant in the care and custody of its father**, for personal injuries, it is error to instruct the jury that his lessened earning capacity is an element of damages, unless it be limited to the period from which he would be entitled to his earnings.

6. **An instruction authorising the jury, in arriving at a verdict**, to bring to bear their own knowledge, observation, and experience in the business affairs of life, is erroneous when not limited to such knowledge, observation, and experience as they share in common with men generally.

7. **An instruction relative to the damages** to be awarded the plaintiff, if any, closed with the statement that they should not exceed a specific amount, naming the amount claimed in the petition. *Held*, that the practice of thus referring to the amount claimed should be discountenanced.

8. **Instructions** tendered examined, and *held* properly refused.

9. **Rulings** on the admission of evidence examined, and *held* not erroneous.

(October 9, 1902.)

ERROR to the District Court for Merrick County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. **John Patterson, J. W. Deweese,** and **Frank E. Bishop,** for plaintiff in error:

The petition does not allege the authority of any agent of the defendant to invite the plaintiff upon its turntable, or any facts which constitute such express invitation. These must be specifically alleged and proved, in both of which the plaintiff has failed.

San Antonio & A. P. R. Co. v. *Morgan*, 92 Tex. 98, 46 S. W. 28; *Schmidt* v. *Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417.

*Headnotes by ALBERT, C.

NOTE.—As to liability of railroad company for injuries to children trespassing on turntable, see also, in this series, Ft. Worth & D. City R. Co. v. Robertson (Tex.) 14 L. R. A. 781, and *note;* Walsh v. Fitchburg R. Co. (N. Y.) 27 L. R. A. 724; Delaware, L. & W. R. Co. v. Reich (N. J. L.) 41 L. R. A. 831; and Edgington v. Burlington, C. R. & N. R. Co. (Iowa) 57 L. R. A. 561.

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The mere temptation of children to go upon the turntable does not amount to an invitation on the part of the company, or charge it with any obligation to the trespassing plaintiff further than not wilfully or unnecessarily to injure him.

Holbrook v. *Aldrich*, 168 Mass. 16, 36 L. R. A. 493, 46 N. E. 115; *Turess* v. *New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614; *Missouri, K. & T. R. Co.* v. *Edwards*, 90 Tex. 65, 32 L. R. A. 825, 36 S. W. 430; *Gillespie* v. *McGowan*, 100 Pa. 144, 45 Am. Rep. 365.

The owner has the right to put upon his own land useful machinery and necessary improvements for the accomplishment of any useful purpose intended, without being liable for injuries inflicted upon the trespasser while using the same improperly.

Sioux City & P. R. Co. v. *Stout*, 17 Wall. 657, 21 L. ed. 745; *Dobbins* v. *Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62; *Richards* v. *Connell*, 45 Neb. 467, 63 N. W. 915; *Slayton* v. *Fremont, E. & M. Valley R. Co.* 40 Neb. 840, 59 N. W. 510; *Walsh* v. *Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1069; *Loomis* v. *Terry*, 17 Wend. 497, 31 Am. Dec. 306; *Delaware, L. & W. R. Co.* v. *Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682; *Turess* v. *New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614; *Daniels* v. *New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248, 28 N. E. 283; *Frost* v. *Eastern R. Co.* 64 N. H. 220, 9 Atl. 790; *Bates* v. *Nashville, C. & St. L. R. Co.* 90 Tenn. 36, 15 S. W. 1069; *St. Louis, V. & T. H. R. Co.* v. *Bell*, 81 Ill. 76, 25 Am. Rep. 269; *Cleveland, C. C. & St. L. R. Co.* v. *Tartt*, 12 C. C. A. 618, 24 U. S. App. 489, 64 Fed. 823; *Haberlau* v. *Lake Shore & M. S. R. Co.* 73 Ill. App. 261; *Rogers* v. *Elliott*, 146 Mass. 349, 15 N. E. 768; *Ponting* v. *Noakes* [1894] 2 Q. B. 281; *Birge* v. *Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Richards* v. *Connell*, 45 Neb. 467, 63 N. W. 915; *Barney* v. *Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069; *Witte* v. *Stifel*, 126 Mo. 301, 28 S. W. 891; *Robinson* v. *Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765, 27 Pac. 689; *Bishop* v. *Union R. Co.* 14 R. I. 314, 51 Am. Rep. 386; *Furey* v. *New York C. & H. R. R. Co.* 67 N. J. L. 270, 51 Atl. 505.

None of the transient ways complained of were an invitation to go upon the table, and the plaintiff did not leave any of them to reach the adjacent table, or fall upon it while using the way; neither was the child permitted to play on the table; nor did the company know that it was used for that purpose.

Gorr v. *Mittlestaedt*, 96 Wis. 296, 71 N. W. 656.

It would not be in the province of the jury to find that the construction of the machine and the placing of it were unsafe or improper. That question was to be determined by the railroad company with reference to the convenient, economical, and effective use of it to accomplish the purposes for which it was intended.

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Boyd v. *Harris*, 176 Pa. 484, 35 Atl. 222; *Hannaher* v. *St. Paul, M. & M. R. Co.* 5 Dak. 1, 37 N. W. 717; *Delaware, L. & W. R. Co.* v. *Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682; *Kinney* v. *Onsted*, 113 Mich. 96, 38 L. R. A. 665, 71 N. W. 482.

Messrs. **Matthew Gering** and **Michael O'Donohoe**, for defendant in error:

Either an express or implied invitation was held out to the defendant in error.

Cooley, Torts, p. 303; *Powers* v. *Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Early* v. *Lake Shore & M. S. R. Co.* 66 Mich. 349, 33 N. W. 813.

The test of authority of the agent to invite should be determined by his authority to protest.

Johnson v. *Chicago, R. I. & P. R. Co.* 58 Iowa, 348, 12 N. W. 329; 1 Redf. Railways, 532, 543, and notes; *McKinley* v. *Chicago & N. W. R. Co.* 44 Iowa, 314, 24 Am. Rep. 748; *Gradin* v. *St. Paul & D. R. Co.* 30 Minn. 217, 14 N. W. 881; *Rosenbaum* v. *St. Paul & D. R. Co.* 38 Minn. 173, 36 N. W. 447.

A child of such tender years as to be incapable of negligence is not to be considered a trespasser.

Battishill v. *Humphreys*, 64 Mich. 494, 31 N. W. 894; *Keyser* v. *Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. 311; *Lynch* v. *Nurdin*, 1 Q. B. 29; *Daley* v. *Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Chicago & A. R. Co.* v. *Gregory*, 58 Ill. 226; *Kay* v. *Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628; *Bellefontaine & I. R. Co.* v. *Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; *Isabel* v. *Hannibal & St. J. R. Co.* 60 Mo. 475.

The maintenance by the company of a turntable upon its premises, with knowledge that children frequented it for amusement, created the duty to fasten and guard the same.

Elliott, Railroads, p. 1973; *Sioux City & P. R. Co.* v. *Stout*, 17 Wall. 657, 21 L. ed. 745; *Harriman* v. *Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Union P. R. Co.* v. *McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Atchison & N. R. Co.* v. *Bailey*, 11 Neb. 336, 9 N. W. 50; *Barrett* v. *Southern P. Co.* 91 Cal. 296, 27 Pac. 666; *Ft. Worth & D. City R. Co.* v. *Robertson* (Tex.) 14 L. R. A. 783, 16 S. W. 1093; *Keffe* v. *Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Twist* v. *Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 402; *Kansas C. R. Co.* v. *Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Nagel* v. *Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Evansich* v. *Gulf, C. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586; *Ilwaco R. & Nav. Co.* v. *Hedrick*, 1 Wash. 446, 25 Pac. 335; *Gulf, C. & S. F. R. Co.* v. *McWhirter*, 77 Tex. 356, 14 S. W. 26; *Pittsburg, A. & M. Pass. R. Co.* v. *Caldwell*, 74 Pa. 421; *Callahan* v. *Eel River & E. R. Co.* 92 Cal. 89, 28 Pac. 104; *Ferguson* v. *Columbus & R. R. Co.* 75 Ga. 637, 77 Ga. 102; *Gulf, C. & S. F. R. Co.* v. *Styron*, 66 Tex. 421, 1 S. W. 161; *Houston & T. C. R. Co.* v. *Simpson*, 60 Tex. 103; *Ft. Worth & D. C.*

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R. Co. v. *Measles*, 81 Tex. 474, 17 S. W. 124; *Union P. R. Co.* v. *Dunden*, 37 Kan. 1, 14 Pac. 501; *Koons* v. *St. Louis & I. M. R. Co.* 65 Mo. 592; *O'Malley* v. *St. Paul, M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440; *Bridger* v. *Asheville & S. R. Co.* 27 S. C. 456, 3 S. E. 860.

Albert, C., filed the following opinion:

This action was brought on behalf of Leo Krayenbuhl, whom we shall hereafter call the plaintiff, by his next friend, against the Chicago, Burlington, & Quincy Railroad Company to recover for personal injuries received by the plaintiff while playing on a turntable belonging to the defendant.

It sufficiently appears from the evidence that on and prior to the 20th day of October, 1895, the defendant operated a line of railroad, which extended through the village of Palmer, at which point it maintained a passenger depot, roundhouse, coal house, water tank, and turntable. A few rods northwest of the depot the road branched, one branch taking a westerly and the other a northwesterly course. The turntable was situated between those two branches, at a point about 1,600 feet from the depot, and about 100 feet from each branch, and a track extended to it from the point of divergence of the two branches. A path or footway, beginning some distance northwest of the turntable, extended in a southeasterly direction, passed within about 70 feet of it, and crossed the track at the south. This path was in common use, not only by the members of the family to which the plaintiff belonged, but by the public generally, and there was no fence between it and the turntable. The turntable was provided with a movable bolt, which by means of a lever could be thrown into a socket in the surrounding framework, thus holding the turntable in position. Provision was also made for locking it with a padlock. The rules of the defendant in force at the time required the foreman of the roundhouse, or in his absence the station agent, to keep the turntable locked when not in use; but there is considerable evidence to the effect that this rule was frequently disregarded, and that, owing to the looseness of one of the staples used in connection with the lock, even when thus fastened, it could be unfastened by young children without much difficulty. The plaintiff's father was in the employ of the defendant as section foreman, and, with his family, occupied a small house on the right of way near the station, within about 30 feet of the track, and about 1,600 feet from the turntable. Another family resided on the right of way, a few rods from the turntable. The two families visited back and forth, using the right of way for a path. The plaintiff's father kept a cow, which was pastured on the right of way, sometimes near the turntable, and it appears from the evidence that his children drove it back and forth on the right of way as occasion required. There is evidence tending to show that it was the common practice for the children of the family and other children in the neighborhood to resort to the coal house, roundhouse, and turntable, and to amuse themselves by revolving the turntable, and riding on it while it was in motion, and that this practice was known to the defendant, who permitted it without protest.

On the 20th day of October, 1895, in the absence of his parents, the plaintiff,—he was then four years of age,—in company with some other members of the family, the oldest of whom was eleven years old, and some other children, the oldest of whom was fourteen, were playing with a push car, moving it up and down on the railroad track. The agent in charge of the station joined them, and rode a short distance on the car. He then left them, and went to his rooms in the station. The children continued to push the car, and finally reached the turntable. There is evidence sufficient to sustain a finding that they found the turntable unlocked and unguarded, but the evidence is conflicting on that point. The plaintiff and some of the other children got on the turntable, while two of the others set it in motion. While it was in motion the plaintiff's foot was caught between the rails, and severed at the ankle joint. The injury thus sustained is that for which damages are sought in this action. A trial was had to a jury, which resulted in a verdict and judgment for the plaintiff. The defendant brings error.

The first question raised is that the petition does not state facts sufficient to constitute a cause of action. The grounds of this objection, as stated in the defendant's brief, are as follows: "It does not allege the authority of any agent of the defendant to invite the plaintiff upon its turntable, or any facts which constitute such express invitation. It does not allege the characteristics either of location or construction of the table, which of themselves render the table an invitation to the danger." The petition is too long to set out at length. We think it will suffice to say that the allegations in these respects are that the plaintiff was induced by other small children, with the knowledge and consent of the defendant, its agents and servants, and by the invitation of the defendant, to come to and about the turntable. On the face of the petition, this is an allegation of an invitation by the defendant. If the plaintiff were invited by the defendant, he was invited by some agent of the defendant having authority in the premises. The allegation in that regard is sufficient. It is true the facts constituting such invitation are not set forth, nor do we deem it necessary that they should be for the purposes of the objection under consideration, which was first made by an objection to the introduction of any testimony, on the ground that the facts stated in the petition did not constitute a cause of action.

The question to which counsel have directed the greater portion of their arguments is whether the facts in this case are sufficient to sustain the verdict. On this question we have been favored with an ex-

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haustive discussion of what is commonly known as the "doctrine of the *Turntable Cases*," which, applied to the facts in this case, would sustain the verdict. The leading case in support of this doctrine is *Sioux City & P. R. Co.* v. *Stout*, 17 Wall. 657, 21 L. ed. 745. The doctrine was reaffirmed by the same court in *Union P. R. Co.* v. *McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, and was expressly approved by this court in *Atchison & N. R. Co.* v. *Bailey*, 11 Neb. 336, 9 N. W. 50, and was approved and applied in the following among other cases: *Barrett* v. *Southern P. Co.* 91 Cal. 296, 27 Pac. 666; *Keffe* v. *Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Twist* v. *Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 402; *Kansas C. R. Co.* v. *Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Ilwaco R. & Nav. Co.* v. *Hedrick*, 1 Wash. 446, 25 Pac. 335; *San Antonio & A. P. R. Co.* v. *Skidmore* (Tex. Civ. App.) 65 S. W. 215; *Gulf, C. & S. F. R. Co.* v. *McWhirter*, 77 Tex. 356, 14 S. W. 26; *Harriman* v. *Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Ferguson* v. *Columbus & R. R. Co.* 75 Ga. 637; *Nagel* v. *Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418.

The doctrine, as we gather it from the cases cited, is that where a turntable is so situated that its owner may reasonably expect that children too young to appreciate the danger will resort to it, and amuse themselves by using it, it is guilty of negligence for a failure to take reasonable precautions to prevent such use. It has not been permitted to pass as law unchallenged. On the contrary, it has been expressly repudiated in many cases, among which are the following: *Walsh* v. *Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1069; *Daniels* v. *New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248, 28 N. E. 283; *Frost* v. *Eastern R. Co.* 64 N. H. 220, 9 Atl. 790; *Delaware, L. & W. R. Co.* v. *Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682. It has been criticised in others, among which are *Ryan* v. *Towar*, 128 Mich. 463, 55 L. R. A. 310, 87 N. W. 644, and *Dobbins* v. *Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62. The latter case would seem to throw some doubt on the position of the courts of Texas in regard to the doctrine in question, but the case of *San Antonio & A. P. R. Co.* v. *Skidmore* (Tex. Civ. App.) 65 S. W. 215, appears to be the latest expression of the court on the question.

The defendant insists that the doctrine is unsound, and asks that it be repudiated by the court, and that the case of *Atchison & N. R. Co.* v. *Bailey*, 11 Neb. 336, 9 N. W. 50, be overruled. The argument in this behalf rests on the proposition that the owner of dangerous premises owes no active duty to trespassing children. The assumption that the plaintiff was a trespasser might well be questioned. The right of way was his home and playground; it was where his father performed his daily labors; it was used as a path and for other purposes by the family. But, as the duty of the owner of dangerous premises to infant trespassers is raised by other assignments, it will shorten this opinion to allow the assumption to pass unchallenged. The proposition is not universally true, as is clearly shown, we think, by Sedgwick, J., in *Tucker* v. *Draper*, 62 Neb. 66, 54 L. R. A. 321, 86 N. W. 917, wherein he says: ". . . . There may be, and often are, circumstances under which one owes some active duty to a trespasser upon his premises. If a man wilfully lies down upon a railroad track, the engineer must not wantonly run his engine over him. One may not set a snare or spring gun for trespassers, and, knowing that some stranger had placed the snare or spring gun, if he wantonly allows it to remain he will be responsible for the consequences. A well may be so contrived as to act as a dangerous trap, and one who allows it so to remain upon his premises will, under some circumstances, be liable. If adults, or children of such age as to ordinarily be capable of discerning and avoiding danger, are injured while trespassing upon the premises of another, they may be without remedy, while under similar circumstances children of three or four years of age would be protected. If I know that there is an open well upon my premises, and know that children of such tender years as to have no notion of their danger are continually playing around it, and I can obviate the danger with very little trouble to myself, and without injuring the premises or interfering with my own free use thereof, I owe an active duty to those children; and, if I neglect that duty, and they fall into the well and are killed, it is through my negligence. I cannot urge their negligence as a defense, even though I have never invited or encouraged them, expressly or impliedly, to go upon the premises."

The language amounts to a reaffirmance of the doctrine of the turntable cases, and, to our minds, suggests the true principle upon which cases of this character rest; that is, that where the owner of dangerous premises knows, or has good reason to believe, that children so young as to be ignorant of the danger will resort to such premises, he is bound to take such precautions to keep them from such premises, or to protect them from injuries likely to result from the dangerous condition of the premises while there, as a man of ordinary care and prudence, under like circumstances, would take. At first sight, it would seem that the principle, thus stated, is too broad, and that its application would impose unreasonable burdens on owners, and intolerable restrictions on the use and enjoyment of property. But it must be kept in mind that it requires nothing of the owner that a man of ordinary care and prudence would not do of his own volition, under like circumstances. Such a man would not willingly take up unreasonable burdens, nor vex himself with intolerable restrictions.

It is true, as said in *Loomis* v. *Terry*, 17 Wend. 497, 31 Am. Dec. 306, " the business

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of life must go forward;" the means by which it is carried forward cannot be rendered absolutely safe. Ordinarily, it can be best carried forward by the unrestricted use of private property by the owner; therefore the law favors such use to the fullest extent consistent with the main purpose for which, from a social standpoint, such business is carried forward, namely, the public good. Hence, in order to determine the extent to which such use may be enjoyed, its bearing on such main purpose must be taken into account, and a balance struck between its advantages and disadvantages. If, on the whole, such use defeats, rather than promotes, the main purpose, it should not be permitted; on the other hand, if the restrictions proposed would so operate, they should not be imposed. The business of life is better carried forward by the use of dangerous machinery; hence, the public good demands its use, although occasionally such use results in the loss of life or limb. It does so because the danger is insignificant, when weighed against the benefits resulting from the use of such machinery, and for the same reason demands its reasonable, most effective, and unrestricted use, up to the point where the benefits resulting from such use no longer outweigh the danger to be anticipated from it. At that point the public good demands restrictions. For example, a turntable is a dangerous contrivance, which facilitates railroading; the general benefits resulting from its use outweigh the occasional injuries inflicted by it; hence the public good demands its use. We may conceive of means by which it might be rendered absolutely safe, but such means would so interfere with its beneficial use that the danger to be anticipated would not justify their adoption; therefore the public good demands its use without them. But the danger incident to its use may be lessened by the use of a lock which would prevent children, attracted to it, from moving it; the interference with the proper use of the turntable occasioned by the use of such lock is so slight that it is outweighed by the danger to be anticipated from an omission to use it; therefore the public good, we think, demands the use of the lock. The public good would not require the owner of a vacant lot on which there is a pond to fill up the pond or inclose the lot with an impassable wall to insure the safety of children resorting to it, because the burden of doing so is out of proportion to the danger to be anticipated from leaving it undone. *Richards* v. *Connell*, 45 Neb. 467, 63 N. W. 915. But where there is an open well on a vacant lot, which is frequented by children, of which the owner of the lot has knowledge, he is liable for injuries sustained by children falling into the well, because the danger to be anticipated from the open well, under the circumstances, outweighs the slight expense or inconvenience that would be entailed in making it safe. *Tucker* v. *Draper*, 62 Neb. 66, 54 L. R. A. 321, 86 N. W. 917.

Hence, in all cases of this kind, in the determination of the question of negligence, regard must be had to the character and location of the premises, the purpose for which they are used, the probability of injury therefrom, the precautions necessary to prevent such injury, and the relations such precautions bear to the beneficial use of the premises. The nature of the precautions would depend on the particular fact in each case. In some cases a warning to the children or the parents might be sufficient; in others, more active measures might be required. But in every case they should be such as a man of ordinary care and prudence would observe under like circumstances. If, under all the circumstances, the owner omits such precautions as a man of ordinary care and prudence, under like circumstances, would observe, he is guilty of negligence. We are fully satisfied that the principle under consideration is sound, and that its application would not operate oppressively on the owner. We see no good reason for receding from the position already taken by this court in cases of this character.

The defendant tendered the following instruction: "The jury are instructed that in this case the plaintiff claims, in substance, that the railroad company was negligent in the manner in which it kept and used the turntable by which the plaintiff was injured, and that the turntable in question was a machine that was naturally enticing to children, and that children were tempted to play on and about this turntable. On this point the court instructs you that the law is that the railroad company has the right to the exclusive use of its own grounds and turntable and other machinery, the same as any other person has the exclusive right and use of his own property and premises, and that the company was under no obligations to keep its turntable in such a condition that it would be safe and convenient for children to play upon and to use as a plaything; and the court instructs you that the defendant was under no obligation to keep a watchman at and about said turntable for the purpose of excluding children therefrom; that the company was only required to exercise reasonable care in the placing and using of said turntable, and have the same fitted with such appliances as would make it reasonably safe and convenient for the purpose for which it was intended." The court refused the instruction as tendered, and modified it by omitting the concluding clause, and inserting the following: "But the company was required to exercise reasonable care in the placing and fastening of the turntable and having the same fitted with such appliances as would make it reasonably safe in the situation where it was placed, under the circumstances as disclosed in this case."

The instruction as thus modified was given. The complaint of the refusal of the court to give the instruction as tendered is covered by what has been said on the sufficiency of the facts to sustain the verdict. But the defendant insists that the instruc-

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tion as modified is erroneous, in that it submitted to the jury the proper construction and location of the turntable. Taking the instruction as a whole, we do not think it admits of that construction. The opening sentence informs the jury of the nature of the plaintiff's claim; that such claim is that the defendant "was negligent in the manner in which it kept and used the turntable by which the plaintiff was injured." In paragraph 7 of the instructions the jury were told that the action rests on the alleged negligence of the defendant in not keeping the turntable guarded, locked, or properly fastened. In the fifteenth paragraph they were told that the defendant "had a right to have and use the turntable in the carrying on of its business as a railroad company." The rejected clause of the instruction under consideration, as tendered by the defendant, uses the word "placing," the only word used in the substituted clause that could be construed as a reference to the location or construction of the turntable. From these considerations, we think the clause complained of has no reference to the location nor original construction of the turntable, but refers rather to the condition in which it was to be kept or left when not in use. In the light of the entire charge, the jury could hardly have understood it to refer to the location or construction of the turntable.

Another instruction tendered by the defendant is as follows: "If the jury find from the evidence that the turntable in question was a ponderous and powerful machine when set in motion, and that according to its mechanism it would turn easily, and when turned, even for a small space, it would accumulate a force of momentum of great power; and if you further find that the young people and children meddling with said turntable at the time of the injury complained of worked upon the levers of said machine back and forth through the small space in which the turntable could be moved, even when the fastenings were in proper place and held the machine; and that by the motion and momentum of the machine set in motion by the young people at the levers the fastenings became loosened so as to permit the turntable to go around,—then you are instructed that under this state of facts the plaintiff could not recover, and your verdict should be for the defendant." It was refused, and its refusal is now assigned as error. The instruction entirely omits the question of due care. There was evidence to the effect that the lock used for the turntable was little, if any, obstacle to the use of the turntable by children, because one of the staples was loose, and could be easily removed. The instruction, if given, would have justified a finding of due care, however carelessly the turntable was fastened. That would have been erroneous. The instruction, in our opinion, was properly refused.

The court on its own motion gave the following instruction as part of the charge to the jury: "But if you find, from a preponderance of the evidence, that the turntable in question was a dangerous machine, and the defendants did know, or had reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accident, this would be evidence of negligence, and would be answerable for damages caused thereby to the children of tender years, and who did not possess sufficient knowledge or understanding to know the danger or dangerous character of such turntable. However, the defendants are not insurers of the limbs of those, whether adults or children, who may resort to their grounds, and there are many injuries continually happening which involve no pecuniary liability to anyone." The defendant contends that there is no evidence to support the hypothesis that the defendant took no means to keep the children away, and no means to prevent the accident. The evidence of at least one of the children who was present at the time, and who assisted in revolving the turntable, at the time, is to the effect that it was not locked, but yielded at once to their efforts to move it. There is other evidence to the same effect. Another witness testifies that it was never locked. As to the means taken to keep the children from the turntable, a considerable portion of the testimony offered on behalf of the plaintiff tends to show that no such means were taken. The defendant contends that the location of the turntable, at a distance from the town, was, in itself, a means of protection. But the instruction has reference to circumstances as they existed at the time of the accident. The location of the turntable, as a means of protection, is important only as tending to show the improbability of children resorting to it, and that the defendant could not reasonably be expected to anticipate that they would do so. It becomes immaterial when, according to the hypothesis, the defendant knew, or had good reason to believe, that children would resort to the turntable and be injured by it. The instruction, we think, finds ample basis in the evidence.

Another criticism urged against this instruction is that it involves the province of the jury, in that it charges that if the defendant, under the circumstances stated, took no means to keep the children away, and no means to prevent the accident, it would be answerable in damages. The defendant insists that the question of negligence was one for the jury, and that it was not within the province of the court to say, in effect, that a certain state of facts constituted negligence. We are inclined to think this criticism is just. From the wording of the instruction, the jury could hardly draw any other conclusion than that, if they found the facts specifically stated therein, the verdict should be for the plaintiff; in other words, that such facts were to be considered by them, not only as evidence of negligence, but as negligence *per se*. It

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has been repeatedly held by this court that it is erroneous to single out and state a group of facts, and inform the jury that if such facts are found it establishes the existence of negligence. The question of negligence is seldom one of law, and the facts enumerated in the instruction should have been considered by the jury as evidence of negligence, to be considered in the light of all the other facts and circumstances shown in evidence. To thus single out and state a group of facts has been held by this court to amount to an improper comment on questions of fact by the court. We think the instruction was erroneous, and that the following cases support that view: *Missouri P. R. Co.* v. *Baier*, 37 Neb. 235, 55 N. W. 913; *Omaha & R. Valley R. Co.* v. *Morgan*, 40 Neb. 604, 59 N. W. 81; *Chicago, B. & Q. R. Co.* v. *Olcson*, 40 Neb. 889, 59 N. W. 354; *Culbertson* v. *Holliday*, 50 Neb. 229, 69 N. W. 853.

The nineteenth and twentieth paragraphs of the charge to the jury related to the measure of damages, and are as follows:

"(19) The jury are instructed if from the evidence in the case, and under the instructions of the court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages, as charged in the declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation, and experience in the business affairs of life.

"(20) The jury are instructed that if, on the evidence in the case and under the instructions of the court, they find the issue in favor of the plaintiff, and that the plaintiff has sustained damages, as charged in the petition, then in assessing such damages they should take into consideration the age, expectancy of life of the plaintiff, his inability to labor as shown by the evidence, his mental anguish and bodily pain, if any has been shown, and whether or not the injury to the plaintiff is permanent. You should take all these elements into consideration, and allow him such a sum as will be fair and just compensation for the injuries sustained, not exceeding the sum of $25,000. But you cannot allow him exemplary damages; that is, damages by way of punishment of the defendants."

One objection urged against these instructions is that the jury were required to consider the facts and circumstances in evidence "in connection with their own knowledge, observation, and experience in the business affairs of life." It is not only proper, but necessary, that, in arriving at a verdict, the jury should make use of such knowledge as they possess in common with other men. But the instruction imposes no such limitation. We think the jury might have fairly inferred from it that they were required to bring to bear any special knowledge which they might have on the subject, or the result of their observations and experience in like cases, which would be manifestly improper.

Another objection to the instructions in this behalf is that the jury were required to take into account the plaintiff's inability to labor as an element of damage. The defendant insists that, as the plaintiff is a minor, in the custody of his father, who is charged with his support and entitled to his earnings during minority, his inability to labor during his minority is not a proper element of damage in this case. The case of *Gulf, C. & S. F. R. Co.* v. *Johnson*, 91 Tex. 569, 44 S. W. 1067, was an action for personal injuries to an infant, and an instruction not different in principle from those complained of was held reversible error for the reasons now urged by the defendant. The same principle was involved in an instruction considered in *Decker* v. *McSorley*, 111 Wis. 91, 86 N. W. 554. The instruction was condemned.

A further objection is urged against these instructions, and that is that they instruct the jury that the damages shall not exceed $25,000. The defendant insists that an intimation was thereby conveyed to the jury that they might allow that sum, and that such intimation was prejudicial to the defendant. No authority is cited in support of this objection, nor are we aware that any exists. It is not unusual for courts to instruct the jury as to the limit of damages allowable under the pleadings in the case. As a matter of practice, we believe it should be omitted. If the damages awarded exceed the amount allowable, the remedy is simple. We believe that most lawyers will agree with us that the intimation conveyed to the jury by such a statement is dangerous to the defendant. We do not go to the extent of saying that it would constitute reversible error, but we believe the practice should be discountenanced.

In the course of the trial the court permitted the plaintiff to introduce in evidence a certain printed rule of the defendant which provided that turntables should be kept locked when not in use, and that it was the duty of agents at the stations where there was no engine-house foreman to see that such turntables were locked after being used. Parol testimony was admitted to the same effect. It also admitted evidence to the effect that, immediately after the accident, the station agent went to the turntable and locked it. The defendant insists that the admission of this evidence was error. We do not think so. It was necessary to bring home to the defendant knowledge that children were likely to resort to the turntable. There is evidence tending to show that both employees mentioned in the rule introduced in evidence had knowledge of such fact, and the rule, taken in connection with the evidence to their relations to the defendant, tends to bring such knowledge home to the defendant. That the agent locked the turntable immediately after the accident, had a bearing on the question of

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whether the turntable was locked before the accident, which was one of the issues in the case.

Another witness was permitted to testify that he went to the turntable after the accident, on the same day, and found the table unlocked. The defendant argues that it was not admissible to show the condition of the table after the accident occurred. This evidence, we think, is also admissible, as tending to show that the children found the turntable unlocked before the accident occurred.

Objection is also made to the admission of evidence of testimony to the effect that the roadmaster, or division superintendent, which one is not stated, was at the turntable after the accident, how long after does not appear. The objection of this evidence is not clear, nor are we able to see how it had any influence on the verdict one way or another. The objection that it was immaterial appears to be well founded, but we cannot see that its admission would constitute reversible error.

The defendant complains of the admission of testimony to the effect that the station agent on the day of the accident met the children, who were playing with the push car, rode a short distance on the push car, and said nothing to the children about playing with it. The ground of this complaint appears to be that playing with the push car, when the agent saw them and took part in the sport, and playing on the turntable, some 500 yards distant, were independent transactions, and the agent could not reasonably anticipate that they would go to the turntable from the place he left them, and therefore was not required to warn them of its danger. It seems to us that the station grounds as a whole were dangerous premises, especially for children of that age. The turntable was only one of its many dangers. The evidence objected to, it seems to us, was competent to show that the defendant had knowledge that children frequented these dangerous premises, and that they did so with its knowledge and consent. We think there was no error in the admission of this testimony.

Certain impeaching questions were addressed to one of the defendant's witnesses which were objected to by the defendant on the ground, among others, that no foundation had been laid. Before the questions were asked, the defendant's attention was directed to the time and place where the contradictory statements were made, and to the persons in whose presence they were made. Taken in connection with his testimony on direct examination, the witness could not fail to understand to what the questions related. We think the foundation was sufficient, and that his answers, some of them showing that he had made contradictory statements, were properly admitted.

We recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

Ames and **Duffie**, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment of the District Court is reversed*, and the cause remanded for further proceedings according to law.

STATE of Nebraska *ex rel.* Daniel FREEMAN, *Plff. in Err.*,
v.
John SCHEVE *et al.*

(.....Neb.....)

*1. **Exercises by a teacher in a public school in a school building,** in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Deity, in accordance with the doctrines, beliefs, customs, or usages of sectarian churches or religious organizations, are forbidden by the Constitution of this state.

On Rehearing.

†2. **The right of all persons to worship Almighty God** according to the dictates of their own consciences is declared by the Constitution of this state to be a natural and indefeasible right.

3. **There is nothing in the Constitution or laws of this state,** nor in the history of our people, upon which to ground a claim that it is the duty of government to teach religion.

4. **The whole duty of the state** with respect to religion is "to protect every religious denomination in the peaceable enjoyment of its own mode of public worship."

5. **Enforced attendance upon religious services** is forbidden by the Constitution, and pupils in a public school cannot be required, either to attend such services, or to join in them.

6. **A teacher in a public school being vested during school hours** with a general authority over his pupils, his requests are practically commands.

7. **It is immaterial whether the objection of a parent** to his children attending and participating in a religious service conducted by a teacher in the schoolroom during school hours is reasonable or unreasonable. The right to be unreasonable in such matters is guaranteed by the Constitution.

8. **The law does not forbid the use of the Bible** in the public schools; it is not prescribe either by the Constitution or the statutes; and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions.

9. **The point where the courts may**

*Headnote by AMES, C.
†Rehearing headnotes by SULLIVAN, CH. J.

NOTE.—As to reading of Bible in schools, or use thereof as a textbook, see also, in this series, State *ex rel.* Weiss v. District Board (Wis.) 7 L. R. A. 830, and Pfeiffer v. Detroit Bd. of Edu. (Mich.) 42 L. R. A. 536.

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rightfully interfere to prevent the use of the Bible in a public school is where legitimate use has degenerated into abuse,—where a teacher employed to give secular instruction has violated the Constitution by becoming a sectarian propagandist.

10. **Whether it is prudent or politic to permit Bible reading** in the public schools is a question for the school authorities, but whether the practice of Bible reading has taken the form of sectarian instruction is a question for the courts to determine upon evidence.

11. **It will not be presumed in any case** that the law has been violated. Every alleged violation must be established by competent proof.

(October 9, 1902.)

ERROR to the District Court for Gage County to review a judgment denying a writ of mandamus to compel the discontinuance of religious and sectarian exercises in a public school. *Reversed.*

The facts are stated in the opinions.

Messrs. **Richard S. Horton** and **Franklin J. Griffen,** for plaintiff in error:

The reading of the Bible in the public schools is simply a relic of the early days, which we have outgrown.

No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes.

Neb. Const. art. 8, § 11.

The court will take judicial notice that the world is divided into a large number of sects having tenets peculiar to each.

State ex rel. Weiss v. *District Board,* 76 Wis. 177, 7 L. R. A. 330, 44 N. W. 967.

The regular reading of the King James version of the Bible, singing religious songs, and offering prayers in the schools constitute "sectarian instruction" within the meaning of the Constitution.

State ex rel. Nevada Orphan Asylum v. *Hallock,* 16 Nev. 385; 2 Jefferson's Works, p. 239.

All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.

Neb. Const. art. 1, § 4.

Men of every creed and men of no creed have equal rights.

Cooley, Const. Lim. 6th ed. chap. 13; *Bloom* v. *Richards* 2 Ohio St. 387; Pom. Municipal Law, 292.

The Constitutions establish, not religious toleration merely, but religious equality.

Cooley, Const. Lim. 6th ed. p. 572.

To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.

2 Jefferson's Works, p. 238; *Cincinnati Bd. of Edu.* v. *Minor,* 23 Ohio St. 211, 13 Am. Rep. 233; 1 Madison's Works, pp. 163, 164; 3 Madison's Works, p. 307; 7 Franklin's Works, p. 138; *Ex parte Newman,* 9 Cal. 502; *Spencer* v. *Joint School Dist. No. 6,* 15 Kan. 259.

The use of a public school building for religious purposes is illegal, and can be prevented upon the application of an objecting taxpayer.

Spencer v. *Joint School Dist. No. 6,* 15 Kan. 259; *Scofield* v. *Eighth School Dist.* 27 Conn. 499; *School Dist. No. 8* v. *Arnold,* 21 Wis. 658; *State ex rel. Weiss* v. *District Board,* 76 Wis. 177, 7 L. R. A. 330, 44 N. W. 967; *Dorton* v. *Hearn,* 67 Mo. 301; *Weir* v. *Day,* 35 Ohio St. 143.

The fact of diversity between people of different religious beliefs is decisive in the matter. This court has no ecclesiastical jurisdiction, and cannot pass upon the reasonableness or materiality of sectarian differences, or the merits of doctrinal disputes.

Mount Helm Baptist Church v. *Jones,* 79 Miss. 488, 30 So. 714.

The object and intent of our constitutional provision against sectarian instruction is to keep our public schools free from religious controversy.

1 Bl. Com. 87.

Mr. **E. O. Kretsinger,** for defendants in error:

The discretion of the district school board will not be interfered with by the court.

A constitutional provision concerning religious freedom should be construed in relation to the state of the law and custom as they existed at the time of its adoption; and the courts can take judicial notice of customs and usages in regard to the use of the Bible in public schools.

Pfeiffer v. *Detroit Bd. of Edu.* 118 Mich. 560, 12 L. R. A. 536, 77 N. W. 250.

The Bible is not a sectarian book.

Stevenson v. *Haynen,* 7 Pa. Dist. Rep. 585.

No principle of constitutional law is violated when thanksgiving or fast days are appointed, when chaplains are designated for the army and navy, when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by the general exemption of the houses of religious worship from taxation for the support of the government.

Cooley, Const. Lim. p. 470.

A requirement that the Protestant or any other version of the Bible be read in the public schools, and imposition of penalty or of expulsion in case of refusal, are not in violation of either the letter or the spirit of the Constitution.

Donahoe v. *Richards,* 38 Me. 379, 61 Am. Dec. 256; *Ferriter* v. *Tyler,* 48 Vt. 444, 21 Am. Rep. 133; *Millard* v. *Board of Edu.* 121 Ill. 297, 10 N. E. 669; *Spiller* v. *Woburn,* 12 Allen, 127; *Com.* v. *Cooke* (Mass.) 7 Am. L. Reg. 417; *Moore* v. *Monroe,* 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; Burke, Public Schools, pp. 103–105.

The executive department of the state of Nebraska has constantly held through the department of public instruction that the Bible may be read and the Lord's prayer repeated in the public schools of the state of Nebraska.

An interpretation of the school laws by the gentlemen whose especial duty it is,

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under the laws and the Constitution of Nebraska, to superintend the public schools of the state will not be set aside by this court except for the profoundest reasons.

Davis v. *Boget*, 50 Iowa, 11; *Nichols* v. *School Directors*, 93 Ill. 61, 34 Am. Rep. 160.

The state of Nebraska recognizes the Christian Sabbath, and punishes blasphemy.

State v. *O'Rourk*, 35 Neb. 614, 17 L. R. A. 830, 53 N. W. 591.

This is a Christian people and nation.

Church of Holy Trinity v. *United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

On motion for rehearing.

The word "sectarian" meant, in 1875, when the Constitution was adopted, what it means to-day. It had no reference to the Bible whatever, and did not intend to exclude it from the public schools as being a sectarian book.

State ex rel. Davis v. *Bacon*, 6 Neb. 297; *State ex rel. Jones* v. *Lancaster County*, 6 Neb. 482; *Oakley* v. *Aspinwall*, 3 N. Y. 568.

To ascertain the meaning of the Constitution, it will be necessary to pay some attention to the source of that provision.

Stuart v. *Laird*, 1 Cranch, 299, 309, 2 L. ed. 115, 118; *Martin* v. *Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Cohen* v. *Virginia*, 6 Wheat. 264, 418–421, 5 L. ed. 257, 294, 295; Cooley, Const. Lim. p. 67.

The interpretation by the court of the constitutional provisions quoted is in direct opposition to the settled principle of "contemporary construction."

At the time of the adoption of the Constitution, the general, if not the universal, sentiment in America, was that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. The real object was not to countenance, much less to advocate, Mohammedanism or Judaism or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

2 Story, Const. §§ 1874, 1877, pp. 605, 606.

The members of the convention who framed the Constitution, and the people who ratified it, never intended to give the provision quoted a meaning or an interpretation different from that given to the corresponding constitutional provisions in thirty-six other states in which the reading of the Bible in the public schools is held to be constitutional.

A construction of the Constitution, if nearly contemporaneous with its adoption, and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded, and is often conclusive.

Sutherland, Stat. Constr. 307; Endlich, Interpretation of Statutes, 357; Sedgw. Stat. & Const. Law, 552; *State ex rel. Horne* v. *Holcomb*, 46 Neb. 88, 64 N. W. 437.

True practical construction will be nothing less than the continued application of sound contemporary construction.

1 Story, Const. § 408, p. 301; *Martin* v. *Hunter*, 1 Wheat. 351, 4 L. ed. 109; *Stuart* v. *Laird*, 1 Cranch, 299, 2 L. ed. 115.

The American Constitutions contain no provisions which prohibit the authorities from such recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings.

Cooley, Const. Lim. pp. 470, 471.

Messrs. **John H. Lindale and T. J. Mahoney,** *amici curiæ.*

Ames, C., filed the following opinion:

Section 4 of article 1 of the Constitution of this state is as follows: "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect, or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted." Section 11 of article 8 of the Constitution reads as follows: "No sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes." Daniel Freeman is a resident taxpayer and a patron of the public school in school district No. 21 in Gage county. He applied for and obtained an alternative writ of mandamus running to the school board of said district, alleging that against his protest, and in disregard of his objections, and in opposition to his demands, the board permitted a teacher employed by them in said school to engage daily, in school hours, in the public school building in said district, and in the presence of the pupils, in certain religious and sectarian exercises, consisting of the reading of passages of her own selection from a book commonly known as "King James' Version or Translation of the Bible," and in singing certain religious and sectarian songs, and in offering prayer to the Deity according to the customs and usages of the so-called "Orthodox Evangelical Churches" of this country, and in accordance with the belief and practices of such churches, the pupils joining in the singing of such songs or hymns. The return to the writ admitted the foregoing recited facts, except that it denied that the exercises complained of were sectarian; but the teacher, who was produced as a witness, admitted that she regarded them as constituting a religious worship, and that she conducted them solely for that reason. That they are correctly so described there can be no doubt. Protestant sects who maintain, as a part of their ritual and discipline, stated weekly meetings, in which the exercises consist largely of prayers and songs and the reading or repetition of scriptural passages, would, no doubt, vehemently dissent from the proposition that such exercises

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are not devotional, or not in an exalted degree worshipful, or not intended for religious edification or instruction. That they possess all these features is a fact of such universal and familiar knowledge that the courts will take judicial notice of it without formal proof. That such exercises are also sectarian in their character is not less free from doubt. For more than three centuries it has been the boast and exultation of the Protestants and a complaint and grievance of the Roman Catholics that the various translations of the Bible, especially of the New Testament, into the vernacular of different peoples, have been the chief controversial weapons of the former and the principal cause of the undoing of the latter. For making of such translations Wickliffe, Luther, Tyndale, and others have been commended and glorified by one party, and denounced and anathematized by the other. Books containing such translations have been committed to the flames as heretical, and their translators, printers, publishers, and distributors persecuted, imprisoned, tortured, and put to death for participating in their production and distribution. The several popular versions differ in some particulars from each other, and all differ from the Catholic canon, both in rendition of passages from which sectarian doctrines are derived by construction and in the number of books or gospels constituting what is regarded as the written record of Divine revelation. In addition to this, there are persons who are convinced, upon grounds satisfactory to them, that considerable parts of the writings accepted by all Protestant denominations are not authentic, while devout Hebrews maintain that the New Testament itself is not entitled to a place in the true Bible. These diverse opinions have given rise to a great number of religious sects or denominations. To some of these sects the reading in public of any portion of any version of the Scriptures unaccompanied by authoritative comment or explanation, or the reading of it privately by persons not commissioned by the church to do so, is objectionable, and an offense to their religious feelings; to some the utterance of public prayer, except recitations from Scripture, is a vain and wicked act; and to some the songs and hymns of praise in which others engage are a stumbling block and an offense. We do not think it wise or necessary to prolong a discussion of what appears to us an almost self-evident fact,—that exercises such as are complained of by the relator in this case both constitute religious worship and are sectarian in their character, within the meaning of the Constitution. Nor do we feel inclined to make what might be looked upon as a spurious exhibition of learning by quoting at length from the many judicial decisions and utterances of eminent men in this country concerning the subject. Perhaps the case most nearly in point, because of similarity both of facts involved and of constitutional enactments construed to those in the case at bar, is *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 7 L. R. A. 330, 59 L. R. A. 44 N. W. 967. There are three separate and concurring opinions in this case by three of the eminent judges of that court. The discussion includes a thorough review of both the legal principles involved and of the historical aspects of the controversy, and, for the most part, and in essential particulars, voices our own views. We think it, therefore, sufficient for our purpose to direct attention to that authority.

But there is another matter deserving of consideration in this connection. Secular education of children within prescribed ages is, by a statute of this state, made compulsory. Punctuality and regularity of attendance at the time fixed for the beginning of and throughout the daily sessions of a district school are of first importance, both as measures of discipline and for the development of a trait, or the formation of a habit, of extreme importance to the students in after life. Very justly, and almost, if not quite, necessarily, pupils are required to conform to these regulations, or incur the penalty of loss of rank in deportment and scholarship. Unless opinions of universal acceptance in this country since the foundation of our government are at fault, it is a policy of the highest importance that the public schools should be the principal instruments and sources of popular education, because they exert, more than any other institution, an influence promotive of homogeneity among a citizenship drawn from all quarters of the globe. But if the system of compulsory education is persevered in, and religious worship or sectarian instruction in the public schools is at the same time permitted, parents will be compelled to expose their children to what they deem spiritual contamination, or else, while bearing their share of the burden for the support of public education, provide the means from their own pockets for the training of their offspring elsewhere. It might be reasonably apprehended that such a practice, besides being unjust and oppressive to the persons immediately concerned, would, by its tendency to the multiplication of parochial and sectarian schools, tend forcibly to the destruction of one of the most important, if not indispensable, foundation stones of our form of government. It will be an evil day when anything happens to lower the public schools in popular esteem, or to discourage attendance upon them by children of any class.

The district court, without consideration of the merits of the controversy, adjudged a dismissal of the suit upon the ground that the practices complained of were so far within the discretion of the district board as not to be subject to control by mandamus. In that opinion we were — or at least the writer was — at first inclined to concur. More mature reflection has, however, convinced us that this view is erroneous. The administration of the public funds for educational purposes is intrusted solely to these boards, and the nature of their office, we think, especially enjoins upon them the duty

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of seeing to it that the constitutional prohibition is observed.

It may be unnecessary to remark that neither the writer nor the court is intended to be committed to any view of any of the matters of theological or exegetical controversy touched upon in the foregoing discussion. All that is intended to be said is that such matters, being the subjects of sectarian differences, are excluded by the express words of the Constitution from being taught, or in any degree countenanced, in educational institutions maintained to any extent by the public funds. It is the function of the court to expound, not religious creeds or writings, but the Constitution and laws of the state.

We are of opinion that the return does not state facts sufficient to constitute a defense to the alternative writ, and it is recommended that the judgment of the district court be reversed, and that a peremptory writ as prayed issue from this court to the respondents and their successors in office.

Albert and **Duffie**, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *it is ordered that the judgment of the District Court be reversed*, and that a peremptory writ as prayed issue from this court to the respondents and their successors in office.

Sedgwick, J., concurring:

I concur in the conclusion reached by the commissioners solely on the ground that the exercises complained of were "sectarian instruction" within the meaning of the Constitution.

Holcomb, J., concurring specially:

I concur in the foregoing opinion in so far as it is held therein that the exercises which it is sought to have eliminated as conducted in the district school in which respondents are school officers violate the constitutional provision declaring that no sectarian instruction shall be allowed in the public schools. As to the views apparently entertained and held to in the opinion, to the effect that the exercises complained of constitute thereby the schoolhouse a place of worship within the meaning and contrary to the section of the Constitution wherein it is ordered "no person shall be compelled to attend, erect, or support any place of worship against his consent," I do not agree. In my judgment, such an interpretation is not justified by any sound rule of construction as to the meaning of the provision quoted. *Moore* v. *Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; *Pfeiffer* v. *Detroit Bd. of Edu.* 118 Mich. 560, 42 L. R. A. 536, 77 N. W. 250. If the views therein expressed are sound, then it would seem that it is in the power of any taxpayer to prevent religious exercises in any of the penal, reformatory, or eleemosynary institutions in the state, and to close the doors of the state capitol to the chaplains of both branches of the legislature. Provisions in substance, if not in the exact language of our Constitution, relating to freedom of religious worship and exemption from involuntary support of any place of worship, are found in very many of the Constitutions of the different states of the Union. With the exception of the case from Wisconsin cited in the opinion, I know of no authority holding to the view that exercises in the public schools or other secular institutions of the nature and character shown to have been engaged in in the case at bar would constitute the place where held a place of worship within the meaning of the fundamental law. Says Judge Cooley, who, as an author in this branch of jurisprudence, ranks highest: "The American Constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the universe, and of acknowledging with thanksgiving His boundless favors, or bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed, when chaplains are designated for the army and navy, when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of state government." Cooley, Const. Lim. 5th ed. p. 582. Nor do I wish to be understood as holding to the view that it is not within the discretionary power of the authorities of school districts to sanction, if deemed wise, under proper restrictions, the reading of the Bible, or portions thereof, or readings therefrom, in the public schools. The Bible itself is not a sectarian book, and it is an erroneous conception to so regard it. Altogether aside from its theological aspects, the Bible has a historical and literary value surpassed by no secular writings. Its moral teachings and precepts are of the purest and highest, and appeal to the noblest impulses of mankind, as no other literary production ever has. Can anyone successfully contend, in the light of the contemporaneous history of the times, that the constitutional framers and the people who adopted that instrument intended to altogether exclude the Bible from the schools? If such had been the intention, would not the members of the convention have expressed themselves in such language as could not be misunderstood? A constitutional provision concerning religious freedom should, it is said, be construed in relation to the state of the law and custom as they existed at the time of its adoption, and the courts can take judicial notice of customs and usages in regard to the use of the Bible in the public schools. *Pfeiffer*

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v. *Detroit Bd. of Edu.* 118 Mich. 560, 42 L. R. A. 536, 77 N. W. 250. The provisions of the Constitution on the subject of sectarian instruction in the public schools should be construed so as to give to them the scope and effect intended by its framers and the people who adopted it. This is accomplished by firmly excluding therefrom all forms of instruction calculated to establish and confirm in the minds of students those theological doctrines and beliefs which are peculiar to some only of the different religious sects. Further than this we are not warranted in going.

A petition for rehearing having been filed, **Sullivan**, Ch. J., on January 21, 1903, handed down the following response:

This case was decided at the last term, and is now before us on motion for a rehearing. In the brief filed in support of the motion, the distinguished counsel for respondents has with considerable ardor attacked, not only the decision, but what he supposes to be its implications. The questions discussed are important, and they have received our most serious consideration. We have again with great care gone over the arguments of counsel, and have again critically examined all of the adjudged cases bearing directly or indirectly upon the points in controversy. The decision of the supreme court of Michigan—a decision rendered by a divided bench—may, perhaps, be regarded as an authority in favor of one of the positions for which respondents contend, but opposed to that case are the unanimous judgments of the highest courts of Ohio and Wisconsin. Other cases cited in the briefs are based upon constitutional provisions essentially different from ours, and are therefore entitled to but little weight as precedents. The fact that there have been Bible reading and religious exercises in many of the public schools ever since the present Constitution was adopted is cited as evidence of a contemporaneous and practical construction in favor of the practice; but, in our opinion, it is rather to be regarded as evidence of the temperate and tolerant spirit of our people, of the waning influence of doctrinal differences, and of a clearer and more general perception of the cardinal truth that, after all, Christianity is greater than creed. It has been the policy of some rulers (as, for instances, Catherine d' Medici) to strengthen the throne by dividing the people; but in this country it has been the constant policy of government to unite the people, to bring them closer and closer together, to dissipate race and religious prejudices, and to fuse their sentiments and aspirations. One of the means to accomplish this end was to give all religious sects and systems a free field and no favors. So far as religion is concerned, the *laissez faire* theory of government has been given the widest possible scope. The suggestion that it is the duty of government to teach religion has no basis whatever in the Constitution or laws of this state, nor in the history of our people. The teaching of religion would mean teaching the system of faith and worship of one or more of the religious sects. It would mean sectarianism in the public schools, and to put sectarianism into the schools would, according to the opinion prevailing when the Constitution was ratified, be to put venom into the body politic. In § 4 of the Bill of Rights we find this language: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." There is no uncertainty as to the meaning of this clause; there is no room for construction; and where, as Judge Cooley has said, the meaning of an instrument is plainly declared by the instrument itself, courts are not at liberty to search elsewhere. The duty of the state with respect to religion—its whole duty—is "to protect every religious denomination in the peaceable enjoyment of its own mode of public worship." This duty is not due alone to the different denominations of the Christian religion, but is due to every religious body, organization, or society whose members are accustomed to come together for the purpose of worshiping the Supreme Being. The framers of the Constitution, after expressing their gratitude to Almighty God for freedom, declared that the right of all persons to worship according to the dictates of their own consciences is a natural and indefeasible right. This right of the relator has been infringed. Without his consent and over his protest, his children have been compelled to attend Divine worship, and to participate in it. They have been obliged to give homage to God, not according to the dictates of their own consciences or the consciences of their parents, but according to the dictates of the conscience of the teacher. Undoubtedly the teacher is a sincere and well-meaning young woman, and was actuated by the purest and best motives; but, in discharging what she conceived to be an imperative duty to her Creator, she violated a right secured to the relator by the supreme law of the state. The regular morning exercises of the school consisted of a formal or improvised prayer, followed by the singing of gospel hymns, such as "Jesus, Lover of my Soul," and "When He Cometh." In these exercises the pupils were compelled to join, and it was their custom, when prayer was offered, to rise from their seats and stand in an attitude of reverence.

It is said that the relator's children were subjected to no compulsion, but that is not true. It was not only their right to attend the school, but, under the statute (Comp. Stat. 1901, chap. 79, § 1, subdiv. 16), it was their duty to attend that school, or some other. As the morning exercises were conducted during school hours, it is difficult to see how they could attend the school without attending worship. But in our view they were not only compelled to attend worship, but to participate in it. The school being in session, the right to command was

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vested in the teacher, and the duty of obedience imposed upon the pupils. Under such circumstances a request and a command have the same meaning. A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form. The teacher, in describing her manner of conducting the exercises, says that after reading from the Bible she "called upon" the pupils to rise, and that she "had them rise from their seats and stand" while she offered prayer. When we take into account the fact that she was dealing with children, it can hardly be doubted that any pupils who joined unwillingly in the exercises joined under compulsion. Whether Mr. Freeman was reasonable or unreasonable in objecting to his children actively or passively participating in the simple religious service conducted by the teacher is altogether immaterial. Some men always have been unreasonable in such matters, and their right to continue to be unreasonable is guaranteed by the Constitution, and characterized as a natural and indefeasible right. The privilege of choosing when, where, and how he shall worship is given unconditionally to every one. He may freely choose his own prayers, songs, and postures; and none of these may be lawfully imposed upon him, either in the public schools or elsewere, except, possibly, in the penal, reformatory, or other institutions where the state stands *in loco parentis* to the inmates.

In order to make it entirely clear that the Bible was not read in the school as mere literature, and that the hymns were not sung as a vocal exercise, and that the prayers were not offered for the sake of their reflex influence, but that the several acts were acts of religious homage, and were intended to be devotional, we quote from the testimony of the teacher:

Q. Now, you say this matter of reading the Bible and singing of hymns was talked over by Mr. Odell at the time he employed you?

A. Yes, sir.

Q. Did you talk about any other branches that you were going to teach at that time?

A. I spoke about having new books,—needing a new set of books.

Q. Why was it that you and he thought it proper and necessary that these exercises should be conducted?

A. One reason I spoke about it was because I had said at the beginning that I did not care to take the contract unless I had the privilege of having the exercises. I said I was in favor of doing all I could for the district, and was in favor of doing all I could to have a good school.

Q. Why did you think these exercises so important?

A. There was nothing, only I had always had them, and I knew they had done away with them.

Q. And you couldn't open school without them?

A. Not according to my belief; no, sir.

Q. According to your belief, then, these are very necessary as a part of the school exercises?

A. I think it is important to have reading of the Bible and singing of songs in the school.

Q. And then you think that the way you have of reading the Bible is very important?

A. I think it is the book of all books.

Q. For what purpose do you read it?

A. For the benefit of myself and those with whom I come in contact.

Q. In what particular way do you expect to benefit yourself and the children?

A. I think there is a Higher Being that has something to do with our actions, and I know in many instances I have been directed to do things right, wherein, if I hadn't trusted in Him, my Savior, I would have been led away.

Q. And you read that book as religious exercises because you think it is important for that purpose, don't you?

A. I think it is.

Q. Yes; and you read it because you think it is the word of God?

A. Yes, sir; I do.

Q. And you believe that sincerely?

A. Yes, sir; I do.

Q. And you select such parts to read as you think proper, don't you?

A. Yes, sir; just as I think it would be best for the pupils and myself.

Q. And whenever you see fit to read, you read?

A. Yes, sir.

Q. And you read whatever you see fit to read?

A. Yes, sir.

Q. And did you read from the New Testament and the Old Testament, both?

A. Yes, sir.

Q. And why do you consider it necessary to offer a prayer?

A. I think we are taught to.

Q. Yes; you think it is done as an act of worship,—the whole thing?

A. We think it is; yes, sir.

Q. Intended to worship God?

A. Yes, sir.

It is said by Commissioner Ames that the morning exercises conducted by Miss Beecher constituted sectarian instruction. This conclusion is vigorously assailed, but, in our judgment, it is warranted by the evidence, and we adhere to it. The decision does not, however, go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction. The pith of the opinion is in the syllabus, which declares that "exercises by a teacher in a public school in a school building, in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Deity, in accordance with the doctrines, beliefs, customs, or usages of sectarian churches or religious organiza-

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tions, are forbidden by the Constitution of this state." Certainly the Iliad may be read in the schools without inculcating a belief in the Olympic divinities, and the Koran may be read without teaching the Moslem faith. Why may not the Bible also be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral. Its language is unequaled in purity and elegance. Its style has never been surpassed. Among the classics of our literature it stands preeminent. It has been suggested that the English Bible is, in a special and limited sense, a sectarian book. To be sure, there are, according to the Catholic claim, vital points of difference with respect to faith and morals between it and the Douay version. In a Pennsylvania case cited by counsel for respondents, the author of the opinion says that he noted over fifty points of difference between the two versions,—some of them important, and others trivial. These differences constitute the basis of some of the peculiarities of faith and practice that distinguish Catholicism from Protestantism, and make the adherents of each a distinct Christian sect. But the fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used. The law does not forbid the use of the Bible in either version in the public schools. It is not proscribed either by the Constitution or the statutes, and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse,—where a teacher employed to give secular instruction has violated the Constitution by becoming a sectarian propagandist. That sectarian instruction may be given by the frequent reading, without note or comment, of judiciously selected passages, is, of course, obvious. A modern philosopher—perhaps the greatest—has said that persistent iteration is the most effective means of forcing alien conceptions upon reluctant minds. Whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities to determine, but whether the practice of Bible reading has taken the form of sectarian instruction in a particular case is a question for the courts to determine upon evidence. It cannot be presumed that the law has been violated. The alleged violation must in every instance be established by competent proof. The value of the common schools as disseminators of knowledge and social levelers is well understood and justly appreciated, and there is little likelihood that the people will ever permit their usefulness to be impaired by sectarian controversies. When we consider that this is the first case of its kind ever presented to this court for decision, we feel assured that neither teachers nor school boards have been much inclined to bring discord into the schools for the chance of securing by indirection a slight sectarian advantage. But if the fact were otherwise, it could not in any way affect our conclusion. The section of the Constitution which provides that "no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes," cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state. We do not wish to be understood as either countenancing or discountenancing the reading of the Bible in the public schools. Even where it is an irritant element, the question whether its legitimate use shall be continued or discontinued is an administrative, and not a judicial, question. It belongs to the school authorities, not to the courts.

The motion for a rehearing is overruled, and the judgment heretofore rendered is adhered to.

J. H. EDMINSTEN, *Plff. in Err.*,
v.
Henry HERPOLSHEIMER *et al.*

(.....Neb.....)

***1. In the absence of special circumstances, in order to hold the drawer liable on his check it must be presented not later than the day following its receipt, where the payee receives it in the place in which the bank on which it is drawn is located.**

2. That the check is drawn on a bank in a city where the collection of such paper is made through a clearing house, and the check was received after banking hours, does not relieve the payee of the necessity of presenting it the following day.

On Rehearing.

3. It is the duty of the holder of a check, if he receives it after banking hours, to present it during banking hours of the next day if the bank is located in the same town; if not, then to forward it by mail the next day.

(Sedgwick, J., dissents.)

(December 4, 1901.)

*Headnotes by ALBERT, C.

NOTE.—As to effect of delay in presenting check to release the maker in case drawee subsequently becomes insolvent, see also, in this series, Anderson v. Gill (Md.) 25 L. R. A. 200; Anderson v. Rodgers (Kan.) 27 L. R. A. 248; Hamlin v. Simpson (Ia.) 44 L. R. A. 397.

As to effect on drawer's liability of delay in presenting check where drawee remains solvent, see Bradley v. Andrus (C. C. App. 3d C.) 53 L. R. A. 432, and *note*.

As to within what time check should be presented, see Carroll v. Sweet (N. Y.) 18 L. R. A. 43.

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ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiffs in an action brought to recover the amount of a check from the maker. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Kirkpatrick & Hager,** for plaintiff in error:

But a limited time is given in which to make presentment, the length of time varying with the persons between whom the question arises. As between the drawer and payee, where the payee receives it in the same place in which the bank is situated, the payee has the next day in which to make the presentment.

Tiedeman, Com. Paper, § 443.

An agent who takes the check in payment of a debt due to his principal must present it immediately.

Smith v. *Miller,* 43 N. Y. 171, 3 Am. Rep. 690; *First Nat. Bank* v. *Fourth Nat. Bank,* 16 Hun, 332; *Farwell* v. *Curtis,* 7 Biss. 160, Fed. Cas. No. 4,690; Norton, Bills & Notes, last ed. Hornbook Series, pp. 388–390; *O'Brien* v. *Smith,* 1 Black, 99, 100, 17 L. ed. 64; *Syracuse, B. & N. Y. R. Co.* v. *Collins,* 3 Lans. 29; *Merchants' Bank* v. *Spicer,* 6 Wend. 443; *Nunnemaker* v. *Lanier,* 48 Barb. 234; *Kelty* v. *Second Nat. Bank,* 52 Barb. 328; *Kirkpatrick* v. *Puryear,* 93 Tenn. 409, 22 L. R. A. 785, 24 S. W. 1130; *Smith* v. *Janes,* 20 Wend. 192, 32 Am. Dec. 527; *Carroll* v. *Sweet,* 128 N. Y. 19, 13 L. R. A. 43, 27 N. E. 763; *Anderson* v. *Rodgers,* 53 Kan. 542, 27 L. R. A. 248, 36 Pac. 1067; Dan. Neg. Inst. 4th ed. § 1590; Randolph, Com. Paper, last ed. § 1105; *Holmes* v. *Roe,* 62 Mich. 199, 28 N. W. 864; *Hamilton* v. *Winona Salt & Lumber Co.* 95 Mich. 436, 54 N. W. 903; *Grange* v. *Reigh,* 93 Wis. 552, 67 N. W. 1130; *Murphy* v. *Levy,* 23 Misc. 147, 50 N. Y. Supp. 682.

The delivery of the check to an agent, or sending it through the clearing house, cannot operate to extend the time within which it must be presented.

Messrs. **Tibbets Brothers** and **Morey & Anderson,** for defendants in error:

Special circumstances may excuse delay.

Scroggin v. *McClelland,* 37 Neb. 644, 22 L. R. A. 110, 56 N. W. 208.

As to what is a reasonable time depends upon the facts and circumstances of each particular case.

First Nat. Bank v. *Miller,* 37 Neb. 500, 55 N. W. 1064; *Mohawk Bank* v. *Broderick,* 13 Wend. 133, 27 Am. Dec. 192.

As between holder and drawer, the rule is not so strict as between holder and indorser.

Re Brown, 2 Story, 517, Fed. Cas. No. 1,985; *Harbeck* v. *Craft,* 4 Duer, 129; *Mohawk Bank* v. *Broderick,* 27 Am. Dec. 196, note, 13 Wend. 133; *First Nat. Bank* v. *Miller,* 37 Neb. 500, 55 N. W. 1064.

Much of the business in this era is done by checks, and it would be imposing undue hardship on merchants to compel them to follow the old rule under new conditions.

First Nat. Bank v. *Miller,* 37 Neb. 500, 55 N. W. 1064; *Loux* v. *Fox,* 171 Pa. 68, 33 59 L. R. A. Atl. 190; *Willis* v. *Finley,* 173 Pa. 28, 34 Atl. 213.

Albert, C., filed the following opinion:

On Friday, May 28, 1897, J. H. Edminsten executed and delivered to Henry Herpolsheimer and another, doing business under the name of H. Herpolsheimer & Co., his check, drawn on the Merchants' Bank of Lincoln, for $200.62, in payment of an account, at their place of business in said city. On the following day the plaintiffs deposited the check, with others, in the American Exchange Bank, with which they transacted their banking business. The Merchants' Bank was open for the transaction of business at the date of the delivery of the check and the day following. The following Monday was a legal holiday, and the next morning the Merchants' Bank failed to open, and has never since opened for the transaction of business, and passed into the hands of the state banking board. It was wholly insolvent, and nothing was realized from its assets. The check was never presented. This action was brought by the payees against the maker of the check to recover the amount due thereon. A trial was had to the court, which resulted in a finding and judgment for the plaintiffs. The defendant brings the case here on error.

The only disputed fact in the case is whether the check was delivered during banking hours on the date of its delivery. This question was submitted to the court on conflicting evidence, and, the court having found that it was delivered after banking hours, under the well-known rule of this court, its finding on that point will not be disturbed. Therefore, for the purpose of this case, we shall assume, as one of the facts in the case, that the check was delivered to the payees after banking hours on May 28, 1897.

This leaves but one question in the case, and that is whether the failure to present the check for payment on the day after its receipt relieves the defendant from liability thereon. It will be observed that the payees were doing business and received the check in the city where the bank on which it was drawn was located. The rule is that, in the absence of special circumstances, in order to hold the drawer liable on his check, it must be presented not later than the day following its receipt, where the payee receives it in the same place in which the bank on which it is drawn is situated. Tiedeman, Com. Paper, § 443, and the cases there cited; Norton, Bills & Notes, last ed. 388 *et seq.*; *Anderson* v. *Rodgers,* 53 Kan. 542, 27 L. R. A. 248, 36 Pac. 1067; Dan. Neg. Inst. 4th ed. § 1590; Randolph, Com. Paper, last ed. § 1105; *Holmes* v. *Roe,* 62 Mich. 199, 28 N. W. 864; *Grange* v. *Reigh,* 93 Wis. 552, 67 N. W. 1130; *Murphy* v. *Levy,* 23 Misc. 147, 50 N. Y. Supp. 682.

Counsel concede this to be the rule, but urge that, under the special circumstances in this case, the plaintiffs were not required to present the check on the day following its receipt. The special circumstances relied

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on are that the collection of such paper in the city of Lincoln is made through the agency of a clearing house, and that the check, having been received after banking hours, could not, in the usual course of business, pass through the clearing house and be presented for payment on the day following its receipt by them. This position is sustained by two opinions, both from the same court, and delivered by the same judge. *Loux* v. *Fox*, 171 Pa. 68, 33 Atl. 190; *Willis* v. *Finley*, 173 Pa. 28, 34 Atl. 213. In the opinions referred to, a departure from the settled rules of the law merchant is impliedly admitted. An attempt to justify such departure is made on the grounds of a custom among banks, and the impossibility, owing to the great volume of business, of conforming to the established rule. The reasoning does not commend itself to our judgment. We do not believe a party should be permitted to excuse a lack of diligence by showing that such lack is customary among those engaged in like business in the same city, nor to plead the magnitude of his business as an excuse for a failure to prosecute it with diligence. The special circumstances that will excuse delay in presentment have generally been held to be such as are beyond the holder's control, or arise from some agreement or understanding between the drawer and some one or more of the other parties to the paper. In *Holmes* v. *Roe*, 62 Mich. 199, 28 N. W. 864, the court says: "The clearing house, and the method of conducting business through it, has no bearing upon the liability of the drawer of the check which is alleged not to have been presented for payment within the time allowed by law." In *First Nat. Bank* v. *Miller*, 37 Neb. 500, 55 N. W. 1064, this court says: "No custom or usage among bankers, as to the manner of presenting ordinary checks for payment, will relieve them from the legal duty of presenting such checks for payment within a reasonable time." The cases just cited, to our minds, state the correct rule. It follows that the failure of the plaintiffs to present the check for payment on the day following its receipt by them relieves the defendant from liability thereon, and that the judgment of the district court is wrong, and should be reversed.

It is recommended that the judgment of the district court should be reversed, and the cause remanded for further proceedings according to law.

Ames and **Duffie**, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment of the District Court is reversed*, and the cause remanded for further proceedings according to law.

A petition for rehearing having been filed, on October 22, 1902, **Oldham**, C., filed the following additional opinion:

The issues involved in this case are properly stated in the original opinion. There was only one disputed question of fact between the parties to the controversy, and that was as to whether the check of defendant, Edminsten, was presented to plaintiffs during banking hours on Friday, May 28, 1897; defendant contending that it was, and the plaintiffs that it was not, delivered until banking hours had closed. This dispute was determined by the trial court in favor of plaintiffs' contention. The finding of the trial court on this disputed question of fact was and should have been treated as binding on this court in the former opinion. All other questions of fact were stipulated in the record, and were, briefly stated, as follows: That the Merchants' Bank of Lincoln was open all day Saturday following the day the check was drawn, from 10 o'clock, A. M. until 3 o'clock, P. M.; that all checks presented on that day were paid by this bank; that defendant, Edminsten, had funds to his credit in this bank more than sufficient to pay the check in controversy; that plaintiffs' place of business and the Merchants' Bank were each located in the city of Lincoln, Nebraska, and were situated within a distance of two blocks of each other; that a subsequent check drawn by the defendant, Edminsten, and delivered to one F. L. Rose on the 29th day of May, was presented at the bank on that day by said Rose, and was paid in full. It was further stipulated that the 30th day of May was Sunday; that the 31st day of May was Decoration Day, and a legal holiday, on which none of the banks of Lincoln were open for the transaction of business; and that on the following day, June 1st, the Merchants' Bank suspended business, and was and is wholly insolvent. It is also stipulated that plaintiffs proceeded with the collection of the check in the manner set forth in the original opinion, and that the check never was presented to the Merchants' Bank on account of the suspension of that institution, but, that it was presented to defendant, Edminsten, and payment demanded of him, and payment refused, before this action was instituted.

In the face of this record, we can see no escape from the conclusion reached by the learned commissioner on the former hearing of this case. We have carefully re-examined the numerous authorities cited in support of his decision, and are satisfied that he has followed a well-beaten track that has been trodden by many judicial feet; and we do not feel disposed to recommend this court to depart from this broad highway of well-reasoned cases, to follow the dimly marked by-path pointed out by counsel for defendants in error. There is every reason why a strict rule of diligence in presenting a check by the holder should be exacted in this case, and no reason why it should be relaxed. Here, plaintiffs' place of business was but two blocks from the bank on which the check was drawn, and the bank remained open, paying all checks presented, a whole day after the check was received, and it would have required very slight physical exertion for plaintiffs or some of their employees to have taken this check to the bank Saturday, and received the money on it;

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but, instead of this, plaintiffs chose a leisurely, labyrinthine journey for this check, by depositing it in another bank, and having it thread its way from this bank to the clearing house, and from the clearing house to the banking house of the drawee. And while this check was pursuing this circuitous route the drawee departed its business life with enough of defendant's money in its possession to have satisfied the check had it reached its destination before the demise of the bank.

In the case of *Grange* v. *Reigh*, 93 Wis. 552, 67 N. W. 1130, it is said: "Where the payee of a check resides and receives the check at the place where the bank is located, a reasonable time for presentation to the drawee reaches, at the latest, only to the close of banking hours on the succeeding day, excluding Sundays and holidays." In *Kirkpatrick* v. *Puryear*, 93 Tenn. 409, 22 L. R. A. 788, 24 S. W. 1130, the court says: "It is the duty of the holder of a check, if he receives it after banking hours, to present it during banking hours of the next day if the bank is located in the same town; . . . if not, then to forward it next day by mail. If he fails to do this, and the check is afterwards not paid, his right as against the indorser is extinguished." Citing, in support of this conclusion, Morse, Banks & Banking, § 422; *Planters' Bank* v. *Merritt*, 7 Heisk. 193; *Schoolfield* v. *Moon*, 9 Heisk. 173.

We are therefore satisfied that the former opinion was right, and should be adhered to; and we so recommend.

Barnes and **Pound**, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, it is ordered that the former judgment of this court be adhered to.

Sedgwick, J., dissenting:

In *First Nat. Bank* v. *Miller*, 37 Neb. 500–506, 55 N. W. 1064, this court says: "We do not mean to lay down any rule by which the indorsee of a check must present the same for payment in any given time in order to hold the indorser." And again, in the same case: "The question, then, is whether plaintiff in error was guilty of such negligence or laches in the presentment of these checks for payment to the bank on which they were drawn as to release the indorser, Miller. The authorities all say that, in order to hold an indorser of a check, it must be presented by the indorsee in a reasonable time, and as to what is a reasonable time depends upon the facts and circumstances of each particular case." This is the rule of all the decisions. The maker of a check selects the bank which he desires to trust with his deposits. He undertakes to pay his creditor by drawing his check upon his account in the bank which he has so selected. If the bank fails before the check is paid, it is the loss of the drawer of the check, unless that loss is caused by the negligence of the payee to whom the check is drawn. The payee is guilty of such negligence as will shift the loss to him if he fails to present the check for payment within a reasonable time. The question is, Has he delayed in presenting the check for such an unreasonable time as to charge him with such negligence that he must make good the loss which otherwise would fall upon the maker of the check?

The apparently conflicting opinions from which it is sought to derive the conclusion that there is an established rule that the check must be presented not later than on the next day after it is received, when received in the town in which the bank is located on which it is drawn, present a curious study. In one of the earlier cases, *Smith* v. *Janes*, 20 Wend. 192, 32 Am. Dec. 527 (decided in 1838), it is said: "We cannot presume laches, especially in a case where the paper was in circulation for so short a period. How long a bill or check, payable on demand, or at a given number of days after sight, may be kept in circulation before presentment, without discharging some of the parties, is not a settled question. Chitty, Bills, 276, ed. 1826. It depends in a great degree on the circumstances of each particular case. In *Robinson* v. *Ames*, 20 Johns. 146, 11 Am. Dec. 259, the bill was drawn in Georgia on merchants residing in New York, and, although seventy-five days elapsed before the presentment, it was held that the drawers were not discharged. In *Gowan* v. *Jackson*, 20 Johns. 176, the bill was drawn in Antigua, on merchants residing in London, and, having been put in circulation, it was held that the drawer was not discharged although six months had elapsed before the presentment. In *Aymar* v. *Beers*, 7 Cow. 705, 17 Am. Dec. 538, the bill was drawn in New York on a house in Richmond, Virginia, at three days' sight, and it was held that the drawer was not discharged by a delay of twenty-nine days in presenting the bill for acceptance. The bill had not been put in circulation, but there were other special circumstances to show that the payee was not chargeable with negligence. In the case at bar, three days were necessary for the transmission of the check from New York to Buffalo, and it could not have been in circulation, after it passed from the plaintiff, more than four or five days before it was presented at the bank for payment. There is no authority for imputing laches on such a state of facts, and the judge was right in overruling the objection." A little later there were a number of decisions to the effect that a delay of one full day after the day of receipt was not unreasonable. Later still, several cases arose in which the payee of the check personally presented it to the bank upon which it was drawn, after holding it in his possession for more than one full banking day,—that is, having received it in banking hours, held it until after banking hours on the following day without putting it in course of collection,—and, in the absence of special circumstances excusing it, the delay was held unreasonable.

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Upon these decisions, some courts have attempted to establish the converse of the first proposition, to wit: that a delay of more than one full day is unreasonable, and shows negligence. Some of the courts have attempted to do what this court has refused to do,—that is, to lay down a fixed rule by which the indorsee of a check must present the same for payment within a given time in order to hold the indorser; but very few have been able to establish such a rule satisfactory to themselves. When the defendant gave his check to the plaintiffs after banking hours on Friday, did he have a right to suppose that the plaintiffs would send the check direct to the bank on which it was drawn for payment, or did he have reason to suppose that the plaintiffs would deposit the check, with others received by them, to their account in the ordinary course of business? Is it unreasonable for a business man to adopt the practice of collecting his checks together before the close of banking hours each day, and depositing them in his bank to his credit? This is a general custom among business men; and have they a right to practice such custom, or is it negligence for them to do so? If a business man in the course of a day receives personal checks drawn on a half dozen or more different banks of the town in which he is doing business, must he send those checks to the individual banks on which they are drawn, or may he adopt and practise the custom of depositing them together in his own bank, and rely upon the bank to present them by a regular course of business? If there is any reason to suppose that the bank in which his money is deposited is unsafe, the drawer of a check may transfer his account to a safer bank, or he may deliver the check upon condition that it be immediately presented for payment. If he thinks his deposit is not in danger, he may deliver his check without any condition; thereby assuring the payee that his business may be done through the banks in the ordinary way. If he does this, why should not the payee rely upon it, and transact his business in the ordinary way, without being chargeable with negligence? This is surely in harmony with all the earlier decisions, and is not in conflict with the principle recognized in all the decisions,—that is, that the payee is not chargeable with negligence unless he delays unreasonably in presenting the check. Certainly, no court would say that to make use of the banks in the ordinary course of such business,—to treat a check given in ordinary business transactions as business men generally treat commercial paper that comes to them in the regular way,—is unreasonable, unless bound by precedent to do so. It is said that this court must do so because the rule is firmly established. But a correct interpretation of the well-considered cases compels the contrary conclusion. The laws of business, which arise from business necessity, are more controlling than careless expressions of courts of other jurisdictions, particularly if such expressions originate in cases where they were not necessary to the determination of the point involved. Such are, generally speaking, the cases relied upon as establishing the rule sought to be invoked in this case.

The merchant's custom of depositing his checks immediately before the close of banking hours on each day is not unreasonable. He relies upon his bankers to act promptly in the usual and regular course of business in presenting the checks so deposited. If they fail to do so, the drawer of the check could, of course, hold the payee responsible for their negligence. If they present the check in the regular and ordinary course of business, everything has been done that business men expect. It is all the drawer is presumed to have expected, and all he has a right to demand. For the courts to say that this course of business, which the commercial necessities of the business world have established, must be broken up, is unreasonable, and is in conflict with the above rule of this court.

It is said that the custom of clearing houses, and the ordinary course of doing business through the banks, have no bearing upon the question. Is this proposition sound? *Holmes* v. *Roe*, 62 Mich. 199, 28 N. W. 864, is the case relied upon as establishing the doctrine. In that case the court said: "We agree with the learned judge who presided at the trial that the clearing house, and the method of conducting business through it, had no bearing upon the merits of the case." This was because the payee held the check for an unreasonable length of time before presenting it or in any way disposing of it. The case turned upon the negligence of the payee in carrying the check home, and keeping it for an unreasonable length of time; and so the method of conducting business through the clearing house had nothing to do with the case. This is all that can be derived from the language used. But when one is given a check upon a bank, and has no notice of any necessity of doing otherwise, he may treat the check as bankable paper. He may use the banks in the ordinary way, and not be chargeable with negligence. This is clearly what the parties contemplate, and is certainly not so unreasonable a course on the part of the payee as to charge him with negligence under the above rule adopted by this court. The practice of doing business through the clearing house is well established, and very generally recognized. Bouvier says it originated in London, and was introduced in New York in 1853; and "in London the practice of presenting checks at the clearing house has been held a good presentment to the banker at law." 1 Bouvier, Law Dict. Rawle's ed. 334. And in all the earlier cases in this country, and in nearly all the later ones, the negligence of the payee consisted in retaining the check in his possession for an unreasonable length of time.

In *Loux* v. *Fox*, 171 Pa. 68, 33 Atl. 190, the supreme court of Pennsylvania said: "As we have seen, it was simply impossible, either to present the check in question for payment, or to deposit it for collection, on

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the day it was received. In every large commercial metropolis like Philadelphia, in which clearing houses are established, the customary mode of collecting checks drawn on banking institutions therein is by depositing them in bank for collection, etc. According to the ordinary course of business, checks thus deposited are presented for payment on the next ensuing business day. That appears to have been the course pursued by the defendant in this case; and unless the rule above quoted from *National State Bank* v. *Weil*, 141 Pa. 457, 21 Atl. 661, is restricted in its operation to checks received during banking hours, and a sufficient time before the close thereof to enable the payees, either to present them for payment, or to deposit them for collection, on the day they are received, the usual course of business will be most seriously disturbed." Has the court a right to disturb this course of doing business? If the check in this case had been given during banking hours on Friday, it appears from the evidence it would have been deposited on Friday, and in that case would have been presented for payment on Saturday; but, having been given after banking hours on Friday, it could neither be presented for payment nor deposited in plaintiffs' bank on Friday, and was therefore in effect the same as though it had been given to plaintiffs on Saturday.

Under such circumstances, to hold the plaintiffs guilty of negligence is upon principle wrong, and even violates the rule that they should have one full day after receiving the check before presenting it.

UNION STATE BANK
v.
FREMONT, ELKHORN, & MISSOURI VALLEY RAILROAD COMPANY, *Plff. in Err.*,
And
NEW YORK, CHICAGO, & ST. LOUIS RAILROAD COMPANY, *Plff. in Err.*,

(.....Neb.....)

***1. Although a railroad company enters into a joint contract with another such company for the transportation of goods to a point beyond the end of its own line it is competent for it to enter into an express contract with the shipper, limiting its liability to the transportation of the property over its own line.**

2. An agent employed to solicit traffic for a foreign railroad company, having no line of road in this state, has implied authority to bind his principal for the safe delivery of goods at a point beyond its own lines, and to contract over what road beyond that line the property shall be transported.

3. A manager of an agency established in this state by a foreign railroad corporation for the purpose of soliciting traffic over its line of road is a managing agent, within the meaning of the statute with reference to the service of summons upon such corporations.

*Headnotes by AMES, C.

(October 22, 1902.)

WRITS of error by both defendants to the District Court for Clay County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries to horses while in defendants' possession for transportation. *Reversed as to the Fremont, Elkhorn, & Missouri Valley Company, and affirmed as to the New York, Chicago, & St. Louis Company.*

The facts are stated in the Commissioner's opinion.

Messrs. **Benjamin T. White, James B. Sheean,** and **Leslie G. Hurd,** for plaintiff in error Fremont, Elkhorn, & M. V. R. Co.:

The contract with the Elkhorn company was in writing, and expressly relieved it from all liability on delivery to the Nickel Plate road at Chicago. This contract was valid.

Fremont, E. & M. Valley R. Co. v. *Waters*, 50 Neb. 592, 70 N. W. 225; *Denman* v. *Chicago, B. & Q. R. Co.* 52 Neb. 143, 71 N. W. 967; *Mulligan* v. *Illinois C. R. Co.* 36 Iowa, 186, 14 Am. Rep. 514; *Detroit & M. R. Co.* v. *Farmers' & M. Bank*, 20 Wis. 124; *Berg* v. *Atchison, T. & S. F. R. Co.* 30 Kan. 561, 2 Pac. 639; *Taylor* v. *Little Rock, M. R. & T. R. Co.* 32 Ark. 399, 29 Am. Rep. 1; *Central R. & Bkg. Co.* v. *Avant*, 80 Ga. 195, 5 S. E. 78; *Savannah, F. & W. R. Co.* v. *Harris*, 26 Fla. 148, 7 So. 544; *Goodman* v. *Oregon R. & Nav. Co.* 22 Or. 14, 28 Pac. 894; *McCarn* v. *International & G. N. R. Co.* 84 Tex. 352, 16 L. R. A. 39, 19 S. W. 547; *Wichita Valley R. Co.* v. *Swenson* (Tex. Civ. App.) 25 S. W. 47; *Pendergast* v. *Adams Exp. Co.* 101 Mass. 120; *American Exp. Co.* v. *Second Nat. Bank*, 69 Pa. 394, 8 Am. Rep. 268; *Jennings* v. *Grand Trunk R. Co.* 127 N. Y. 438, 28 N. E. 394; *Myrick* v. *Michigan C. R. Co.* 107 U. S. 106, 27 L. ed. 326, 1 Sup. Ct. Rep. 425.

In the absence of fraud or mistake, a party executing and acting upon a written contract is conclusively presumed to know its terms.

NOTE.—For other cases in this series as to validity of contract by connecting carrier for loss occurring on other lines, see cases in *note* to Adams Exp. Co. v. Harris (Ind.) 7 L. R. A. 216; Deming v. Merchants' Cotton-Press & Storage Co. (Tenn.) 13 L. R. A. 518; McCarn v. International & G. N. R. Co. (Tex.) 16 L. R. A. 39; McCann v. Eddy (Mo.) 35 L. R. A. 110; Illinois C. R. Co. v. Carter (Ill.) 36 L. R. A. 527.

As to liability of connecting carrier beyond its own line generally, see cases in *notes* to Fox v. Boston & M. R. Co. (Mass.) 1 L. R. A. 703; Crossan v. New York & N. E. R. Co. (Mass.) 3 L. R. A. 766; and Richmond & D. R. Co. v. Payne (Va.) 6 L. R. A. 849; also Colfax Mountain Fruit Co. v. Southern P. Co. (Cal.) 40 L. R. A. 78; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. (Va.) 41 L. R. A. 511; Illinois C. R. Co. v. Southern Seating & Cabinet Co. (Tenn.) 50 L. R. A. 729; Courteen v. Kanawha Dispatch (Wis.) 55 L. R. A. 182; and Taffe v. Oregon R. & Nav. Co. (Or.) 58 L. R. A. 187.

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Mulligan v. *Illinois C. R. Co.* 36 Iowa, 181, 14 Am. Rep. 514; *Wertheimer* v. *Pennsylvania R. Co.* 17 Blatchf. 421, 1 Fed. 232; *Jones* v. *Cincinnati, S. & M. R. Co.* 89 Ala. 376, 8 So. 61; *St. Louis, I. M. & S. R. Co.* v. *Weakly*, 50 Ark. 397, 8 S. W. 34; *Robinson Bros.* v. *Merchants' Despatch Transp. Co.* 45 Iowa, 470; *McMillan* v. *Michigan S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208; *Hutchinson* v. *Chicago, St. P. M. & O. R. Co.* 37 Minn. 524, 35 N. W. 433; *St. Louis, K. C. & N. R. Co.* v. *Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *Durgin* v. *American Exp. Co.* 66 N. H. 277, 9 L. R. A. 453, 20 Atl. 328; *Hill* v. *Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163; *Cincinnati, H. & D. R. Co.* v. *Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *East Tennessee, V. & G. R. Co.* v. *Brumley*, 5 Lea, 401.

Mr. **John C. Stevens** for plaintiff in error New York, C. & St. L. R. Co.

Mr. **Thomas H. Matters,** for defendant in error:

It was beyond the power of the Elkhorn road, by any provision which appeared in the waybill, to limit its liability.

St. Joseph & G. I. R. Co. v. *Palmer*, 38 Neb. 473, 22 L. R. A. 335, 4 Inters. Com. Rep. 494, 56 N. W. 957.

Ames, C., filed the following opinion:

This is an action to recover damages for injuries to a car load of horses, alleged to have been suffered in the course of transportation from Harvard, in this state, to Belvidere, New Jersey. On the 13th day of February, 1897, the plaintiff below, the Union State Bank, entered into a contract for the shipment of the horses, which was signed by an agent of the bank and an agent of the plaintiff in error the Fremont, Elkhorn, & Missouri Valley Railroad Company, the terms of which, so far as they are pertinent to this controversy, are as follows:

Harvard, Nebraska Station,
Hour: 3:10 P. M. February 13, 1897.

Received of Union State Bank one car horses, to be delivered to Nickel Plate Road for Belvidere, New Jersey, at Union Stock Yards station, Chicago, Illinois. . . . And in this case the railroad company upon whose road the accident, loss, or damage shall occur shall alone be liable therefor, and no suit shall be brought or claim made against any other company forming a part of the route for such loss or damage (it being expressly understood and agreed that the responsibility of these companies shall cease upon delivery of said property to their connecting line, unless otherwise agreed to in writing, and said written agreement signed by the respective parties thereto).

It is not disputed that the Fremont, Elkhorn, & Missouri Valley Railroad Company literally kept the stipulations, performance of which was imposed upon it by this contract: and it is not contended that the horses suffered any injuries, for which damages are recoverable, during their transit from Harvard and until their delivery to the plaintiff in error the New York, Chicago, & St. Louis Railroad Company, commonly called the "Nickel Plate Road," at the Union Stock Yards station in Chicago. The facts thus far stated are either admitted or proved without contradiction, and, if this was all there is of the case, the record would present no matter of legal controversy, because there would be no question that the trial court erred in refusing to instruct the jury that the Fremont, Elkhorn, & Missouri Valley Railroad Company had incurred no liability. Comp. Stat. art. 1, chap. 72, § 5, which is much relied on by the defendant in error, would be without application to such a state of facts, for several reasons, among which are that this section has reference to the legal effect, not of express contracts between shippers and railroad companies, but to that of notices by the latter to the former, which are quite different matters; and, further, that, in the absence of evidence of fraud or mistake, a party is conclusively presumed to have had notice of the contents of formal written contracts executed by him; and, finally, that the company appears to have fully discharged and satisfied every liability incurred by it as a common carrier, so that, if the contract does by its terms purport to limit such liability, there is no fact or circumstance connected with the transaction upon which the limitation could have had operation.

At and before the making of this contract and the shipment of the horses, and subsequently, the plaintiff in error the New York, Chicago, & St. Louis Railroad Company maintained an office at the city of Omaha, in this state, under the general charge of one Bernard E. Morgan, for the purpose of carrying on the business of securing freight and traffic to be carried over its line of road, extending eastward from Chicago and St. Louis. In the conduct of this business, Morgan was authorized to employ, and did employ, subagents or solicitors, among whom was one A. L. Armstrong. Shortly before the date above mentioned, Armstrong obtained through one Bentzer, a traveling freight agent of the Fremont, Elkhorn, & Missouri Valley road, an introduction to the officers and agents of the plaintiff bank, and solicited from them the routing of the horses eastward from Chicago over the line of the corporation represented by him. As a result of this solicitation, and of negotiations and agreements growing out of it, the horses were on the day of the making of the above contract, and as a part of the same transaction, shipped on board the cars of the Fremont, Elkhorn, & Missouri Valley company at Harvard, and a bill of lading was issued therefor by the latter, naming N. B. Updike, an agent of the plaintiff bank, as both consignor and consignee, and Belvidere, New Jersey, as the place of destination, by way of the Nickel Plate road. At the same time the total amount of freight charges from Harvard to Belvidere was paid to the agent of the Fremont, Elkhorn, & Missouri Valley

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company, who alone signed the bill of lading. There was no written stipulation with respect to the lines over which the horses should be transported beyond the eastern terminus of the New York, Chicago, & St. Louis company, but the evidence is practically without dispute that it was orally agreed between Updike, the agent of the bank, and Armstrong, that they should be carried from Buffalo to Phillipsburg over the Lehigh Valley & Hudson River road, and from the latter point to Belvidere over the Pennsylvania road, and that this agreement was an indispensable inducement to Updike to consent to their being delivered to the New York, Chicago, & St. Louis company. The shipment was delivered at Phillipsburg to another railroad, upon which it is alleged that the animals suffered the injury for which damages are claimed, on account of the lack of facilities of the company for caring for them, and as a consequence of the negligence and wrongful conduct of its agents and employees. The plaintiff below recovered a verdict and judgment against both defendants jointly, and the railroad companies, having filed separate motions for a new trial, prosecute separate petitions in error to this court.

With respect to the Fremont, Elkhorn, & Missouri Valley company, it is entirely clear that it was entitled to a peremptory instruction in its behalf, unless it is obligated in some manner not indicated by the above-quoted contract between itself and Updike, the agent of the bank. It does not appear to us that it was so obligated. The contract mentioned, the bill of lading, the conversations between Updike and Armstrong, the agent of the Nickel Plate, and the shipment of the horses, were all of the same date, and parts of the same transaction. It cannot reasonably be supposed that the waybill and the receipt of the tariff charges by Kempster, the local freight agent of the company, were intended or supposed by the parties, or any of them, to have the effect of superseding and annulling the terms of the formal contract explicitly reciting and defining the duties of the company. They are more properly to be regarded as additional and supplemental thereto, and as having had for their main purpose the carrying out of the agreement between the shipper and Armstrong, the routing of the property from Chicago to destination by way of the New York, Chicago, & St. Louis Railroad Company and the other lines mentioned, and the collecting for the last-named company of the charges for the transportation beyond Chicago. To this extent the case is analogous to that of a contract made in the name of one party for the benefit and in the behalf of another. In such cases it is true that, as a general rule, both the party beneficially interested and the person by and in whose name the contract is made are liable for its breach. But we think that in the case at bar the agreement first above mentioned limited and qualified that created by the bill of lading and shipment, and is sufficient to overcome the presumption otherwise arising from these facts and the collection of the freight charges. By this construction the several agreements, oral and written, and the circumstances of the transaction, appear to be consistent with themselves and with each other, and such a construction is obligatory upon the courts in all cases in which the relation of the parties and the subject-matter of the agreements and the attendant facts will permit of it. We are therefore of opinion that the decision of this court in *St. Joseph & G. I. R. Co.* v. *Palmer*, 38 Neb. 463, 4 Inters. Com. Rep. 494, 22 L. R. A. 335, 56 N. W. 957, is not applicable to this feature of the case at bar. The sum paid by the shipper to the Fremont, Elkhorn, & Missouri Valley Railroad Company was the aggregate of freight charges for the whole distance over which the animals were to be carried; and all the facts, taken together, disclose a joint contract on the part of the two companies to transport the property from Harvard, Nebraska, to Belvidere, New Jersey, but their respective liabilities were so distributed that that of the last-named company was restricted to safe delivery to the connecting line at Chicago. This restriction was not, under the circumstances, invalid, or a limitation of the common-law liability of the Fremont, Elkhorn, & Missouri Valley company, in violation of the Constitution or statutes of this state, because, as is recognized in the opinion in the case above cited, a common carrier is not bound to accept goods for transportation beyond the end of its own line, and it follows that, although it may bind itself jointly with another carrier for the safe delivery of the property to the latter at that point, it may, by express stipulation, relieve itself of responsibility with the connecting line for the further carriage of them. That a railroad company is not, in the absence of an express or implied contract, bound for the transportation of property beyond the terminus of its own road, was expressly ruled by this court in *Fremont, E. & M. Valley R. Co.* v. *Waters*, 50 Neb. 592, 70 N. W. 225, and such is the great weight of authority in this country. *Myrick* v. *Michigan C. R. Co.* 107 U. S. 106, 27 L. ed. 325, 1 Sup. Ct. Rep. 425. See also *Mulligan* v. *Illinois C. R. Co.* 36 Iowa, 186, 14 Am. Rep. 514; *Detroit & M. R. Co.* v. *Farmers' & M. Bank*, 20 Wis. 124; *Berg* v. *Atchison, T. & S. F. R. Co.* 30 Kan. 561, 2 Pac. 639; *Taylor* v. *Little Rock, M. R. & T. R. Co.* 32 Ark. 399, 29 Am. Rep. 1; *Central R. & Bkg. Co.* v. *Avant*, 80 Ga. 195, 5 S. E. 78; *Savannah, F. & W. R. Co.* v. *Harris*, 26 Fla. 148, 7 So. 544; *Goodman* v. *Oregon R. & Nav. Co.* 22 Or. 14, 28 Pac. 894; *McCarn* v. *International & G. N. R. Co.* 84 Tex. 352, 16 L. R. A. 39, 19 S. W. 547; *Wichita Valley R. Co.* v. *Swenson* (Tex. Civ. App.) 25 S. W. 47; *Pendergast* v. *Adams Exp. Co.* 101 Mass. 120; *American Exp. Co.* v. *Second Nat. Bank*, 69 Pa. 394, 8 Am. Rep. 268; *Jennings* v. *Grand Trunk R. Co.* 127 N. Y. 438, 28 N. E. 394. But it was held in *St. Joseph & G. I. R. Co.* v. *Palmer*, 38 Neb. 463, 22 L. R. A. 335, 4 Inters. Com. Rep. 494, 56 N. W. 957, that

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such a contract may be implied from the receipt of freight charges for the whole distance, and its existence is further established in this case by the uncontradicted evidence of conversations between the shipper and Armstrong, the agent of the New York, Chicago, & St. Louis company, which established an agreement not contradictory, but supplemental, to that implied by the bill of lading and other circumstances above detailed, and which was, as has been said, a part of the same transaction. There is therefore no variance between the proof and the petition as respects the joint character of the contract on the part of the two railroad companies. It is undisputed that the horses were diverted from the route specified in the oral agreement, as alleged in the petition of the plaintiff, and that after their diversion they were injured while in the custody of the carrier. All of the foregoing matters are, therefore, to be disposed of as questions of law; and it is unnecessary to discuss any of the instructions complained of, except the refusal to give a peremptory instruction for a verdict.

There was at the trial no question properly to be left to the jury except that of the amount of damages, concerning their disposition of which there is no complaint in the briefs of the plaintiffs in error. But it is insisted that Armstrong, the solicitor of the New York, Chicago, & St. Louis company, had no authority to stipulate concerning the route of the shipment beyond the line of his employer, or to contract a liability for carriage beyond that line, and that Morgan, upon whom service of summons was made in this case, was not a managing agent of the company, within the meaning of our statutes. Neither of these objections is well taken. Morgan was the manager of an agency maintained in this state for the express purpose of soliciting traffic for his corporation, which was foreign to this state, and had no line of road entering its territory, and Armstrong was one of his employees in the business. Such persons, by the very nature of their employment, are represented to the public to have authority to do any act or enter into any contract for their principal pertaining to the business which they have in charge, and which has a tendency to promote its successful conduct. Obviously, one of the most frequently requisite of such acts would be the routing of goods over the defendant's line as an intermediate line to the points of destination. Without such routing, the shipment in question could not have been secured, and the case may be taken as fairly illustrative of the character of the business in which the agency was engaged.

It is recommended that the judgment of the district court in so far as it affects the plaintiff in error the New York, Chicago, & St. Louis Railroad Company, be affirmed, and that in so far as it affects the plaintiff in error the Fremont, Elkhorn, & Missouri Valley Railroad Company it be reversed, and a new trial granted

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Per Curiam:

For reasons stated in the foregoing opinion, it is ordered that *the judgment of the District Court, in so far as it affects the plaintiff in error the New York, Chicago, & St. Louis Railroad Company, be affirmed,* and that, *in so far as it affects the plaintiff in error the Fremont, Elkhorn, & Missouri Valley Railroad Company it be reversed,* and a new trial granted.

Duffie, C., concurring:

I concur in the conclusion reached in the foregoing opinion, and with the reasons given therefor. To my mind, it is plain that there is no conflict between this case and the case of *St. Joseph & G. I. R. Co.* v. *Palmer*, 38 Neb. 163, 4 Inters. Com. Rep. 494, 22 L. R. A. 335, 56 N. W. 957. The facts in this case are so different from those in the *Palmer Case* that the latter cannot be considered a precedent by which this should be ruled. In the *Palmer Case* a bill of lading was issued which limited the liability of the receiving company to its own line, which extended to Grand Island, 24 miles distant from Hastings, the place of shipment. The plaintiff insisted that he had made an oral contract with the agent of the road for the carriage of his goods to their destination, — Grant's Pass, Oregon; that the agent had received the freight charges for the entire distance; and that he signed the bill of lading issued by the company in the belief that it was a receipt for the freight charges paid and in ignorance of the clauses therein limiting the liability of the company. The principal controversy in that case was in relation to the terms of the contract of shipment; the plaintiff insisting that the contract was an oral one that provided for the through shipment of his goods, and that his signature to the written contract or bill of lading had been fraudulently obtained in the belief that it was a receipt, while the company insisted that the bill of lading truly set forth the real contract entered into by the parties, and that its liability did not extend beyond its own line. The bill of lading contained a clause limiting the liability of the carrier to $5 per 100; and the opinion, after calling attention to article 11, § 4, of the Constitution, which prohibits any limitation upon the liability of a railroad company as a common carrier, and to former decisions of the court holding that such liability cannot be limited even by express contract, then turns to a discussion of the question whether the company's contract of carriage was to the end of its own line, and delivery to the next carrier, or to the final point of delivery. Relating to this question, the opinion is as follows: "It is said that at common law the common carrier is not liable for loss, in the absence of special contract, beyond the point at which it delivered the goods to a connecting carrier. To this it should be added that the contract of the shipper was with the carrier first receiving the goods, and if such carrier undertook to deliver the goods at their destination, even though it contemplated doing

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so through intermediate carriers, it assumed a liability of such character for every part of the route. Many cases hold that receiving goods marked for a point beyond the end of the receiving carrier's route is evidence of a contract to deliver them as marked. In this case the bill of lading was executed in duplicate. In one of the copies the destination was left blank; in the other the language was: 'Received of Palmer and Pardee the following described package, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to Grant's Pass, Oregon, and delivered at the railroad depot at that point.' Both copies in writing show that the goods were consigned to Pardee at Grant's Pass, Oregon. The negotiations as to the freight were, according to the uncontradicted testimony, with a view to prepayment all the way through. Hastings was only 24 miles from Grand Island, where the car was delivered to the Union Pacific; and the $200 received by the railroad company, if not intended as a full prepayment of the freight to Oregon, was certainly intended to apply on the freight throughout the whole distance. There is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier." It will be observed that the opinion treats the payment to the first or initial carrier of the freight charges for the whole distance as presumptive only that the contract of carriage was a through contract, and that, together with the fact that the goods were received at a point but 24 miles distant from the terminus of its line, and that the bill of lading itself recited that the goods were "to be transported to Grant's Pass, Oregon, and delivered at the railroad depot at that point," was conclusive that the contract was one for through shipment. We entirely agree with the writer of the opinion, under the facts in that case, that "there is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier." The bill of lading in the case at bar recited the following: "Received of Union State Bank one car horses, to be delivered to Nickel Plate Road for Belvidere, New Jersey, at Union Stock Yards station, Chicago, Illinois." As we interpret this agreement, the contract of carriage extends to Chicago only, and the circumstances under which it was made give force to this construction. The evidence shows that some time previous to February 13, 1897, one Armstrong, a freight solicitor of the Nickel Plate road, learned that the Union State Bank was about to ship two cars of stock from Harvard, Nebraska, to Belvidere, New Jersey, and requested L. G. Kempster, the local agent of the Elkhorn company, to introduce him to the officers of the bank. The Elkhorn company had already secured the shipment to Chicago, and was not interested in the shipment east of that point. The introduction was made as requested, and Armstrong contracted to receive the shipment at Chicago from the Elkhorn company, and to transport the same over the Nickel Plate road to Buffalo, and to forward it to its destination over certain roads named by the bank. When shipment was made on the 13th, the bill of lading was made out and signed by the parties. The freight charges for the entire route were paid to the Elkhorn company, and this, in the absence of a special agreement to the contrary, would be presumptive that the company had contracted to deliver the freight at Belvidere, New Jersey, its ultimate destination; but in the face of the express agreement which, as we have said is a contract on the part of the Elkhorn company to carry to Chicago only, their liability as carriers ceased at that point, and that company cannot be held liable for injuries to stock received on the other lines over which it was being transported. As said in *Fremont, E. & M. Valley R. Co.* v. *Waters*, 50 Neb. 592, 70 N. W. 225: "A railroad company, receiving for shipment goods consigned to a point on the line of a connecting carrier under an agreement to transport them to the terminus of its own road, is neither at common law, nor by statute of this state, answerable therefor after their safe delivery to the connecting line named in the bill of lading or contract of shipment."

Albert, C.: On a re-examination, I fully concur in the foregoing.

Rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

John HOLLER
v.
P. Sanford ROSS, *Plff. in Err.*

(.....N. J.....)

***1. The servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did, which caused the injury, was an act which was, expressly or by necessary implication, within the line of his duty under his employment.**

2. The master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work.

*Headnotes by FORT, J.

NOTE.—As to liability of master for killing, by servant set to guard premises, of person coming thereon, see also, in this series, Davis v. Houghtelin (Neb.) 14 L. R. A. 737, and Lipscomb v. Houston & T. C. R. Co. (Tex.) 55 L. R. A. 869.

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3. **A person employed to watch the personal property of a company,** stored upon the real property of another, will not be deemed to be acting within the line of his duty if he shall shoot a person trespassing upon the realty, because that person refuses to go off the premises, or to halt, or to throw up his hands, at his command.
4. **Where it appears, when the plaintiff rests,** that the act of the servant was a wilful one, and was not, expressly or impliedly, within the line of the servant's duty or employment, there should be a nonsuit.

(*Pitney, J., dissents.*)

(November 17, 1902.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Circuit Court for Hudson County in favor of plaintiff in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Reversed.*

Statement by **Fort, J.:**

On the night of January 16, 1900, the plaintiff was shot in the face and back by the servant of the defendant. One of the results of the shooting was the loss of the plaintiff's eye. The defendant was the owner of certain personal property stored upon a wharf, called by the witnesses a "dock," which is situate upon the Jersey side of the Hudson river, near Ft. Lee. The shooting occurred at about 6 P. M. It was dark. The defendant did not own the wharf, and its personal property was only upon a part of the property. The servant was employed to watch the property of the defendant upon the wharf,—to take care of it and see that it was not stolen. On the day of the shooting, prior to the time of shooting, three men had been to the wharf, and been driven away by the defendant's servant; and the men, as the plaintiff's case shows, had threatened to return and kill the defendant's servant. The same night the plaintiff, with two other men, came to the wharf in a boat, and tied it, and climbed up the crib work upon it, and began to move around upon the filled work at the river front, and back upon other parts of the property. The defendant's servant saw them, and surmised they were, or might be, the same three men who had been there before on that day, in a boat, and who had threatened to kill him. He armed himself with a shotgun which he had upon the premises to shoot game, but which gun was not his master's, nor had it been furnished by his master, nor was the gun brought to the premises with his master's consent or knowledge. The servant testified for the plaintiff that he had used the gun to kill game in the daytime, and had at times carried it at night. The servant further testified in the plaintiff's case, on the plaintiff's examination, as follows:

Q. For what purpose was it,—protection or what,—that you fired?

A. I was the man to know their business on that dock during that hour in the night.

Q. For whom did you want to know that?

A. For myself; nobody else.

The evidence of the person who owned the property, who was called by the plaintiff, was that the defendant was "merely allowed to use the dock property for storage, up to such time as I might rent the property or make use of it." Adolph Aspen, one of the men who was upon the wharf with the plaintiff, testified for the plaintiff:

Q. When he called "hands up," you three fellows all started to run?

A. Yes, sir; I wasn't going to stand there like a monkey. I was scared, of course. I had four children and a wife home.

It further appeared on direct examination in the plaintiff's case, in the testimony of the servant, Anderson, as follows:

Q. Tell us what happened, and what you saw, and what was done?

A. Before I spoke to them, I told them to hold up their hands and stop, and I told them to stop two or three times, but they did not. They did not stop. When one of them answered me, he says, "Which way do you want me to run?" I says, "Don't run at all." I says, "Go on the dock and stand still, so I can see who you are." I called to them again. I called to them about four times before I shot. Then I fired right straight over their heads. . . .

Q How many barrels?

A. Only one the first time. Then I called to them three or four times again, and I went after them, and I shot again.

Q. What did you do that for?

A. I wanted them men to halt.

Again the witness said:

Q. You told them to throw up their hands and stop. What did they do?

A. Commenced to run.

The plaintiff also testified that he, with his companions, were upon the wharf to get some wood to heat coffee, and were there only seven or eight minutes before he was shot. Plaintiff was at all times quite a distance from, if not, at the time of the shooting, running away from, the defendant's servant.

Messrs. **Bedle, Edwards, & Lawrence** for plaintiff in error.

Messrs. **Young & Arrowsmith,** for defendant in error:

The case was clearly one for the jury, and the defendant's motion for a nonsuit was properly denied.

Montgomery v. *Sartirano,* 16 App. Div. 95, 44 N. Y. Supp. 1066.

A master is ordinarily liable for injuries caused by his servant in preventing damage or loss to property of the master.

14 Am. & Eng. Enc. Law, p. 810; *Rounds*

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v. *Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; Cooley, Torts, pp. 629, 630; *Mott* v. *Consumers' Ice Co.* 73 N. Y. 543; *McCann* v. *Consolidated Traction Co.* 59 N. J. L. 487, 38 L. R. A. 236, 36 Atl. 888; *Lang* v. *New York, L. E. & W. R. Co.* 51 Hun, 603, 4 N. Y. Supp. 565; *Hoffman* v. *New York C. & H. R. R. Co.* 87 N. Y. 25, 41 Am. Rep. 337; *Limpus* v. *London General Omnibus Co.* 1 Hurlst. & C. 528; *Arasmith* v. *Temple*, 11 Ill. App. 39; *Kansas City, Ft. S. & G. R. Co.* v. *Kelly*, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172; *Kline* v. *Central P. R. Co.* 37 Cal. 400, 99 Am. Dec. 282; *Redding* v. *South Carolina R. Co.* 3 S. C. N. S. 1, 16 Am. Rep. 681; *Aycrigg* v. *New York & E. R. Co.* 30 N. J. L. 462.

The application of the rule *respondeat superior* does not depend upon the obedience of the servant to his master's orders, nor upon the legality of the servant's conduct.

Bayley v. *Manchester, S. & L. R. Co.* L. R. 8 C. P. 148; *Driscoll* v. *Carlin*, 50 N. J. L. 30, 11 Atl. 482; *New York, L. E. & W. R. Co.* v. *Haring*, 47 N. J. L. 139, 54 Am. Rep. 123; *Mott* v. *Consumers' Ice Co.* 73 N. Y. 547; *Barrett* v. *New York C. & H. R. R. Co.* 45 App. Div. 225, 61 N. Y. Supp. 9; *Levy* v. *Ely*, 48 App. Div. 554, 62 N. Y. Supp. 855.

Even though Holler was a trespasser, Anderson was not justified in shooting him.

Carter v. *Louisville, N. A. & C. R. Co.* 98 Ind. 552, 49 Am. Rep. 780; *Amato* v. *Sixth Ave. R. Co.* 9 Misc. 4, 29 N. Y. Supp. 51; *Baber* v. *Broadway & S. Ave. R. Co.* 10 Misc. 109, 30 N. Y. Supp. 931; *Palmer* v. *Gordon*, 173 Mass. 410, 53 N. E. 909; *Herrick* v. *Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; *Harris* v. *Eaton*, 20 R. I. 81, 37 Atl. 308.

The damages are not excessive.

Walsh v. *Fitchburg R. Co.* 78 Hun, 1, 28 N. Y. Supp. 1097; *Arnesen* v. *Brooklyn City R. Co.* 9 Misc. 272, 29 N. Y. Supp. 748; *De Wardener* v. *Metropolitan Street R. Co.* 1 App. Div. 240, 37 N. Y. Supp. 133; *Dieffenbach* v. *New York, L. E. & W. R. Co.* 5 App. Div. 92, 38 N. Y. Supp. 788; *Solarz* v. *Manhattan R. Co.* 8 Misc. 656, 29 N. Y. Supp. 1123; *Magar* v. *Hammond*, 54 App. Div. 532, 67 N. Y. Supp. 63.

Fort, J., delivered the opinion of the court:

There is but one question in this case, *viz.:* Is the defendant liable for the injuries done to the plaintiff by its servant, under the facts set out at the head of this opinion? In an action of tort, in the nature of an action on the case, Judge Hoar says the rule is that "the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work." *Howe* v. *Newmarch*, 12 Allen, 49, 57. The servant in this case was not employed to protect the wharf, but the personal property of the defendant upon a part thereof. The wharf itself did not belong to the defendant. A person employed to watch the personal property of a company, stored upon the real property of another, will not be deemed to be acting within the line of his duty if he shall shoot a person trespassing upon the realty because that person refuses to go off the premises, or to halt or throw up his hands, upon his command. If the person shot had the personal property, or some of it, in his possession, and refused to surrender it, or if he was in the act of taking it, and refused to desist when commanded so to do, and he was shot by the servant, even though the shooting were wanton and wilful, the master might nevertheless be liable. But that is not this case. There is no proof in this case that the plaintiff, or those with him, were interfering in any way with the property of the defendant. They were simply upon the wharf to boil some coffee, and the servant of the defendant, without excuse or explanation, while they were engaged in gathering wood for this purpose, or while they were in the act of running away, shot and injured the plaintiff. It is difficult to see how such shooting can in any way be distinguished from the shooting by any stranger who might have happened to be on the wharf and tried to drive the men therefrom. There is no proof in the record that it was any part of the duty of the defendant's servant to keep persons off the wharf. In fact, the implication is entirely the other way. He was to watch the personal property of the defendant, stored upon the wharf, to see that it was not taken away by persons who might come thereon for any lawful or other purpose. Even where a watchman is given by the master a revolver to use in guarding property, it is held in *Golden* v. *Newbrand* that the master is not liable for injuries caused to a person who has been upon the property, but who is, at the time the shot is fired, off the property, and fleeing away. In that case the court said: "To protect the brewery did not require Roenspeiss to shoot and kill a person who was retreating therefrom. The killing was not, therefore, done in the line of the duty Roenspeiss was employed to perform." 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537. "It is immaterial whether or not the tortious act be committed while the agent is engaged in the rightful business of his employer, which he is attending to by his direction; for, if he transcends his authority while so engaged, his acts do not bind his employer unless sanctioned by him." *New Orleans, J. & G. N. R. Co.* v. *Harrison*, 48 Miss. 112, 12 Am. Rep. 356. The case at bar is not within the class of cases where the master is required by contract to protect the person assaulted by his servant, as in the case of passengers assaulted by railway employees. *Dillingham* v. *Anthony*, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. 139; 15 Am. St. Rep. 753, see note; *Ware* v. *Barataria & L. Canal Co.* 35 Am. Dec. 189, 201, note (15 La. 169). The plaintiff and his companions were clearly technical trespassers upon the wharf property. Neither he nor they had any contract or other legal relations with the defendant, or, indeed, with the wharf owner. The supreme court of Connecticut states the rule applicable to this class of

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cases about as clearly as it can be done when it says: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." *Stone* v. *Hills*, 45 Conn. 47, 29 Am. Rep. 635. For a complete review of all the cases in this country upon the general subject of the master's liability or nonliability for the acts of his servant in cases of tort, see the note to *Goodloe* v. *Memphis & C. R. Co.* 54 Am. St. Rep. 67, 71, 85 (107 Ala. 233, 29 L. R. A. 729, 18 So. 166).

The servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did, which caused the injury, was an act which was, expressly or by necessary implication, within the line of his duty under his employment. When the plaintiff rested, the proof, as I think, left no room for doubt that the act of the servant was not within the express or implied duty imposed upon him by the fact or nature of his employment. The plaintiff was bound by the evidence of Anderson, Aspen, and Ross, offered by him, which established the fact that the servant of the defendant was not, at the time of the shooting, doing an act which was necessary, or which he could possibly have believed to be necessary, to protect his master's property, but was engaged in a wilful and wanton trespass, outside the line of his duty. Anderson testified that he fired the shot "to know for himself" why the men were on the wharf at that hour of the night. He was not employed for that. It was not in the line of his duty to shoot at men to learn that fact. It is quite apparent, of course, that the shooting in this case could in no sense be considered a negligent act. It was clearly wilful. It was an act of the servant intentionally done. It was as wrongful as it was wilful. It could hardly be characterized as less than malicious. It was evidently inspired by a feeling of personal resentment, to punish the three men because he thought they were the persons who had threatened to kill him on the afternoon of the same day. Under the early English authorities, beginning with Lord Kenyon's judgment in *M'Manus* v. *Crickett*, 1 East, 106, for such an act as that done by this defendant's servant the master was not liable. The early cases made the test of the master's liability depend upon the moral quality of the act, instead of leaving it to depend upon the question of whether the act was done in the line of the master's business, and within the scope of the servant's employment. This was not only true in England, but in this country. *Moore* v. *Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Wright* v. *Wilcox*, 32 Am. Dec. 59 L. R. A. 507, note (19 Wend. 343); *Cox* v. *Keahey*, 36 Ala. 340, 76 Am. Dec. 325; *Hughes* v. *New York & N. H. R. Co.* 4 Jones & S. 222; *Yerger* v. *Warren*, 31 Pa. 319; *Pittsburg, A. & M. Pass. R. Co.* v. *Donahue*, 70 Pa. 119; *Crocker* v. *New London, W. & P. R. Co.* 24 Conn. 249; *Brasher* v. *Kennedy*, 10 B. Mon. 30; *Harriss* v. *Mabry*, 23 N. C. (1 Ired. L.) 240. It will not be necessary to cite the cases which show that this rule is no longer followed in England or this country. Any text-book on Master and Servant will give them, and show the gradual growth away from the doctrine of *M'Manus* v. *Crickett;* but a careful study of the cases will demonstrate that the reason for the change in the rule has generally been supported upon principles arising out of the contract character of the relation between the master and the person injured, under which the wilful act has been committed. The rule has been gradually extended until it may be said that the liability of the master for the wilful, wrongful, and malicious acts of the servant now extends to every case where the act of the servant is done with a view to the furtherance and discharge of his master's business, and within the scope and limits of his employment. *Mott* v. *Consumers' Ice Co.* 73 N. Y. 543; *Rounds* v. *Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; 20 Am. & Eng. Enc. Law, 2d ed. p. 169. Beyond the scope of his employment, the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. Smith, Mast. & S. 4th Eng. ed. 299. The rule as it is now established by the later judicial declarations should be held strictly within its defined limits. It is a rule capable of great abuse and much hardship, and the courts should guard against its extension or misapplication. For a wilful act done by a servant, not within the line of his employment, and about which there is not a doubtful question of fact as to whether the act of the servant was or was not within the line of his duty, the court should control the case, and nonsuit, or direct a verdict for the defendant. Whether there be evidence which raises a question to go to the jury, as to whether the act of the servant was within the line of his duty and employment, is for the court. If the court so determines, then it is a question for the jury whether, under the proof, the act was or was not within the line of the servant's duty or employment. Where it appears, when the plaintiff rests his case, that the act of the servant was a wilful one, and was not, expressly or impliedly, within the line of the servant's duty or employment, there should be a nonsuit.

When the plaintiff rested his case, the defendant moved to nonsuit "because there is no testimony in this case which would, if true, operate to bind the defendant, P. Sanford Ross, Incorporated." A careful examination of the plaintiff's proof makes it clear that such was the fact. The shooting by the servant of the defendant was not, under the

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proof made by the plaintiff, shown to have been done while the servant was acting within the line of his duty or employment, and a nonsuit should have been granted. Its refusal was error, and for this cause *the judgment should be reversed.*

Pitney, J., dissents.

STATE of New Jersey (CHILDREN'S SEASHORE HOUSE at Atlantic City, for Invalid Children, Prosecutor), *Plff. in Err.*
v.
ATLANTIC CITY.

(.....N. J.....)

*1. **A charitable corporation, already enjoying exemption from taxation for its house and the land on which it is located** under that section of the tax act which exempts from taxation all buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary for the fair enjoyment thereof, and the furniture and personal property used therein (P. L. 1894, p. 354; 3 Gen. Stat. p. 3320), purchased other land, a mile away, with the purpose of removing the institution there after a sale of the property it then occupied. Pending such sale it located and occupied a camp on the newly acquired lot, consisting of tents for the accommodation of the overflow from the main institution during the months of July and August, with a one-story frame structure adjacent thereto, used exclusively as a kitchen and laundry for the camp, in which no one slept. Upon review of an assessment for taxes laid upon the newly acquired land, it was *held* that neither the tents nor the frame kitchen were buildings, in the sense of the statute, and that the assessment must be affirmed.

2. **The charter of the corporation limited its right to hold property to an amount not exceeding $100,000,** but contained no clause exempting it from taxation. The exempting clause above recited was the general law of the state at the time the charter was granted. A general law was afterward passed increasing the capacity of benevolent and charitable corporations to hold property to a sum not exceeding $500,000, but this act contained a proviso to the effect that nothing therein contained should be construed to exempt the property of said corporation from taxation. Upon a review of the above assessment on certiorari, the tax was sustained on the ground that the corporation had already obtained exemption from taxation to the amount limited by its charter, and that the result was not altered by the act increasing its capacity to hold property beyond the required amount because of the proviso attached thereto. Upon error the tax was sustained, but not upon the ground stated; the court holding that the proviso did not operate as a repeal, as to this class of corporations, of the general act creating exemptions from taxation.

*Headnotes by HENDRICKSON, J.

NOTE.—For a case in this series similar to the above, holding that an exemption from taxation of "houses of religious worship" will not include that portion of a lot of land procured for the erection of a permanent church building upon which work has not been commenced, although a temporary structure has been erected for religious worship on another portion of the lot, see All Saints Parish v. Brookline (Mass.) 52 L. R. A. 778.

(November 17, 1902.)

ERROR to the Supreme Court to review a judgment affirming an assessment of prosecutor's property for taxation. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Thompson & Cole** for plaintiff in error.

Messrs. **Godfrey & Godfrey**, for defendant in error:

Exemptions depend upon the use of the property.

Property held, though convenient, is not necessary to the enjoyment and use.

Intention to use at a future time does not entitle to exemption.

Congregation of St. Vincent de Paul v. *Brakeley*, 67 N. J. L. 176, 50 Atl. 589.

Hendrickson, J., delivered the opinion of the court:

This writ of error brings up for review an adjudication of the supreme court upon certiorari affirming an assessment of taxes levied upon lands of the prosecutor below, situate upon the beach, and bounded by Annapolis, Richmond, and Atlantic avenues, in Atlantic City. The dimensions of the land are 300 by 344 feet, which include an entire block in that section of the city. It is valued in the assessment at $15,000. The tax was sustained in the supreme court on the ground, as stated in the syllabus, that the prosecutor was authorized by its charter to hold property not exceeding in value $30,000; that it owns and uses exclusively for charitable purposes certain buildings, with the land whereon the same are erected, valued in excess of that sum, and has been and is exempted from all taxation thereon; that it is not entitled to the exemption claimed, it being in excess of its grant to exemption, which is limited to property the value of which does not exceed $30,000. The grounds of the conclusion are fully presented by the learned justice who delivered the opinion of the court, to which reference should be had, and they need not here be restated.

It must be observed that the special act incorporating the prosecutor (P. L. 1873, p. 984) contained no provision exempting its property from taxation; nor did the supplement to said act, approved February 9, 1875 (P. L. p. 19 of Private Acts), which enlarged the amount of property authorized to be held by the prosecutor to $100,000, embody in it any exemption from taxation. This latter act seems to have been overlooked in the court below, but it does not affect the question under discussion, because the affidavits show that the property of the prosecutor included in the previous exemption referred to was worth $200,000. The opinion holds that the act entitled "An Act Concerning Corporations Constituted for

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Benevolent and Charitable Purposes" (P. L. 1890, p. 46) includes within its general terms a corporation of the character of the prosecutor, and that its capacity to hold property is thereby increased from the limit of $30,000 to the amount of value of $500,000. But the act contains a section which reads as follows: "Sec. 3. That nothing herein contained shall be construed to exempt the property of said corporation from taxation." This section, of course, is general in its application, and does not make direct reference to the prosecutor. The supreme court has found this section to be a barrier against any exemption from taxation being allowed to the prosecutor beyond the amount of property it is authorized to hold under its charter. We are unable to concur in this view. At the time of the passage of this act a supplement to the tax act, approved April 11, 1866 (P. L. p. 1078), was in full force. It was a general act, and by its 5th section it declares and defines the persons and property that shall be exempt from taxation. Included in the description of the property so declared exempt is the following paragraph:

"And all buildings used exclusively for charitable purposes, with the land whereon the same are erected and which may be necessary for the fair enjoyment thereof, and the furniture and personal property used therein."

This exemption clause is found, without verbal alteration, in a supplement to this act approved May 16, 1894 (P. L. p. 354; 3 Gen. Stat. p. 3320).

To give the effect suggested to the 3d section of the act of 1890, it would have to be regarded as operating to repeal the exempting clause of the general act of 1866, so far as the prosecutor and other like corporations are concerned. And it would be a repeal by implication only, which is not favored by the courts. There are no repealing words in the act of 1890, and when these are absent a strong presumption arises that no repeal was intended, or it would have been expressed. *M'Neely* v. *Woodruff*, 13 N. J. L. 352; *Plum* v. *Lugar*, 49 N. J. L. 557, 9 Atl. 779. The act of 1890 does not say that such corporations, whose capacity to hold property is thereby increased, shall not enjoy the immunity from taxation they may be entitled to under the general tax law, but only that they shall not claim such immunity, by virtue of that act. This matter, I think, is quite plain, so that we are not required to ascertain the precise object the legislature had in view in thus incorporating the proviso in the act of 1890. It may not be amiss to suggest a possible object. It is well understood that, for a number of years anterior to the passage of the amendments to the Constitution in 1875, quite a large number of corporations were constituted for benevolent and charitable purposes,—some under the general act, and others by special charter. In these the amount of property permitted to be held was usually stated, and in a number of these charters there was a provision exempting the property of the corporation from taxation. To illustrate, an act was approved in 1869 incorporating the First German Benevolent Society of Jersey City (P. L. 1869, p. 1272), wherein the society is authorized to hold real and personal estate not exceeding $15,000 in value, and a provision is added exempting the property from taxation. A number of other acts of like purport might be cited. It may be that the section of the act of 1890 was ingrafted thereon as a precaution against a seeming confirmation and extension of such special exemptions from taxation. But whatever may have been the intent of the legislature in adding this section upon the principle above stated, it does not bar the prosecutor from seeking such exemption as it may be entitled to under the general tax act. We think, however, that the tax in question must be sustained upon another ground, and that is, for the reason that the property assessed is not exempt, within the meaning of the act above quoted. To particularize, we think the evidence fails to show that there is any building upon the land used exclusively for charitable purposes in the sense of the statute.

The right to this exemption cannot be based upon the fact that the prosecutor has a house and buildings at Ohio avenue used exclusively for charitable purposes, for, as the case shows, the prosecutor has already obtained and enjoys complete immunity from taxation for its buildings and lands there situate. And such exemption can only be extended, under the statute, to the land on which the buildings are erected, and not to its lands elsewhere. And hence, unless it can be shown that the prosecutor is also possessed of a building or buildings upon its land at Annapolis avenue, used exclusively for charitable purposes, in the sense of the statute, its claim of exemption from taxation for its property there must fail. In considering this question, recourse must be had to the evidence before us. The following are the facts in brief, as therein developed: The main house and buildings of the prosecutor are located at Ohio avenue,—a mile away, in an easterly direction, from the property in question. This latter property was used altogether as a camp for boys over twelve years of age. It was used to accommodate the overflow from the main house at Ohio avenue, and consisted of two sleeping tents, one dining tent, and a one-story frame structure used for a kitchen and laundry. The boys, who averaged about 36 in number, and the help employed, occupied tents which were used from July 1st to September 1st, and then taken down for the balance of the year. The camp occupied a strip of land about one eighth of the depth of the lot. Its management and direction emanated from the main house at Ohio avenue, from whence many of the supplies were sent, and where the records and expense accounts of the camp were kept. The property was not bought for the purpose of the camp, but with the object of selling the property at Ohio avenue, and

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moving the institution to the newly purchased lot; but, after having the latter for a year, the society decided to use it for the care of the boys it could not take care of in the main institution. This property is valued at $60,000 and upwards, and at the time the evidence was being taken the society was offering for sale its property at Ohio avenue for $200,000, with a view to such removal. On May 20th, when the tax was assessed, there was nothing upon the land except the structure used for a kitchen and laundry, which was vacant.

In considering the question here raised, we might ask, What is a building, in the sense of the statute? According to Webster, a building is defined as "that which is built; a fabric or edifice constructed, as a house, a church, etc." This definition was adopted in construing the word as used in the mechanic's lien law in *Coddington* v. *Beebe*, 31 N. J. L. 477. It needs no argument to conclude that a tent is not a building. Is the frame tenement used for a kitchen and laundry only, without any accommodations for sleeping or for the care and shelter of the objects of the charity, a building, in the sense of the statute? It is, perhaps, within the ordinary definition of "building," taken in its broadest sense; but is it within the statutory meaning? The word "building," in a statute, will almost always depend for its meaning, in some degree, upon the particular subject-matter, and its connection with other words. Bishop, Statutory Crimes, 292. The use of the word in the statute under consideration is clearly within the rule here suggested; for it is here associated with other objects of a charitable character that are to enjoy the like immunity, and the maxim, *Noscitur a sociis*, would apply. And the statutory definition is not merely buildings, but buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary to the fair enjoyment thereof. The associated words, where, as in this clause, buildings are the principal subject-matter of the exemption, are colleges, schoolhouses, buildings erected and used for religious worship, and buildings used as asylums or schools for the care, cure, maintenance, and education of feeble-minded persons and children. This circumstance indicates that the buildings here intended were to be such as would comfortably house the class of persons to be benefited by the charity, and the officers and agents who were to administer the same. The fact that the exemption is extended to "the furniture and personal property used therein" is a like indication. The qualifying words, "used exclusively for charitable purposes," further point to the building as a place where the charitable use was to have a concrete existence. Again, the words "and the land," etc., "necessary to the fair enjoyment" of the buildings, show that the building was to be the principal factor in the scheme, and not a mere incident to the purposes of an encampment or some other temporary device.

The conclusion we have reached from these observations, and the other circumstances developed by the testimony, is that the structure for kitchen and laundry purposes, before referred to, is not a building, in the sense of the statute under consideration. To determine otherwise might have the effect of encouraging evasions of this wholesome law, and the consequent exemption unlawfully of large aggregations of property from the common burden of taxation. The result thus reached is also in harmony with the general purposes of the corporation, which are declared in the charter to be "to provide at Atlantic City a house, and medical treatment during the summer season for invalid children and those needing the benefit of sea air." In reaching the conclusion, we are not unmindful of the principle that statutes in aid of such charitable purposes as are here declared are not to be construed narrowly, but liberally. *State, Sisters of Charity, Prosecutor*, v. *Chatham Twp.* 52 N. J. L. 373, 9 L. R. A. 108, 20 Atl. 292. And, although giving full heed to that beneficent rule of construction, we are unable to find in the statute any support for the claim of exemption under the facts in this case.

The result is that the judgment of the Supreme Court is affirmed, with costs.

David H. MITCHELL, *Plff. in Err.*,
v.
Annie W. D'OLIER.

(.....N. J.....)

*1. **A deed of conveyance made by the owner of a tract of land**, upon a portion of which was located a fresh-water lake, by which deed he conveyed to the defendant a portion of the upland adjoining the lake, "together with" certain rights and privileges to be exercised upon the waters of the lake by the grantee, her heirs and assigns,—*Held*, to grant those rights and privileges as appurtenant to the upland, and not in gross.

2. **Incorporeal rights thus held as appurtenant to land will pass** upon a conveyance of the dominant tenement, although not mentioned in the deed of conveyance.

3. **What will pass by certain descriptive words** in a grant will be excepted by the same descriptive words in an exception.

4. **Every purchaser of land takes title subject to any defects**, reservations, and exceptions that are referred to in the deed by which he acquires title, or that may be ascertained by reference to his chain of title as spread forth upon the public record.

(November 17, 1902.)

*Headnotes by PITNEY, J.

NOTE.—As to right to assign or to transmit an easement in gross, see Fisher v. Fair (S. C.) 14 L. R. A. 333, and *note*.

As to effect of attempt to sever appurtenant easement from the premises for the benefit of which it exists, see Cadwalader v. Bailey (R. I.) 14 L. R. A. 300, and *note*.

As to exception or reservation of appurtenant or other easement, see Hagerty v. Lee (N. J. L.) 20 L. R. A. 631.

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ERROR to the Circuit Court for Burlington County to review a judgment in favor of defendant in an action brought to recover damages for the alleged wrongful cutting and carrying away of certain ice. *Affirmed.*

The facts are stated in the opinion.

Mr. **Samuel M. Roberts,** for plaintiff in error:

The right to fish, boat, and gather ice from Silver lake is an entirely distinct and separate piece of property, and that it may be excepted from the influence of the foreclosure such fact must appear affirmatively in the proceedings.

Beckman v. *Kreamer,* 43 Ill. 447, 92 Am. Dec. 146.

"The right to catch fish in a fresh-water lake" is not an easement, but is a right of profit in the waters of the lake.

Cobb v. *Davenport,* 33 N. J. L. 223, 97 Am. Dec. 718.

The right of Annie W. D'Olier, her heirs, and assigns, to traverse said lake was not excepted from coming within the influence of the foreclosure of a mortgage made prior to the conveyance by which that right was acquired, and it was therefore extinguished by the foreclosure of that mortgage.

Mr. **Franklin C. Woolman,** for defendant in error:

The essential qualities of easements are: (1) They are incorporeal; (2) they are imposed upon corporeal property; (3) they confer no rights to profits; (4) they are imposed for the benefit of corporeal property; (5) there must be two distinct tenements, the dominant, to which the right belongs, and the servient, upon which the burden is placed.

Big Mountain Improv. Co.'s Appeal, 54 Pa. 361; *Slegel* v. *Lauer,* 148 Pa. 236, *sub nom. Slegel* v. *Herbine,* 15 L. R. A. 547, 23 Atl. 996; 10 Am. & Eng. Enc. Law, 2d ed. p. 399.

These essential qualities are all included in the grant of Fisler to D'Olier.

The right conferred by an easement attaches to the soil of the servient tenement, the only obligation on the owner being negative, *viz.,* to suffer or not to do. This burden on the servient tenement passes with it to each successive proprietor.

Taylor v. *Whitehead,* 2 Dougl. 749; *Pomfret* v. *Ricroft,* 1 Wms. Saund. 322; *Bullard* v. *Harrison,* 4 Maule & S. 387; *Wallis* v. *Harrison,* 4 Maule & S. 538.

It is a charge upon the estate or property of the servient tenement, and follows it into the hands of any person to whom such tenement or any part thereof is subsequently conveyed.

Taylor v. *Dyches,* 69 Ga. 455; *Morrison* v. *King,* 62 Ill. 30; *Smith* v. *Wiggin,* 48 N. H. 105; *Wolfe* v. *Frost,* 4 Sandf. Ch. 89; *Child* v. *Chappell,* 9 N. Y. 246; *Hills* v. *Miller,* 3 Paige, 254, 24 Am. Dec. 218; Washb. Easem. 4th ed. 7; 3 Kent, Com. 420; Napoleon's Code, art. 686.

The owner in fee of land may impose upon it any burden, however injurious or destructive, not inconsistent with his general right of ownership, if such burden is not in violation of public policy, and does not injuriously affect the rights of property of others.

Van Rensselaer v. *Albany & S. R. Co.* 1 Hun, 507.

Pitney, J., delivered the opinion of the court:

This was an action of tort brought to recover damages for an alleged unlawful entry upon a tract of land covered with water, and cutting and carrying away ice therefrom. The defendant justified under an express grant from a former owner of the *locus in quo.* The case was tried before Hon. James H. Nixon, circuit judge, without a jury. He rendered judgment in favor of the defendant, and the plaintiff, having taken exception to that conclusion, now asks for a reversal. The following are the essential facts found by the trial court: The *locus in quo* is a fresh-water lake, located within a tract of 181.62 acres of land which, on and prior to November 17, 1890, was owned in fee by one Jacob G. Fisler. On that date Fisler executed a mortgage upon the whole tract to the Burlington Savings Institution. On September 8, 1894, he conveyed to Mrs. D'Olier, the defendant, 10.58 acres, and on September 15, 1894, he conveyed to her a tract of 1.92 acres, both being parcels of the whole tract. These two pieces were afterwards released by the savings institution from the lien of the mortgage. On October 25, 1894, Fisler and wife made a deed of conveyance to Mrs. D'Olier purporting to convey a tract of 15½ acres, which included the two pieces just mentioned and a lot of 3 acres besides. The description of this tract shows that it has a frontage of about 250 feet upon the shore of the lake. At the end of the description the deed contains the following words: "Together with the right to the said party of the second part, her heirs and assigns, to traverse the said lake or pond in boats for pleasure or amusement only, and to fish in the waters thereof for pleasure, and not for profit, and to gather ice therefrom for her own or their own private and domestic use, but not for sale; said right and privilege to be exercised and enjoyed by the said party of the second part, her heirs and assigns, in common with the said party of the first part, his heirs and assigns." All the foregoing instruments were duly recorded. In the year 1897 the Burlington Savings Institution instituted proceedings in chancery to foreclose its mortgage, making Fisler and wife and Mrs. D'Olier defendants. Concerning the proceedings in this foreclosure suit, the findings of the trial court disclose only this: That Mrs. D'Olier made answer praying that the lands be sold in such manner as to preserve her rights; that the execution from the court of chancery commanded the sheriff to sell the lands described therein (being the tract of 181 62-100 acres), "excepting thereout the 15 acres included in the said deed of October 25, 1894, from Fisler to D'Olier, as fully as the same is described therein;"

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and that the deed from the sheriff to Howard Flanders, who became purchaser of the land when sold by virtue of the foreclosure proceedings and execution, contained the following words at the end of the description of the tract of 181 62-100 acres: "Excepting and reserving thereout all that certain lot or parcel of ground situated," etc. (without description by metes and bounds), "containing 15 acres, conveyed to Annie W. D'Olier by Jacob F. Fisler, by deed dated October 25, 1894, and recorded in Book 313 of Deeds, page 186, as fully as the same is therein described." The sheriff's deed to Flanders was dated March 10, 1898, and duly recorded. Subsequently Flanders conveyed the land so purchased to David H. Mitchell, the plaintiff, excepting thereout, by metes and bounds, the tract of 15½ acres, conveyed by Fisler to D'Olier by deed of October 25, 1894, but omitting entirely the recital of the privileges granted in that deed. It was admitted by the parties upon the trial, and found as a fact by the trial court, that the trespass in question consisted solely in the cutting of ice by the defendant from the lake in question, and storing it in her icehouse upon the 15½ acre tract, for her own domestic use, and not for profit.

As thus certified to us, the facts of the case bear this aspect: The plaintiff claims title under a sheriff's sale made in execution of a decree of the court of chancery in a foreclosure suit to which Mrs. D'Olier and her grantor were parties, the date of the commencement of the suit being subsequent to the acquisition of her title. The presumption is, therefore, that the sheriff's deed had the effect of conveying whatever estate and interest Mrs. D'Olier was entitled to in the lands described in the deed. If, by the terms of that deed, the *locus in quo* was conveyed without reservation of her rights of fishing, boating, and cutting ice, she cannot, on the facts presented in this record, justify the trespass as an exercise of those rights. But, if the sheriff's deed does not purport to cut off her rights, then there is nothing to prevent her from setting them up as a justification, relying on the deed from Fisler to her, dated October 25, 1894, as the source of her title, unless, indeed, Mitchell, the plaintiff, can claim any greater rights than those to which his grantor, Flanders, became entitled by the sheriff's deed.

From the arguments presented by the respective counsel before this court, it would seem that the findings of the trial court do not include the entire history of the foreclosure proceedings in question; that those proceedings were to some extent irregular; that Mrs. D'Olier ceased to be a party thereto before the making of the final decree; and that the decree required the sale of the entire mortgaged premises without mention of any exception or deduction. It is admitted, however, that the writ of execution issued upon this decree commanded the sheriff to sell the *locus in quo*, excepting therefrom the land included in the deed of October 25, 1894, from Fisler to D'Olier, "as fully as the same is therein described." In this court we are, of course, bound by the findings of the trial court upon matters of fact, and we mention the discussions of counsel only for the purpose of saying that, in the view we take of the case, the facts assumed in argument do not differ essentially from the judge's findings; for, whether Mrs. D'Olier was or was not a party to the final decree, and whether that decree did or did not call for a sale of the entire mortgaged premises, the effect of the sheriff's deed is limited by the terms of the description contained in it. The trial judge accorded full force and effect to that deed; the plaintiff can ask no more.

In seeking for a solution of the problem in conveyancing thus presented, the initial inquiry may properly be whether the deed of October 25, 1894, made by Fisler to Mrs. D'Olier conveyed to her the rights and privileges therein mentioned in gross, or as an appurtenance of the tract of 15½ acres. And first, a word as to the nature of those rights. The right to traverse the lake in boats for pleasure and amusement only, is manifestly a pure easement, being a privilege without profit. The right to catch fish, although expressly granted "for pleasure, and not for profit," is none the less a profit *à prendre*, for it involves a taking of the products of the land. *Cobb* v. *Davenport*, 32 N. J. L. 369; *Albright* v. *Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 45 Atl. 634. The right to gather ice seems to fall within the same category; for although flowing water, of which the owner of the subjacent soil has but a right of user, is treated as not being a product of the soil (*Race* v. *Ward*, 4 El. & Bl. 702, 24 L. J. Q. B. N. S. 153), and so a right to take such water is but an easement, yet it seems plain the right to take ice must be considered a profit *à prendre* (*Huntington* v. *Asher*, 96 N. Y. 604, 48 Am. Rep. 652; 15 Am. & Eng. Enc. Law, 2d ed. title *Ice*, p. 909).

The fact that the grant *sub judice* is expressly limited to the private and domestic use of Mrs. D'Olier and her heirs and assigns, and excludes the selling of the ice gathered, does not touch upon the distinction between an easement and a profit *à prendre*. The limitation is upon the extent to which the right may be enjoyed, and is in the nature of a stint. It may amount to a condition subject to which the right is to be held, but does not change the nature of the right itself. In the courts of England it seems to be established that a private easement can only be held as appurtenant to a dominant tenement, and that an easement granted to an individual in gross amounts to no more than a personal license; so that, although the grant be accompanied by words of inheritance, the privilege conferred inures only to the personal benefit of the grantee, and dies with him. *Ackroyd* v. *Smith*, 10 C. B. 164, 19 L. J. C. P. N. S. 315, 14 Jur. 1047, 10 English Ruling Cases, 1; Gale, Easem. 8–14; Goddard, Easem. Bennett's ed. 6–10; Washb. Easem. *8; 10 Am. & Eng.

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Enc. Law, 2d ed. title *Easements*, pp. 402, 409.

In some of the American states, notably in Massachusetts, the distinction between a pure easement and a profit *à prendre* seems to have been lost sight of. As a result it has been held that a mere private easement may be held in gross, as an incorporeal hereditament, without a dominant tenement to support it. *Goodrich* v. *Burbank*, 12 Allen, 459. 90 Am. Dec. 161. The English rule seems to be well founded, both in reason and authority. It forbids, in ordinary circumstances, the existence of a private easement in gross. The right of way of a railroad company, and the right to divert water, as held by an aqueduct company, stand upon a footing of their own; such rights being by express legislative sanction annexed to the franchise in whose aid they are held.

Passing now to the right of profit *à prendre*, we observe that in *Cobb* v. *Davenport*, 32 N. J. L. 369, at page 389, Mr. Justice Depue, speaking for the supreme court, said: "The right of fishing, being a profit *à prendre* in another's soil, as distinguished from an easement, cannot be claimed by custom, but must be prescribed for in a *que* estate." A similar expression was made use of by the same learned justice in a later stage of that case, in 33 N. J. L. at page 226, 97 Am. Dec. 718. And it also appears in an opinion read for this court in *Albright* v. *Cortright*, 64 N. J. L. 330, at pages 333, 336, 48 L. R. A. 616, at pages 618, 619, and 45 Atl. 634, at pages 635, 637. The form of expression—that a profit *à prendre* must be prescribed for in a *que* estate—seems to have originated with Lord Kenyon, Ch. J., in *Grimstead* v. *Marlowe*, 4 T. R. 718, and is repeated in Washb. Easem. § 80. See also *Ackerman* v. *Shelp*, 8 N. J. L. 125.

If the statement quoted were an accurate expression of the law, it would dispose at once of the question now before us; for to say that a given incorporeal hereditament must be prescribed for in a *que* estate is tantamount to saying that it cannot be held in gross, or otherwise than as appendant or appurtenant to a dominant tenement. Were this true, we must conclude that a grant of privileges such as were granted to Mrs. D'Olier could not be made to her and her heirs unless it were annexed as an appurtenance to land.

The rule as expressed in *Cobb* v. *Davenport*, however, is not quite accurate. The distinction there under discussion was that between a public or common right in the nature of a pure easement, which might at common law be claimed either by custom, dedication, or prescription, and a profit *à prendre*, which, whether claimed by the public or by an individual, could not be claimed by custom or dedication, but must be acquired either by grant, or by prescription which presumed a grant long since made and lost. In emphasizing the point that so substantial an interest in the soil as a right to partake of its products must, if claimed under evidence of long user, be prescribed for,—that is, supported by a user as definite as if it had been exercised under a grant made by deed,—the distinction between the different modes of prescription was lost sight of. It is true, as already shown, that, at least according to the English decision, an easement, such as a right of way or the like, if held in private ownership, must be appurtenant to a dominant tenement, and so, if claimed by prescription, it must be prescribed for in a *que* estate. But there were other modes of prescription. Blackstone in one place mentions two modes, *viz.*: (1) Prescribing in a man and his ancestors; and (2) prescribing in a man and those whose estate he hath, which latter is called prescribing in a *que* estate. Coke mentions a third mode, *viz.*, prescribing in a body politic or corporate and their predecessors. Co. Litt. 113 *b*, 121*a*; 2 Bl. Com. 264, 265; Comyns' Digest, *Prescription*, A. & H.; Comyns' Digest, *Pleader*, E. 23, E. 24; and Blackstone himself, in discussing rights of common and how they may be acquired and held says: "Common in gross or at large is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed, or it may be claimed by prescriptive right, as by a parson of a church or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor." 2 Bl. Com. 34.

While it is thus clear that a profit *à prendre* may be held in gross, it is none the less true that such a right may be held as an appurtenance to land. The terms of the deed from Fisler to Mrs. D'Olier are such as to render the question of construction easy, after the preliminary discussion that has just been had. We observe at once that there is no separate grant of the rights and privileges in question. They are inserted in the deed immediately after the description of the tract of 15½ acres, and to that description they are joined by the words "together with,"—words importing a close and inseparable union. And a significant circumstance is this: That the 12½ acres of land previously conveyed to Mrs. D'Olier are again included in this conveyance,—a circumstance for which no explanation is offered, unless it evidences a purpose to make the rights and privileges an appurtenance of the entire tract of 15½ acres and of every part thereof. Finally, the clause granting the rights and privileges plainly evinces an intention that all the rights shall be enjoyed, not only by Mrs. D'Olier, but by her heirs and assigns; yet a pure easement (the boating privilege) is grouped together with rights of profit *à prendre*, while, as already appears, in order to be heritable and assignable, an easement perhaps must, and a profit *à prendre* certainly may, be held as appurtenant to land. For these reasons, we are clearly of the opinion that the rights and privileges in question were granted to Mrs. D'Olier, not in gross, but as an appurtenance of the 15½ acre tract.

Being thus annexed, the incorporeal here-

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ditament becomes so inseparably connected with the ownership of the dominant tenement that it cannot be held and enjoyed separate therefrom, and it passes in any general description of the corporeal hereditament without express mention. This does not mean, of course, that it was not competent for Mrs. D'Olier to release her incorporeal rights to the owner of the lake, or that it was impossible for those rights to be taken from her by a decree made in an action which included the owners of both the servient and the dominant tenement, if such a decree had resulted in a conveyance of the servient tenement devested of the servitude. But a deed made by Mrs. D'Olier, conveying a tract of 15½ acres, without mention of the appurtenant rights, would have passed those appurtenances as an incident to the grant of the corporeal hereditament. *Parry* v. *Pennsylvania R. Co.* 55 N. J. L. 178, 26 Atl. 829; *Richardson* v. *International Pottery Co.* 63 N. J. L. 248, 43 Atl. 692; Martindale, Conv. §§ 93, 94; Washb. Easem. 3d ed. *25, *26, *39, *40, *47, *58, *59.

The sole purpose of a description of land, as contained in a deed of conveyance, is to identify the subject-matter of the grant. This may be done either by describing it in words at length, or by referring the reader to some other deed or record containing such a description; and where a deed in this manner refers to another deed it has the effect of incorporating the latter deed into the description, so that what is therein described will pass. Martindale, Conv. § 108.

The same rules that are applicable to the identification of the subject-matter of a grant apply equally to the subject-matter of an exception. "That which will pass by words in a grant will be excepted by the same words in an exception." Shep. Touch. 100. Indeed, an exception out of a grant may be treated for practical purposes as if the grant were for the whole estate, but made upon condition that the grantee should forthwith execute a conveyance back to the grantor, or to some other person designated, for the subject-matter of the exception. Washb. Real Prop. 6th ed. § 2352; Martindale, Conv. § 109.

It is entirely clear that, if Mrs. D'Olier, at any time after she acquired title to the 15½ acres and the appurtenant rights and privileges described in the deed of October 25, 1894, had made a deed of conveyance to another person "for all that certain lot or parcel of ground, containing 15 acres, conveyed to Annie W. D'Olier by Jacob G. Fisler by deed dated October 25, 1894, and recorded in Book 13 of Deeds, page 186, as fully as the same is therein described," her grantee would have acquired by such conveyance, not only the tract of 15½ acres described in the Fisler deed, but also the appurtenant rights therein granted. The sheriff's deed to Flanders, which conveyed the tract of 181.62 acres out of which her tract had been conveyed, and upon the residue of which her rights and privileges constituted a servitude, contained an express exception of the land conveyed by Fisler to her in the terms just quoted. It therefore had the effect of limiting the conveyance to Flanders in the same manner as if the deed to Flanders had been free from the exception, and he had thereupon instantly made a deed to Mrs. D'Olier in the terms quoted. In short, the title thus acquired by Flanders was subject to Mrs. D'Olier's rights in all respects. Subsequently, Flanders made a deed of conveyance to the plaintiff, *in* which deed Mrs. D'Olier's tract of 15½ acres was specifically described by metes and bounds as excepted from the land conveyed, but no reference was made to the rights and privileges held by Mrs. D'Olier. But the plaintiff could not in this manner acquire from Flanders any greater title or any higher rights than Flanders acquired under the sheriff's deed. He cannot be deemed a purchaser without notice; for it is established that every purchaser takes title subject to any defects, reservations, and exceptions that are referred to in his deed, or that may be ascertained by reference to his chain of title as spread forth upon the public records. *Sheppard* v. *Hunt*, 4 N. J. Eq. 277–294; *Van Doren* v. *Robinson*, 16 N. J. Eq. 256; *Brewer* v. *Marshall*, 19 N. J. Eq. 537–541, 97 Am. Dec. 679; *Wallace* v. *Silsby*, 42 N. J. L. 1; *Fitzgerald* v. *Faunce*, 46 N. J. L. 536–598; *Roll* v. *Rea*, 50 N. J. L. 264, 12 Atl. 905; *Hagerty* v. *Lee*, 54 N. J. L. 580–584, 20 L. R. A. 631, 25 Atl. 319.

The plaintiff was charged with constructive notice of the exception as contained in the sheriff's deed to Flanders, and must either trace back the reference to Mrs. D'Olier's title therein contained, or else be bound by whatever an examination of that title would have disclosed. The result is that plaintiff's title is subject to defendant's rights, and her entry upon the *locus in quo* in the exercise of those rights was justified.

***Let the judgment under review be affirmed,* with costs.**

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RHODE ISLAND SUPREME COURT.

Trase V. MAINZ
v.
Benedict B. LEDERER.

(.....R. I.....)

An attachment is not authorized in a suit for breach of promise of marriage by a statute authorizing attachment upon the filing of an affidavit that plaintiff has a just claim against defendant that is due, upon which he expects to recover a sum sufficient to give jurisdiction.

(March 14, 1902.)

EXCEPTIONS by defendant to an order of the Court of Common Pleas for Providence County denying a motion to dissolve an attachment in an action to recover damages for breach of promise of marriage. *Sustained.*

The facts are stated in the opinion.

Messrs. **Miller & Carroll,** for defendant:

A writ of mesne process cannot be a writ of attachment, unless the action could have been commenced by writ of attachment. The writ of attachment on mesne process is an extraordinary power given by statute against common right.

3 Enc. Pl. & Pr. p. 3.

An action for breach of promise of marriage cannot be commenced by writ of attachment. The most that this action rep-

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NOTE.—*Right to attachment or order of arrest in breach of promise case.*

I. *Attachment,* 954.
II. *Arrest,* 957.

I. *Attachment.*

In the absence of a special statute, it is generally held that an attachment cannot be had in actions for breach of promise to marry. This is owing to the uncertainty of estimating in advance the amount of recovery and also because of the peculiar nature of this class of actions. It is not necessary here to state whether it is one of tort or contract, or a mixture of both. Many cases call it an action on a contract, and some class it as a contract *sui generis,* differing from all other contracts. Under the peculiar language of the statute in Georgia and the early statute of Ohio, it was properly held in both states that an attachment would lie. Under a later statute in Ohio, an attachment was denied in one court and subsequently granted in another. In both cases the statute was radically different from that in the early case. So now it may be asserted that in Ohio an attachment may be had in a breach of promise case under a statute providing for an attachment on claims "arising upon contract." This does not seem to have been held in any other state.

In MAINZ *v.* LEDERER it was held that an attachment was not authorized in a suit for a breach of promise of marriage. This was under R. I. Gen. Laws, chap. 252, § 14, providing for an attachment upon an affidavit that the plaintiff has a just claim against the defendant that is due, upon which the plaintiff expects to recover in such action a sum sufficient to give jurisdiction to the court, and § 17, providing for an attachment if the plaintiff shall make an affidavit setting forth facts which would authorize an attachment upon an original writ. It was held that, under this statute, in order to warrant an attachment, the cause of action must be based upon a contract where the damages, although they may be unliquidated, are yet susceptible of estimation and determination by a jury under the ordinary and well-understood commercial and business rules which apply to contracts proper.

So, it was held in Barnes v. Buck, 1 Lans. 268, that in an action founded on a breach of contract to marry no warrant of attachment is allowed, under N. Y. Code Civ. Proc. § 227, providing for attachments in actions arising on contracts for the recovery of money only and 59 L. R. A.

actions for the wrongful conversion of personal property. In this case the court said: "A warrant of attachment cannot be issued under the Code, except in case of actions arising on contract for the recovery of money only, where the breach of the contract can be compensated by some recognized legal rule or rate of damages, so that the sum due can be made certain, either by computation or by evidence. In short, the contract must be one of a pecuniary character. This is not the case where the contract is, that one person will marry another, and nothing else. Such a contract is not, in any lawful sense, or ought not to be, a cash transaction."

So, it was held that a suit for breach of promise to marry could not be commenced by original attachment, under N. C. Rev. Code, chap. 7, § 1, providing for an attachment upon complaint made "that any person indebted to him, or who hath endamaged him as hereinafter mentioned, hath removed, etc.," and providing that the plaintiff, or his attorney "further swears to the amount of his debt or demand to the best of his knowledge or belief." Maxwell v. McBrayer, 61 N. C. (Phill. L. —) 527. The court said: "The only subjects for which an attachment seems to be provided in the section alluded to, are debts, and demands for damages caused by a tort. It speaks of a person indebted to the plaintiff, or one who has endamaged him as thereinafter mentioned. The after-mentioned endamaging is unquestionably that which is provided for in the 16th section of the act, and for which the plaintiff says she does not seek redress under that section. Her claim then must be, and her counsel asserts that it is, for a debt under the 1st section, and we have only to consider whether an unliquidated claim for damages arising from a breach of promise to marry can, in any proper and legal sense, be called a debt. We are decidedly of opinion that it cannot, and in support of our conclusion we refer to the reasoning of the court in the case of Minga v. Zollicoffer, 23 N. C. (1 Ired. L.) 278, in which it was first held that a claim for damages caused by a trespass or other tort committed by the defendant was not a debt within the meaning of the attachment law." The court further said: "The plaintiff, by suing in trespass or trespass on the case for the wrong done to her, might have had redress had she proceeded under the 16th section of the act within the time therein prescribed." This section provides that if anyone shall do an injury to the person or property of another, and shall, within three

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resents is an alleged personal injury (1 Chitty, Contr. p. 67), the remedy for which, allowed by law, is money.

Kneeland, Attachm. p. 53.

The claim is not an actually subsisting debt at the time the affidavit is required to be made that a writ of attachment may issue.

Kneeland, Attachm. p. 62; *Warwick* v. *Chase*, 23 Md. 154; *Ex parte Charles*, 14 East, 198; *Walker* v. *Barnes*, 5 Taunt. 778.

It cannot be stated truthfully that such a claim is due.

Bowen v. *Slocum*, 17 Wis. 181; *Lee* v. *Co-operative Life & Acci. Asso.* 19 N. Y. S. R. 879, 2 N. Y. Supp. 864; *Cross* v. *McMaken*, 17 Mich. 511, 97 Am. Dec. 203.

It cannot be stated truthfully that plaintiff expects to recover in such action a sum sufficient to give jurisdiction to the court to which the writ is returnable.

Drake, Attachm. ¶¶ 22, 23; *Roelofson* v. *Hatch*, 3 Mich. 277.

As the court has power to control its process, it may entertain a special motion to discharge an attachment for irregularity or impropriety in its issue, without special statutory authority.

Morgan v. *Avery*, 7 Barb. 656; *Branson* v. *Shinn*, 13 N. J. L. 250.

Mr. **Franklin P. Owen** for plaintiff.

Tillinghast, J., delivered the opinion of the court:

The only material facts in this case, which is an action of assumpsit for breach of promise of marriage, are as follows: The original writ was issued on October 12, 1897, and was a writ of summons. Upon the trial of the case in the common pleas division in October, 1898, a verdict was rendered in favor of the plaintiff, and her dam-

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months thereafter, abscond or conceal himself, his estate may be attached to answer the damages for such injury under the same rules as are provided for original or judicial attachments returnable to court, provided the attachment be issued within three months after the injury done.

So, under N. C. Code Civ. Proc. § 197, providing for an attachment against the property of a nonresident "in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property," it was held that an action brought to recover damages for the breach of a promise to marry was not within the meaning of this section of the Code. Price v. Cox, 83 N. C. 261. The court said: "The present action is for damages wholly indefinite until fixed by a verdict, and incapable of being determined and stated by the plaintiff in her summons, or of being ascertained, according to the settled practice of the courts, by the clerk alone. . . . It is in its essential features an action for the redress of a personal injury, like one for defamation or an assault and battery, and we see no reason for admitting the process of attachment in the one case that does not apply with equal force to the others, nor for putting a construction upon the statute that allows it in any of them."

And under Pa. act May 15, 1874 (P. L. 183), authorizing the issuing of writs of attachment in actions *ex delicto*, where affidavit is made of the truth of the claim and of the facts on which the attachment is founded, it was held that an attachment would not lie in an action for a breach of promise of marriage, on the ground that there were elements which entered into the estimate of the damages which were uncertain and speculative, and not capable of admeasurement with approximate precision. Isett v. Bender, 2 Chester Co. Rep. 430. In this case the court said: "The act of 1874 is restricted by its terms to cases where the plaintiff has a right of action *ex delicto* for an alleged tort. These terms are well understood, and the act, it seems to us, admits of but one construction. It does not embrace that class of cases arising from contract where the damages are unliquidated or speculative, and of which the action for breach of promise of marriage is simply one."

In Roelofson v. Hatch, 3 Mich. 277, under Mich. Rev. Stat. 514, § 2, authorizing an attachment to be executed upon the making of an affidavit by the plaintiff stating that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness over and above the legal set-offs, and that the said is due upon contracts, express or implied, or upon judgment, the court said: "Nor are we prepared to say that the declaration in this case does not disclose a cause of action which may not be enforced by this remedy of attachment. There may be cases of contracts not within this remedy, as, for example, a breach of promise to marry, where the damages rest so entirely in opinion that it would be a solecism to say the amount of indebtedness could be sworn to."

But it was held that an attachment would lie in a case for a breach of promise of marriage, under Ga. Acts 1857, p. 23, providing that in all cases of money demands, whether arising *ex contractu* or *ex delicto*, plaintiff shall have the right to sue out attachment when defendant shall have placed himself in such a situation as will authorize plaintiff to sue out attachments on complying with the statute now in force in relation thereto. Morton v. Pearman, 28 Ga. 323. In this case the court said: "The old law provided for all cases of certain—of liquidated-money demands. Therefore, the object of the new law must have been provision for uncertain, unliquidated money demands."

In Conley v. Creighton, 5 Ohio Dec. Reprint 402, Affirmed in 2 Ohio L. J. 4, under Ohio Code, § 191, subdiv. 9, providing that an attachment shall not be granted, on the ground that the defendant is a nonresident of this state, for any claim other than a debt or demand arising upon contract, judgment, or decree, it was held that an action for a breach of promise of marriage was not such a claim or demand, within the meaning of the statute. The court said: "I am willing to call it a claim arising upon contract for the recovery of money, and to concede that an attachment would lie under the 1st clause of § 191, but I think, also, that it is included in the exception made by the 9th schedule of the section, and an attachment will not lie."

But in Caldwell v. Spillman, 1 Ohio Dec. Reprint, 308, it was held that under Swan's (Ohio) Stat. § 9, p. 91, providing for attachments, and "that no judgment shall be rendered under the provisions of this act except for causes arising out of, founded upon, or sounding in, contract," an action would lie for a breach of promise to marry. The court said: "Formerly the writ of attachment could be sued out in all cases of tort as well as of contract; but the legislature has now confined it to cases

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ages were assessed in the sum of $12,500. Thereafterwards, on the 24th day of July, 1899, and pending the defendant's petition for a new trial, the plaintiff sued out of said common pleas division a writ of mesne process, which commanded the attachment of the goods and chattels and real estate of the defendant, to the value of $50,000, which writ was served by attaching said real estate of the defendant in the city of Providence. The defendant thereupon filed a motion in the common pleas division that said writ of attachment be dismissed, and that the service thereof be set aside, which motion was duly heard by said division, and on the 27th day of April, 1901, was denied. The defendant duly excepted to the ruling, and the case is now before us upon the question as to whether it was correct.

The grounds of the defendant's objection to the ruling complained of are, substantially: (1) That a writ of mesne process cannot be a writ of attachment, unless the action could have been commenced by a writ of attachment; (2) that the General Laws of Rhode Island do not authorize writs of attachment to be issued in actions for breach of promise of marriage; (3) that the plaintiff in an action for breach of promise of marriage cannot properly make the affidavit required by the general laws to be made before a writ of attachment can issue: and (4) that the issuing of said writ is an abuse of the process of the court, and hence should be dismissed, the service thereof set aside, and the attachment made thereon dissolved. R. I. Gen. Laws, chap. 252, § 14, provides as follows: "An original writ commanding the attachment of the real or personal estate of the defendant, including

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'arising out of, founded upon, or sounding in, contract.' . . . In a breach of a promise of marriage the form of the suit is for a breach of contract, and the writ of attachment is as plainly applicable to cases of this description as to cases of debt for the nonpayment of money, or of damages for the breach of any other contract."

In Conley v. Creighton, 5 Ohio Dec. Reprint, 402, Affirmed in 2 Ohio L. J. 4, the court said: "It is almost superfluous to say that the case of Caldwell v. Spillman, decided by the old supreme court in the circuit in 1849, and reported in 1 Ohio Dec. Reprint, 308, is not at all in point. As the law then stood, an attachment was authorized in all cases sounding in contract, which a contract for marriage undoubtedly is. . . . The action for breach of promise of marriage, though nominally an action founded on the breach of contract, presents a very strong exception to the general rules which govern contracts."

In Halbert v. Armstrong, 14 Ohio C. C. 296, referring to this case (Caldwell v. Spillman) it was said: "It is true that the contrary doctrine was held by Judge Tilden in special term of the superior court (1 Ohio L. J. 341), and this decision was affirmed by the general term (2 Ohio L. J. 4), but we are of the opinion that the doctrine announced by the supreme court on the circuit is the better law."

In Halbert v. Armstrong, 14 Ohio C. C. 296, it was held that, Ohio Rev. Stat. § 5511 (5521), providing that in similar actions for the recovery of money the plaintiff may have an attachment against the property of the defendant on the ground that the defendant is a nonresident of the state, and providing that an attachment shall not be granted on such ground for any claim other than a debt or demand arising upon contract, judgment, or decree, an attachment could properly issue in an action brought to recover damages for a breach of a contract of marriage where the only ground alleged in the affidavit for the attachment was that the defendant was a nonresident of the state. It was held that this was a debt or demand arising upon contract. The court said: "It is true that the amount of damages to be recovered would be estimated on rules and principles differing from those recoverable on ordinary contracts, and more like those applying to actions of tort. But, nevertheless, the claim is one arising upon contract, and we think comes clearly within the letter and spirit of our statute." In this case it was also said: "In the case of Caldwell v. Spillman, 1 Ohio Dec. Reprint, 308, decided by the supreme court of Ohio on the circuit, Judges Hitchcock and Caldwell presiding, this direct question arose under the statute then in force, differing, as we conceive in no substantial degree from that now in force."

In Drury v. Merrill, 20 R. I. 2. 36 Atl. 835, the action was one of assumpsit, and was brought to recover on a promissory note, and also to recover damages for an alleged breach of promise of marriage. The defendant claimed there was a misjoinder, and that was the question involved in the case. In discussing this question, defendant's counsel claimed that the defendant would be liable to imprisonment, as in a tort action, on the execution which might issue against him on the judgment for breach of promise of marriage, while he would not be thus liable on a judgment founded on a promissory note. But the court said he could only be imprisoned on some one of the grounds whereon any person might be so dealt with in ordinary actions of assumpsit, and that the defendant would not be liable to imprisonment on a judgment founded on either or all of said counts of the declaration, and then said: "The execution follows the writ. The writ does not command that the defendant be arrested, but that his property be attached, and that he be summoned to answer the plaintiff's complaint, both of which things have been done; and no execution in the case can issue against his body unless by virtue of some one of the provisions of R. I. Gen. Laws chap. 256, § 11." This statement implies that an attachment had been granted in that case, but it was not discussed or referred to except as stated above.

Referring to this case, the court, in MAINS v. LEDERER, says: "In refusing to grant the motion to dissolve the attachment in question the justice before whom it was made was probably influenced by some remarks of this court in Drury v. Merrill, 20 R. I. 2, 36 Atl. 835, in which a breach of promise of marriage was involved in one count, and a breach of contract growing out of a promissory note was involved in another count. In that case, therefore, it was not necessary to decide whether an attachment would lie in an action for breach of promise of marriage solely; and hence what was said or intimated in that regard was mere *dictum*. The writer of the opinion in the present case, however, is free to admit that when writing the opinion in that case he was under the impression that an attachment would lie in a case of this sort on the ground that it was an action *ex contractu*. But more careful study has fully convinced him to the contrary."

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his personal estate in the hands or possession of any person, copartnership, or corporation as the trustee of the defendant and his stock or shares in any banking association or other incorporated company, may be issued from the common pleas division of the supreme court or any district court, whenever the plaintiff in the action to be commenced by such writ, his agent or attorney, shall make affidavit, to be indorsed thereon or annexed thereto, that the plaintiff has a just claim against the defendant that is due, upon which the plaintiff expects to recover in such action a sum sufficient to give jurisdiction to the court to which such writ is returnable." Section 17 of the same chapter provides that "the plaintiff in any action may, as often as may be necessary, at any time before final judgment in such action, sue out of the court in which the action shall have been commenced, a writ of mesne process, commanding the attachment of the real or personal estate of the defendant," etc., "provided, the plaintiff, his agent or attorney, shall make affidavit to be indorsed on or annexed to said writ, setting forth facts which would authorize an attachment . . . upon an original writ." The plaintiff's attorney made the statutory affidavit on said writ of mesne process, and it was then served as aforesaid. It will at once be seen from the foregoing statement of facts that the only question which is presented for our decision is whether an attachment can legally be made in an action for breach of promise of marriage. If it can be, then the ruling complained of was correct, and should be sustained; but, if it cannot be, then the ruling was erroneous, and should be reversed. Contrary to our first

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II. *Arrest.*

The question of the right to an order of arrest in an action for a breach of promise to marry, under the statutes of the various states, has not often arisen. In those states where the question has been squarely before the court, and the right was sustained notwithstanding the constitutional prohibition against arrests in actions for debt except in cases of fraud, the cases sustaining the right and discussing the question were those where seduction was also one of the chief elements of the action. This is held to be sufficient fraud to entitle to an order of arrest. This decision is clearly made in New Jersey, Michigan, and North Carolina. On the other hand, there are a few cases that sustain or recognize the right to arrest, but in those cases the constitutionality of the statute, or the necessity of stating seduction or fraud, is not discussed. In those cases the questions at issue seem to have been only as to matters of form, or practice, and are only of value as a precedent recognizing the right to arrest without a discussion.

So, under N. J. Const. art. 1, § 17, providing that no person shall be imprisoned for debt in any action or on any judgment founded upon contract unless in cases of fraud, it was held that if a man promises to marry a woman, and at the same time seduces her by the influence of such a promise, and then seeks avoidance by attempting to run away and refusing to marry her, his original promise was a fraud, and he can be held to bail. Perry v. Orr, 35 N. J. L. 295. In this case N. J. act April 15, 1846, "respecting imprisonment for debt in cases of fraud," provided that this act shall not extend to actions on promises to marry. The court said: "As, however, it is expressly excepted from the limitations of fraud, as defined in the statute, it is left for judicial construction to determine what shall constitute fraud in such cases. . . . The affidavits in this case sufficiently disclose the facts of the promise to marry, the seduction effected by means of the same, the attempt to elude the jurisdiction and process of the court, and the refusal to marry. Such conduct is fraudulent."

And under N. C. Code, 201, subdiv. 1, providing that the defendant may be arrested in an action for damages not on contract, where he is a nonresident, or where the action is for injury to person or character, and subdiv. 2, in an action for seduction, and subd. 4, where the defendant has been guilty of a fraud in contracting a debt or incurring the obligation for which the action is brought, or where the action is brought to recover damages for fraud or deceit, it was held that an order of arrest was proper where the action was brought by the woman for seduction under promise to marry, and that, while the complaint could be construed as an action for breach of promise to marry with the aggravation of seduction, it could also be construed as an action for damages for "fraud and deceit," or for "injury to person and character," or also for "seduction." Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397. In this case the court said that since the decision in Moore v. Mullen, 77 N. C. 327, which held that this section authorizing an arrest in an action on a promise to marry was in violation of the Constitution, art. 1, § 16, providing that there shall be no imprisonment for debt except in cases of fraud, the next legislature struck out these words and inserted "seduction," "which seems a legislative construction that where a woman should sue for the seduction, instead of a mere breach of promise, an arrest would lie."

In Moore v. Mullen, 77 N. C. 327, it was held that N. C. Code Civ. Proc. § 149 (2), authorizing the arrest of the defendant in an action on a promise to marry, violated Const. art. 1, § 16, providing that there shall be no imprisonment for debt except in cases of fraud. In this case, referring to the case of ——— N. J., in which it was held that under a similar provision of the New Jersey Constitution such act was valid, the court said: "But in that case the whole stress is put on the fact that the defendant had, by means of the promise to marry, seduced the plaintiff, and was attempting to abandon her by fleeing from the state. In our case there are no such additional circumstances; the complaint sets out a promise to marry, the answer attempts to excuse the defendant by the allegation that after the engagement, on second thought, he was satisfied he was not in a condition to take upon himself the duty of supporting a family. Ours, therefore, is a case of the breach of promise to marry, and nothing more. Whether in a case attended by seduction and an attempt to flee the state, we would feel at liberty to follow the New Jersey case, is a matter about which we express no opinion, except to say, such base conduct was well calculated to excite sympathy and induce the judges to bring the case within the meaning of the Constitution, if they were able to convince themselves that such was the true construction, for all would feel that such ought to be, if it is not, the law."

And where an order of arrest was granted in an action for a breach of promise to marry

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impressions, we are of the opinion, after careful and diligent consideration of the question raised, that under our statute an attachment will not lie in an action of this sort. True, it is an action based on contract, but the contract is wholly unlike any other, in that the damages for a breach thereof are not measured by any commercial or business standard, but are governed almost exclusively by those rules which are applicable to tort actions, and rest almost absolutely in the judgment of the jury. Thus the law allows punitive or vindictive damages to be assessed in such cases (*Johnson* v. *Jenkins*, 24 N. Y. 252; *Thorn* v. *Knapp*, 42 N. Y. 474, 1 Am. Rep. 561); and all the circumstances attending the breach before, at the time, and after may be given in evidence in aggravation of damages (*Baldy* v. *Stratton*, 11 Pa. 316; *Tubbs* v. *Van Kleek*, 12 Ill. 446; *Reed* v. *Clark*, 47 Cal. 194; 1 Wait, Act. & Def. 727). Again, the plaintiff may, in such an action, for the purpose of enhancing her damages, prove that she announced the fact of her engagement to her friends, and invited them to attend the wedding. *Reed* v. *Clark*, 47 Cal. 194. So the length of time a marriage engagement existed has been held to be a proper element of damage for the breach thereof. *Grant* v. *Willey*, 101 Mass. 356. A defense to such an action that the plaintiff is unchaste, if not established at the trial, may be considered by the jury in aggravation of damages. *Southard* v. *Rexford*, 6 Cow. 254; *Davis* v. *Slagle*, 27 Mo. 600. Seduction may also be proved in aggravation of damages. *Mainz* v. *Lederer*, 21 R. I. 370, 43 Atl. 876. There may also be given in evidence in such a case, and the jury may take into consideration in estimating the damages, as said by this court in *Drury* v. *Merrill*, 20 R. I. 2, 36 Atl. 835, "the defendant's wealth, his social position, the length of the engagement, the depth of the plaintiff's devotion, her lack of independent means, her mortification and injured feelings and affections, her altered social condition in relation to her home and family due to his conduct, and her expenses in preparation for the marriage." These and many other illustrations which might be given show that, while the action is based upon contract, it is really an action by itself, and partakes almost entirely of the nature of a tort in everything that pertains to the real object thereof. We have been unable to find many cases bearing directly upon the question involved, but all of the cases

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and for seduction. It was held that whether, in actions for breach of promise to marry in general, the defendant is liable to arrest or not, a case like this is to be regarded as one of fraud, and therefore is one excepted by the provisions of Mich. Const. art. 6, § 33, providing that no person shall be imprisoned for debt except in cases of fraud. *Re* Sheahan, 25 Mich. 145.

A cause of action based simply upon a breach of contract to marry, in the absence of any charge involving fraud, was held to be within the constitutional inhibition of Mich. Const. art. 6, § 33, prohibiting imprisonment for debt except in cases of fraud, and the defendant was discharged. *Re* Tyson, 32 Mich. 262.

In People *ex rel.* Singer Mfg. Co. v. McAllister, 19 Mich. 215, which was an action for fraudulently converting money by an agent, the court said: "If the action is to be regarded as one upon any of the agreements, express or implied, growing out of the contract of agency, it is plain that there was no ground for a *capias*. The statute (Comp. Laws, § 4, 119); authorizes personal actions arising upon contract to be commenced by *capias*, only to recover damages for any breach of promise to marry, or for moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment."

In the following cases the right to an arrest on a proper showing was recognized, but the discussion was only as to matters of pleading and practice.

So, under Pa. act July 12, 1842, providing that no person shall be arrested or imprisoned on any civil process except actions for fines and penalties and breach of promise to marry, etc., it was held that the defendant should be discharged on common bail where the plaintiff's affidavit in an action for breach of promise used the words "the said defendant" without naming him. Snedden v. Gunn, 16 Pa. Co. Ct. 47. In this case the court said that the rule should be made absolute. "The affidavit in this case, which must be construed strictly, states that defendant promised to marry plaintiff, but after careful examination of the affidavit we are unable to find where plaintiff accepted said promise, or ever made any promise to marry defendant. Until such acceptance was made by plaintiff, or mutual promises to marry made by both, no contract would be made that would warrant the arrest on *capias ad respondendum*."

In Weaver v. Cline, 12 Pa. Co. Ct. 363, the affidavit to hold the defendant to bail set forth that the defendant, after having obtained the consent of plaintiff's parents and obtained a license to marry her, had refused to have the ceremony performed, or to see her or have anything to do with her, and had written a letter to her to that effect. A motion was made to discharge the defendant on common bail. It was claimed that the allegation was insufficient in that it omitted to state "that the plaintiff had offered to marry the defendant and asked him to marry her." It was held that the motion to discharge the defendant should be denied.

In Rhode Island it seems that an arrest can be made if sufficient grounds are stated under the statutes of that state.

In Malone v. Ryan, 14 R. I. 614, it was held under R. I. Pub. Stat. chap. 206, § 9, cl. 2, providing for a writ of arrest in any action of trover, detinue, trespass, trespass on the case, trespass and ejectment, that the action of "trespass on the case" was an action *ex delicto* or in tort, and not assumpsit, and consequently that the defendant in assumpsit for a breach of promise of marriage could not be arrested without the affidavit prescribed by the 3d clause of that section, providing that when the plaintiff makes affidavit that he has a just claim against the defendant, upon which he expects to recover in the action commenced by such writ, and that the defendant is about to leave the state without leaving therein real or personal estate subject to execution, or that the defendant has committed a fraud in contracting the debt, or in the concealment of his property or in the disposition of the same, an original writ commanding his arrest may be issued. The court said: "A promise of marriage is simply a contract. The breach of it is

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which have come to our knowledge, with one exception, sustain the general position taken by the defendant's counsel. Thus, in *Maxwell* v. *McBrayer*, 61 N. C. (Phill. L.) 527, the court quashed the writ of attachment in a case of this sort. Battle, J., in delivering the opinion of the court, said: "The damages which a jury might assess for the breach of such a contract are quite as uncertain as those which might be given for a trespass by an assault and battery on the person, and the amount of them as a debt can no more be sworn to by the plaintiff, his attorney or agent, in the one case than in the other." In *Conley* v. *Creighton*, 5 Ohio Dec. Reprint, 402, the court said: "The action for breach of promise of marriage, though nominally an action founded on the breach of contract, presents a very strong exception to the general rules which govern contracts. The action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to include the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule, and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance. Sedgw. Damages, 455. . . . The very object of the action is to fix the amount of the claim, and the amount can never be known in any other way. How, then, can a plaintiff swear to any? How much shall be set down to the account of injured feelings and affections and wounded pride; and how much as the value of the lost marriage? I confess myself as being wholly unable to regard such a claim as a demand within the meaning of the statute." This case was afterwards affirmed by the superior court of Cincinnati, general term. 2 Week. L. Bull. 379. In Kneeland on Attachment, the author, in speaking of cases of this sort, says [§ 88, p. 53]: "There are a class of actions arising nominally on contract that partake, nevertheless, of the nature of personal torts, and should be classed with that family. Principal in this class is the action for the breach of promise of marriage. The contract is not in any sense a pecuniary one, although the only remedy for the breach allowed by the law is money. The measure of damages, however, is governed by the circumstances of each particular case, and is entirely in the discretion of the jury, the

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not a tort, though it may resemble a tort in its consequences."

In New York, the Code of Civil Procedure, § 549, provides for an order of arrest in an action for a breach of promise to marry. Subdivision 4 provides for an arrest in an action upon contract, express or implied, other than a promise to marry, in cases of fraud or fraudulent disposition of property. Section 553 provides that a woman cannot be arrested as prescribed in that title, except in a case where the order can be granted only by the court, or where it appears that the action is to recover damages for a wilful injury to person, character, or property. There have been but few cases of arrest in breach of promise actions in this state. The cases beginning at an early day seem to take for granted that the statute authorizing an arrest was valid, and the decisions are therefore all as to the form of the pleadings and proceedings.

In Hapeman v. Woolford, 1 Hill, 202, which was an action for breach of promise of marriage, and the *ac etiam* was in the ordinary form of assumpsit, "and also, etc., upon promises," without adding "to marry," it was held the *ac etiam* "on promises" was sufficient as comprehending a promise to marry, and stood on the old law of bail, under 2 Rev. Stat. 270, § 7, providing that no person shall be held to bail on a *capias ad respondendum* unless the true cause of action be particularly expressed therein. This was held to call for no more than the old forms of *ac etiam*, and a motion to set aside an order discharging the defendant on filing common bail, and to amend the *ac etiam*, was granted. The court held that this case came within the exceptions of the non-imprisonment act, 1 Rev. Stat. 808, 2d ed. § 2, providing that the preceding section (prohibiting arrests and imprisonment in certain cases) shall not extend to actions on promises to marry.

In an action for breach of promise of marriage, it was held that the defendant could not be held to bail without the judge's order to hold to bail, under 2 Rev. Stat. 348, § 7, providing for holding to bail without a special or-

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der in actions of debt and actions of contract and actions of trover, trespass, and replevin, and § 8, providing that in all cases an order requiring bail may be granted by the judge of the court. Bromley v. Town, 1 Hill. 373.

And, where, in an action for breach of promise to marry, the defendant was arrested, it was held that he should be discharged where he filed an affidavit admitting the promise and tendering an offer of readiness and willingness to marry the plaintiff. Bonn v. Bloch, 13 N. Y. Civ. Proc. Rep. 275.

In Durand v. Durand, 2 Sweeney, 315, where parties had cohabited as husband and wife for sixteen years, both representing themselves as married, and had born to them five children, and the affidavit of arrest by the woman charged abandonment and a disclaimer on the part of the defendant that he was a husband, and there were allegations of a promise to marry made within six years, for a breach of which the action was brought, it was held that the complaint stated facts sufficient to raise a presumption that the relation of husband and wife existed, and that there were such slight grounds for the action that the order of arrest should be vacated.

In 3 N. Y. Code Rep. 23, it was said: "In the New York common pleas, Daly, Justice, held in the case of Siefke v. Diana Tappey—an action by a male for breach of promise to marry by a female defendant—that a female defendant in such action could not be held to bail under the Code." At this time N. Y. Code Proc. § 179, subdiv. 5, provided: "But no female shall be arrested in any action except for a wilful injury to person, character, or property." This section must have been the one referred to by number in the report of the case.

That the defendant, sued for a breach of promise of marriage, had told the plaintiff that he would go to the United States if she insisted on their marriage before the time agreed on, does not entitle her to a *capias* against him if no proof is given that he intended to put his threat into execution and defraud the plaintiff. Walker v. Goldman, Rap. Jud. Quebec, 16 C. S. 466.

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same as in ordinary actions for personal torts. Both the nature of the action and the rule of damages exclude the right of attachment in such actions, although they 'arise on contract' and are 'for the recovery of money only.'" 1 Shinn, Attachm. § 10, takes substantially the same view, and says that, "unless an attachment for demands arising *ex delicto* is also permitted, attachment for a breach of contract of marriage will generally be denied; and, if an attachment has issued in such case, it will be set aside on motion." In support of this statement, the author cites the case of *Barnes* v. *Buck*, 1 Lans. 268, which is a very well reasoned case upon the question involved. In *Price* v. *Cox*, 83 N. C. 261, it was held that attachment would not lie in an action of this sort. Smith, Ch. J., in speaking of this form of action, said: "It is in its essential features an action for the redress of a personal injury like one for defamation, or an assault and battery, and we see no reason for admitting the process of attachment in the one case that does not apply with equal force to the others, nor for putting a construction upon the statute that allows it in any of them." See also 2 Addison, Contr. 8th ed. p. 328; Parsons, Contr. 8th ed. p. 73; Chitty, Pl. 11th Am. ed. p. 67; 3 Am. & Eng. Enc. Law, 2d ed. p. 190; *Roelofson* v. *Hatch*, 3 Mich. 277. The exceptional case hereinbefore referred to, in which an attachment was upheld in a case of this sort, is that of *Morton* v. *Pearman*, 28 Ga. 323. But that case is not pertinent here, because the statute under which the attachment was made authorized suits of attachment "in all cases of money demands, whether arising *ex contractu* or *ex delicto*." 59 L. R. A.

Similar latitude was given by the statutes of Minnesota in force in 1860. *Davidson* v. *Owens*, 5 Minn. 69, Gil. 50. But under our statute we are very clearly of the opinion that, in order to warrant an attachment, the cause of action must be based upon a contract where the damages, although they may be unliquidated, are yet susceptible of estimation and determination by a jury under the ordinary and well-understood commercial and business rules which apply to contracts proper.

In refusing to grant the motion to dissolve the attachment in question the justice before whom it was made was probably influenced by some remarks of this court in *Drury* v. *Merrill*, 20 R. I. 2, 36 Atl. 835, in which a breach of promise of marriage was involved in one count and a breach of contract growing out of a promissory note was involved in another count. In that case, therefore, it was not necessary to decide whether an attachment would lie in an action for breach of promise of marriage solely; and hence what was said or intimated in that regard was mere *dictum*. The writer of the opinion in the present case, however, is free to admit that when writing the opinion in that case he was under the impression that an attachment would lie in a case of this sort on the ground that it was an action *ex contractu*. But more careful study has fully convinced him to the contrary.

The defendant's exceptions are sustained, and the case is remitted to the Common Pleas Division with direction to quash said writ of mesne process and dissolve the attachment made thereon.

END OF CASES IN BOOK 59.

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RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1902, Classified as Follows:

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
II. CONTRACTUAL AND COMMERCIAL RELATIONS.
III. CORPORATIONS AND ASSOCIATIONS.
IV. DOMESTIC RELATIONS.
V. TORTS; NEGLIGENCE; INJURIES.
VI. PROPERTY RIGHTS; WILLS; LIENS; GIFTS; DEEDS.
VII. CIVIL REMEDIES.
VIII. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Confining the right to act as agent for foreign insurance companies to residents of the state is held not to be an unconstitutional impairment of the privileges and immunities of citizens of other states. (Vt.) 338.

Naturalization.

Members of the Japanese race are held not to be entitled to become citizens of the United States. (Wash.) 671.

Courts.

Preventing the use, during court hours, of a pavement newly laid in a street adjoining the courthouse in such a way that the noise of the traffic thereon interrupts the business of the court is held to be within the power of a court, both at common law and under a statute giving it power to preserve order so far as is necessary to prevent interruption and disturbance of its proceedings. (Ala.) 572.

Bankruptcy.

A seat in a stock exchange owned by one who has no unsettled contracts with, or claims against, him in favor of other members, under which circumstances the rules of the exchange permit a sale of the seat, is held to be within the provision of the bankruptcy act that the trustee shall be vested, by operation of law, with the bankrupt's title to all property which, prior to the filing of the petition, he could by any means have transferred. (C. C. App. 3d C.) 94.

Service of process on nonresident.

An act providing for service of summons in a personal action against a natural person who is a citizen of another state, but carries on business in this state, on his agent in charge of the business, without seizure of his property by the process of the court, is held to be unconstitutional. (Minn.) 735.

Public improvements; special assessments.

The legislature having placed the cost of sewers for a particular district upon such district, individual landowners within it are held to have no right to show that they have received no benefit, because that question has been decided by the legislature. (Mass.) 728.

Schools.

Permitting the use of a school building for theatrical performances as a business is held to be a breach of faith and properly enjoined, where the building has been constructed with the proceeds of bonds based upon a tax voted to be imposed to erect a building for school purposes. (La.) 723.

Reading the Bible, offering prayer, and singing hymns during school hours in the public schools, in accordance with the usages of sectarian churches, is held to be an infringement of the constitutional guaranty of religious freedom. (Neb.) 927.

Compulsory education.

A statute requiring the compulsory education of children is held not to infringe the rights of parents. (Ind.) 435.

Officers.

A member of a board of education of a school district is held to be a ministerial officer within the meaning of a statute providing for the punishment of certain public officers for malfeasance in office. (Neb.) 915.

A peace officer acting without a warrant is held to have no right to kill a fleeing person who refuses to stop when commanded to do so, on suspicion that he has been guilty of a felony, where the offense is in fact only a misdemeanor. (Ky.) 720.

Municipalities.

The issuance of bonds by a municipality, to procure funds for a water supply, which are payable out of a sinking fund to be provided by a special tax upon the property within the municipality, and for which there can be no general liability on the part of the city, is held not to create an indebtedness within the meaning of a constitutional limitation of municipal indebtedness. (Iowa) 620.

A constitutional provision that no city shall become indebted beyond a certain limit "in any manner or for any purpose" is held to forbid the making of a present levy of an annual tax, to extend over a long period of years, for the payment of interest-bearing

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bonds, with the proceeds of which a municipal water supply is to be immediately procured. (C. C. App. 8th C.) 604.

A municipality is held to have the power to take property in trust for the education of poor white male orphans, under statutory authority to take gifts by devise, and providing for the assistance of charitable organizations, and for the good order, health, good government, and general welfare of the city. (Colo.) 407.

A city which voluntarily constructs a cinder bicycle path along the side of one of its streets is held to be bound to construct and maintain it so that it will be reasonably safe for the ordinary use for which it is intended. (Wash.) 346.

Ordinances.

Under a general welfare clause a municipal corporation is held to have no right to prohibit one from carrying on a lawful vocation on Christmas Day, when there is nothing in the character of the business which is calculated to interfere with the peace, good order, and safety of the community. (Ga.) 602.

Requiring street-car companies to keep the surface of the streets between their outer rails clean is held not to illegally discriminate against, or cast the public burden upon, them, where their tracks tend to accumulate dirt, and make the crown of the street flat, so as to render the cleaning of the street much more difficult than it otherwise would be. (Ill.) 666.

An ordinance requiring all street railways to pave, repave, and keep in repair the space between their tracks and between the rails of their tracks and for the space of 1 foot outside of each outer track, is held to be an invalid assumption of the power of taxation, and not to be sustainable as an exercise of the police power. (N. J. Err. & App.) 455.

Charter authority to make regulations to guard against construction of buildings so as to be unsafe or inflammable or dangerous to health, life, or property, is held not to cover an ordinance authorizing the refusal of permits for the erection of buildings unless they are to conform in size, character, and appearance to those previously erected in the same locality, and to be such as will not tend to depreciate the value of surrounding property. (Md.) 282.

Establishment of highway by user.

A private way is held not to become a public one by user, under a statute providing that roads that have been used as such for ten years shall be deemed public highways, where it was built for private gain, from a public highway to a private ferry landing, and has always been maintained by private enterprise, the township having in no way indicated an intention to accept it, while the ferry license was granted on the express condition that the licensee should maintain the way. (Mich.) 287.

Adverse possession of street.

Adverse possession of part of a strip of land dedicated as a city street, and accepted by the authorities as such, is held to give no title by prescription, although such possession is under a deed from the dedicator subsequent to the deed to the municipality, and the part so occupied has never been opened and used by the city as a street. (Ga.) 101.

Street railways.

Electric railway companies are held to be entitled to track connections with intersecting steam roads, where the incorporation of both classes of roads is provided for by the same statute, the various provisions of which, including those for track connections, refer to "every railroad corporation." (N. Y.) 489.

To entitle a company operating a system of street railways which were originally constructed under charters granted to separate companies, to the benefit of contracts between the municipality and such companies, fixing the rates of fare to be charged by them, it is held that it must show the assignment of such contracts to itself. (Ill.) 631.

Eminent domain.

Under a constitutional provision that private property shall not be taken or damaged for public use without just compensation having been first made, it is held that possession of land sought to be condemned pending the proceedings cannot be given by the legislature to the applicant, upon payment into court of sufficient money to compensate the landowner in case the land is finally taken. (Cal.) 404.

In condemnation proceedings for a railroad right of way it is held that general benefit to land not taken cannot be set off against damages to it under a constitutional provision requiring compensation to be made in money and in advance. (Cal.) 581.

A business is held not to be property within the meaning of a statute providing a jury trial to determine the damage in case of injury to "property" by the exercise of the right of eminent domain. (Mass.) 726.

The flowing of land by a dam for manufacturing purposes is held to be a taking within the meaning of the constitutional provision regulating the taking of land by right of eminent domain. (Vt.) 817.

Public waters.

A railroad company is held to have the right, under legislative authority, to close the entrance to a navigable cove without making compensation to the owners of property on the cove, the value of which is thereby diminished. (Me.) 68.

The right to obstruct a navigable stream by an upheaval of plastic clay, caused by the pressure of a railroad embankment near the river, is held not to be granted by an act of Congress authorizing the construction of the railroad parallel to the river, where the existence of the clay was unknown to Congress, and the result was not foreseen by anyone. (C. C. App. 8th C.) 80.

Authorizing the lowering of the level of the water of a public lake for manufactur-

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ing purposes is held to be within the power of the legislature, although public rights of navigation are thereby impaired, and the shore line in front of private riparian property is changed. (N. H.) 55.

A lake, although 20 miles long and 7 wide, with water in some places 18 feet deep, is held not to be navigable in the technical sense, so as to place the title to its bed in the state, where it is covered and filled with trees, stumps, and snags, through which there are no proper channels to make navigation available. (Tenn.) 324.

The right of a riparian owner to use a navigable stream for floating logs is held not to be derived from the state; and it is held that he cannot be deprived of such right without just compensation. (N. C.) 33.

Taxes.

Land purchased by a charitable corporation for the purpose of removing thereto its institution after a sale of the property then occupied by it, and which, pending such sale, is occupied by tents for the accommodation of the overflow from the main institution, and a one-story frame structure used as a kitchen and laundry, is held not to be exempt from taxation under a statute exempting all "buildings" used exclusively for charitable purposes, with the lands on which erected, and which may be necessary for the fair enjoyment thereof. (N. J. Err. & App.) 947.

A statute imposing a transfer tax upon property passing by the "intestate laws" of the state is held to be applicable to a widow's dower interest and her award under the administration laws. (Ill.) 807.

Voters and elections.

Prohibiting the placing on an official ballot of the name of an unsuccessful contestant for a party nomination at the primary election, is held to be a reasonable regulation, and not to violate a constitutional provision that any person entitled to vote at any election shall be eligible to any elective office. (Minn.) 447.

A statute forbidding the printing of the name of a candidate for office in more than one column, and, in case of nomination of the same person by more than one party, forcing him to choose on which ticket his name shall be printed, and directing that, on failure to make such choice, it shall be printed on the ticket first filed, is held to be an unconstitutional interference with the rights of political parties and candidates. (Cal.) 97.

Limiting hours of work.

Forbidding the employment of females in certain establishments more than ten hours a day is held not to unconstitutionally deprive them of life, liberty, or property. (Wash.) 342.

An act limiting to eight hours per day the work of laborers, etc., employed on behalf of the state or any of its political subdivisions, and requiring that every contract for public work shall contain a stipulation that no laborer shall be permitted to work more than eight hours under penalty of a forfeiture by the contractor of a certain sum for each day any person shall work more than such time,—is held to be unconstitutional and void. (Ohio) 775.

Osteopathy.

The practice of osteopathy is held not to be within the provisions of a statute making the practice of medicine or surgery without a license a misdemeanor. (N. C.) 187.

Magnetic healers.

Requiring a magnetic healer to procure a license before engaging in the healing art is held not to deprive him of his liberty or property without due process of law, or deny him the equal protection of the laws. (Ind.) 190.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

See also *infra*, V., as to *Carriers* and *Telegrams*.

The marriage of parties to a parol contract to convey property in consideration of marriage is held not to take the contract out of the provisions of a statute making void every agreement made upon consideration of marriage, except mutual promises to marry, unless they are in writing, so that the conveyance can be enforced in equity. (N. Y.) 306.

A railroad company carrying mail under contract with the United States government is held to owe no duty to the sender of a particular registered package of mail, which will give him a right of action in case the package is destroyed through the negligence of the company's servants. (Iowa) 796.

Bills and notes.

The maker of a negotiable instrument who delivers it to the payee complete in all its parts is held not to be liable thereon, even to an innocent holder, after the same has been fraudulently altered so as to express a larger amount than was written therein at the time of its execution. (Kan.) 717.

Indorsement by agent.

One purchasing from an agent, upon his indorsement, commercial paper payable to the order of his principal, is held to have no right to imply authority to make the indorsement from the facts that he has seen the agent in charge of the principal's mill, engaged in the management of his business, opening mail, giving order to employees, and countersigning checks drawn by the principal for supplies. (Ill.) 657.

Checks.

In the absence of special circumstances, it is held that a check must be presented not later than the day following its receipt, in order to hold the drawer liable, where the payee receives it in the place in which the bank on which it is drawn is located. (Neb.) 934.

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Payment.

That a party to whom money due another is paid is not in possession of the evidences of the indebtedness is held not to be conclusive on the question of his authority to make the collection. (Neb.) 294.

Sale; countermand.

Upon a countermand by the purchaser in a written contract for the sale of goods, and notice before shipment that he will not accept the goods, it is held that the only remedy of the vendor is an action to recover damages for the breach of the contract; and he is held to have no right to complete the contract and sue upon open account to recover the price of the goods. (Ga.) 122.

Telegrams.

Delivery of a telegram, directed to a person in care of a railroad company at a certain place, to the ticket agent of the company there, after making extensive search for the sendee, is held to relieve the telegraph company from further liability. (N. C.) 477.

Contracts; validity.

A contract by the publisher of a newspaper to use it in influencing the choice of delegates and the action of a convention in favor of a certain candidate for public office is held to be void as contrary to public policy. (Vt.) 336.

A contract by a father, releasing a railway company from all liability for injuries to a minor son while in the company's employ, is held to be valid and binding to the extent of exempting the employer from liability for negligent acts of itself and servants which are not criminal. (Ga.) 115.

Contract of married woman.

A married woman sued in the state of her domicil is held to have the right to avail herself of the protection of its statute allowing her to plead coverture as a defense to her contracts, when sued there on a note delivered and payable in another state, where such defense would not be recognized. (Tenn.) 408.

Insurance.

A provision of an insurance policy rendering it void if, without consent of the insurer, mechanics are employed in building, altering, or repairing the premises for more than fifteen days at any one time, is held to be operative regardless of the reasonableness of the repairs. (C. C. App. 3d C.) 492.

The innocence of an insured who was executed after conviction of a capital crime is held not to change the rule that insurance cannot be recovered upon the life of a person who was executed for crime, even if the policy makes no provision for forfeiture on that account. (C. C. App. 5th C.) 393.

A contract to indemnify an employer against loss by reason of liability for accidental injuries to employees is held not to inure to the benefit of an injured employee, so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment. (Me.) 444.

In case of the death, in the same disaster, of a member of a mutual benefit society and the beneficiary named in the certificate, which provides that, in the event of the death of the beneficiary before the decease of the member, the benefit shall be paid to his heirs, it is held that the representatives of the beneficiary must show her survivorship or the fund will go to the heirs. (Ill.) 653.

The entry of a judgment setting aside in favor of creditors a voluntary deed is held not to change the ownership of the grantee from sole and unconditional, within the meaning of a policy of insurance in his favor, which is to be void in case he has not such ownership. (S. C.) 319.

A railroad paymaster traveling upon business of the company from station to station, and stopping between stations for the purpose of paying off employees wherever they may be, is held not to be, while so doing, a "passenger" within the meaning of a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a passenger car using steam as a motive power. (Ga.) 107.

Carriers.

Although a railroad company enters into a joint contract with another company for the transportation of goods to a point beyond the end of its own line, it is held to be competent for it to enter into an express contract with the shipper, limiting its liability to the transportation of the property over its own line. (Neb.) 939.

A carrier which, having transported goods at consignor's risk C. O. D., presents a bill to the consignee before delivering them, knowing facts which indicate that they have been damaged in transit, is held to be bound to disclose such facts, or to be liable to return the money collected in case the consignment is rejected by the consignee. (Mass.) 731.

III. CORPORATIONS AND ASSOCIATIONS.

Directors of an insolvent manufacturing corporation are held to be entitled to apply its assets to their own unsecured claims against it, and to its obligations upon which they are individually liable, although the result is to deprive persons who have contracted with it of any remedy for breach of its contracts. (Ind.) 199.

A borrowing member of an insolvent building and loan association is held not to be entitled to be credited on his debt with the full amount of dues he has paid in on his stock, but it is held that his stock payments must share the losses and expenses of winding up, and the balance only be credited on the loan. (Miss.) 743.

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IV. DOMESTIC RELATIONS.

See also *supra*, II.; *infra*, VI., VII., VIII.

A judgment of divorce rendered in a state in which the wife has acquired a separate domicil, and valid there, is declared to be valid in other jurisdictions. (La.) 135.

Legitimation of a bastard by the laws of his parents' domicil, through their marriage during his minority, is held to fix his status so that he is legitimate everywhere. (N. C.) 317.

V. TORTS; NEGLIGENCE; INJURIES.

One who negligently inflicts injury on another is held not to be able to escape liability for any part of the loss caused thereby, for the reason that, because of the condition of the injured person, produced by his voluntary use of alcohol, the shock of the injury brings on delirium tremens, which retards his recovery. (C. C. App. 1st C.) 496.

A railway company which delivers a defective car to a connecting line is held not to be liable in damages to an employee of the latter, who is injured by reason of such defects after the car has been inspected by the company receiving it. (Kan.) 711.

Malicious prosecution.

A suit for partnership accounting, which results in a judgment in plaintiff's favor for a small balance, is held not to sustain a simple action for malicious prosecution, although complainant alleged mismanagement of the business and misappropriation of funds, which allegations were not sustained. (Tenn.) 501.

Ejection of passenger.

One purchasing a round-trip railroad ticket good only on the day of purchase is held to be entitled to recover damages in case he is ejected from the only train passing his station on the return trip on that day, for the reason that the ticket is not good on that train because the train is not scheduled to stop at that station. (Miss.) 742.

A railroad company is held to be liable in damages for injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physicial injury thereby. (Ga.) 590.

A street car passenger who is ejected from a car to which he is transferred because of a mistake not noticed by him in the transfer slip given him by the conductor to whom he paid his fare is held to be entitled to recover substantial damages from the company. (Wash.) 350.

Injury to passenger.

The shooting of a passenger by negro tramps while endeavoring to escape after having been brought into the train under arrest for stealing a ride is held not to render the carrier liable because of the failure of the employees to search and bind the tramps, where there was nothing in the circumstances under which they were arrested to cause the employees to apprehend that they were dangerous characters or likely to resort to violence in an effort to escape. (Ga.) 104.

The negligent jolting of a train, by which a passenger is hurled through the rear door and left in an insensible condition upon the track, is held to be the proximate cause of his death, where he is subsequently run over and killed by an engine belonging to another company which the first company knows has a right to use the track and is likely to use it at any time. (Ga.) 109.

To hold the carrier responsible for an injury received by a passenger while using an excursion ticket, one of the conditions on which is that the passenger assumes all risk of accident, it is held that he must show affirmatively that the carrier was guilty of negligence which caused the injury. (Pa.) 815.

Injury to person at railway station.

A railroad company is held to be under no obligation to protect persons who resort to its stations to aid the departure of friends who are to become passengers on its cars from assaults by persons lounging about the stations, although such duty may exist as to the intending passengers. (Tex.) 392.

Injury to person on railroad track.

No invitation to cross the yard of a railroad company to reach show grounds is held to be given by the railroad company by permitting a circus to exhibit on its vacant land adjoining its switch yard, so as to charge it with the duty of exercising care to protect people from danger, and render it liable to one injured by the operation of trains while attempting to cross the yard after having been expressly told to keep out, where the show grounds can be reached without danger by the highway. (Wash.) 508.

Injury to children.

A railroad company is held to be liable for injury to a child of immature years who gets upon the running board of an engine as it enters a playground, according to a general custom of children playing there, well known to the railroad employees, and who is injured while attempting to alight therefrom at a point where children have been, for a long time previous, in the habit of alighting, even though the employees in charge of the train have no actual knowledge of the child's presence upon the engine. (Ga.) 592.

Injury to a child by a turntable to which children were in the habit of resorting, to the knowledge of the company and its employees, is held to render the railroad com-

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pany liable, where it took no means to prevent the children from playing on the turntable, and failed to keep it guarded or properly fastened. (Neb.) 920.

Injury to servant.

The negligence of a fellow servant is held not to relieve the master from liability to a coservant for an injury which would not have happened had the master not been negligent himself. (Ga.) 596.

Trackmen charged with the inspection and repair of the tracks and roadbed are held not to be fellow servants of a trainman so as to absolve the master from liability for injury to the latter by the negligence of the former. (N. J. Err. & App.) 302.

The negligence of a fire boss whom the owner of a mine is required by statute to employ is held to render the master liable for an injury to an employee caused thereby. (Kan.) 707.

A railroad section hand thrown from a hand car by the application of the brakes by a brakeman, without warning, on the signal of the foreman, is held to have no right of action against the railroad company for the resulting injuries, under a statute making an employer liable for injuries caused by the negligence of a fellow servant who at the time was acting in the place and performing the duty of the employer in that behalf. (Ind.) 792.

A master is held not to be liable for the death of a servant because he failed to furnish a better belt shifter, where the one furnished was safe and suitable when properly used, and the servant made no objection to using it. (Or.) 785.

Undertaking to work as brakeman, or continuing at work without complaint, with knowledge that the railroad company habitually exceeds the speed fixed by ordinance in running trains through a municipality, is held to be an assumption of the risk of such excess of speed, so far as the protection of the ordinance is concerned. (Iowa) 698.

Injury by servant.

A person employed to watch the personal property of a company stored upon the real property of another is held not to be acting within the line of his duty where he shoots a person trespassing upon the realty, because that person refuses to go off the premises or to halt or throw up his hands at his command. (N. J. Err. & App.) 943.

Injury to trespasser.

One who attempts to take fish from a private lake contrary to law, knowing that it is guarded by a watchman with a gun which is sometimes discharged, is held to have no right to recover for a wound unintentionally inflicted upon him by a shot from the gun, although it is negligently fired. (N. Y.) 315.

Injury to trespassing cattle.

A statute and custom depriving the owner of unfenced land of the right to recover for injuries caused by trespassing cattle are held not to require him to keep the property safe for such animals, so as to charge him with the loss in case he leaves poisonous liquids used in his business exposed where, without his knowledge, the animals drink it and perish. (Mont.) 771.

Proximate cause.

The contraction of smallpox by a guest from an inmate of the house, who is conceded to have contracted the disease because of the unlawful location of a pest hospital near by is held to be the proximate result of such unlawful location, so as to render the city liable for the injury thereby caused to the guest. (Ky.) 718.

Negligence of physician.

A physician is held not to be absolved from liability for failure to exercise proper skill in a particular case by the fact that the result is as good as is usually obtained in like cases. (Ky.) 277.

Mistake in telegram.

Loss sustained by performance of a contract closed at a price quoted in a telegram as changed in transmission is held not to make the telegraph company liable, where the sendee, from his knowledge of the market, knew that a mistake must have occurred, and acted in bad faith, since, the contract not being binding upon the sender, it is held that he cannot voluntarily perform it and throw the loss on the company. (Cal.) 575.

Delay in delivery of telegram.

A grandmother is held to be entitled to recover damages for mental anguish for failure promptly to deliver to her a telegram announcing the serious illness of her grandchild. (Ala.) 398.

Blasting.

One who uses high explosives in excavating so near the property of another that the natural and probable result of an explosion will be injury to such property is held to be liable for injuries caused, even by the vibration of earth and air, however high a degree of care he may have exercised in their use. (Ill.) 421.

VI. PROPERTY RIGHTS; WILLS; LIENS; GIFTS; DEEDS.

See also *supra*, I.

Ferries.

The owner of a ferry is held not to be entitled to recover compensation for injury to his ferry flowing from loss of patronage incident to the establishment of a second ferry, either from the owner of the second ferry or the county. (W. Va.) 513.

Oil.

The mere drilling of a well and the discovery of oil are held not to give a vested interest in the oil to the lessees in an oil and gas lease, so as to give them the right to cease operations, refuse to develop the property, and simply hold it for speculative purposes, but merely to vest in them the

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right to produce and take the oil in accordance with the terms of the contract. (W. Va.) 566.

Entireties.

Land held by a debtor and his wife by entireties is held to pass, except her right of survivorship, by his assignment of all his estate, real and personal, for the benefit of creditors, under statutes making everything pass which might be taken in execution against him, but providing that neither the wife's separate property nor its products shall be liable for his debts. (Vt.) 340.

Easements.

An owner of land abutting on a public street is held to have an easement of view from every part of the street, of which he cannot be deprived by encroachments placed on it by an adjacent proprietor. (Ala.) 399.

A deed made by the owner of a tract of land, upon a portion of which was located a fresh-water lake, by which he conveyed a portion of the upland adjoining the lake, "together with" the right to traverse the lake in boats for pleasure, and to take fish and ice therefrom for domestic use, and not for profit, by the grantee, her heirs and assigns, is held to grant those rights and privileges as appurtenant to the upland, and not in gross. (N. J. Err. & App.) 949.

Fixtures.

A building erected on stone posts set in the ground on another's land, under a parol agreement that it shall remain the property of the builder, is held not to pass by a conveyance of the land to a bona fide purchaser. (Me.) 279.

Ovens, engine boilers, and shafting placed by a tenant in a leased building for carrying on the bakery business, with the intention of removing them, are held to be removable as trade fixtures. (Ill.) 131.

Wills.

The adoption of a child after the making of a will is held to bring it within the provisions of a statute providing that on the birth of a child after the making of a will, unless an intention to disinherit it shall appear from the will, the devises and legacies shall be abated in equal proportions to raise a portion for such child equal to that which it would have been entitled to receive out of the estate of the testator had he died intestate. (Ill.) 664.

Under a will directing that two thirds of all the residue of the estate not disposed of should be distributed in equal shares to such persons in life at the decease of the testatrix as would then be the heirs at law of her deceased husband had he survived her, and that the other one third should be distributed in equal shares to the heirs at law of the testatrix then in life, it is held that a distribution *per stirpes*, and not *per capita*, should be made. (Ga.) 125.

Liens.

A purchaser of property upon which a log lien is claimed is held to be deprived of his property without due process of law by a statute making him personally liable for the full amount of the claim if a petition for lien is duly filed, proceedings to enforce it are begun in time, and the property has been so changed that the lien cannot be enforced against it. (Wis.) 737.

Gift.

A verbal assignment of a policy of life insurance by the insured, accompanied by words indicating an intention to give, and by a delivery of, the policy, is held not to constitute a complete gift. (Ga.) 129.

Deeds.

A deed absolute in form is held to be properly treated as a mortgage when it is given to secure payment of a debt, although the parties may have agreed that upon default of payment the deed shall become absolute. (Neb.) 296.

A quitclaim deed is held to carry the grantor's interest in a covenant of seisin and warranty in his title deed, which runs to him and his assigns, so as to vest in the grantee a title acquired by the warrantor after the execution and delivery of his deed. (Mo.) 748.

VII. CIVIL REMEDIES.

The full penalty prescribed by statute having been recovered for the unlawful killing of a railroad employee who is a member of the voluntary relief department of the railroad company, it is held that the beneficiary named in the certificate of such employee cannot maintain an action against the railroad company on such benefit certificate. (Neb.) 291.

Foreign judgment.

A foreign judgment rejecting a claim after a fair trial upon the merits is held to be a bar to a subsequent attempt by the same plaintiff to recover the same claim from the same defendant in the local courts, although such judgment involves a mistake as to the force and effect of the local laws. (N. H.) 448.

Courts; equity.

The extension by a state of equity jurisdiction to suits to set aside probated wills is held to permit the maintenance of such suits in Federal courts sitting in such state, which acquire jurisdiction through diverse citizenship of the parties. (C. C. App. 7th C.) 425.

Equity is held to have jurisdiction of a bill by one who by actual fraud has been induced to take a warranty deed for a tract of land containing only about three fourths of the quantity it was represented to contain, and give back a trust deed to secure a part of the purchase money, to cancel the trust deed and adjust the compensation for the deficit. (Mo.) 761.

A court of equity sitting in one state is

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held to have jurisdiction of a suit by one of its citizens holding a mortgage on property in another state, to enjoin another citizen from removing from the property alleged fixtures which he has furnished under a conditional contract. (Pa.) 907.

A court of equity is held to have no jurisdiction to settle the title and boundary of lands between adverse claimants when the plaintiff has no equity against the party claiming adversely to him. (W. Va.) 556.

Appeal.

That a case has not been disposed of as to one defendant who has never been served with notice or appeared in the action is held not to prevent an appeal from a judgment entered in favor of a codefendant. (Wash.) 802.

Pleading.

A general allegation of negligence, while good against a general demurrer, is held not to be good against a demurrer on the ground of uncertainty, under a statute requiring the plaintiff to make a statement of the facts constituting the cause of action in ordinary and concise language. (Idaho) 209.

Injunction.

The unauthorized publication of one's likeness by another person for advertising purposes is held not to give a right to an injunction or damages on the theory that it is an invasion of a "right of privacy." (N. Y.) 478.

The publication of an unjust and malicious criticism of a manufactured article is held not to be restrainable by injunction, although the manufacturer has no remedy at law because of inability to prove special damages. (N. Y.) 310.

An injunction to restrain a riparian owner from cutting trees along the stream, on the ground that it facilitates evaporation to the injury of the lower proprietor, is held not to be allowable. (Cal.) 333.

Garnishment.

A claim against a railroad company for unliquidated damages for breach of a shipping contract is held not to be subject to garnishment. (Tex.) 353.

Attachment.

An attachment in a suit for breach of promise of marriage is held not to be authorized by a statute authorizing attachment upon the filing of an affidavit that plaintiff has a just claim against defendant that is due, upon which he expects to recover a sum sufficient to give jurisdiction. (R. I.) 954.

Levy; exemptions.

A decree requiring the owner of a timber-culture claim to public land to convey it to a partnership of which he is a member, in accordance with his agreement to do so, is held not to remove the claimant's interest in the property from the protection of the statute exempting such claims from liability to the satisfaction of debts contracted before the issuing of the final certificate therefor, even in favor of debts of the partnership. (Or.) 782.

Conversion.

In an action as for conversion, brought against a factor by the true owner of personal property which has come to the possession of the former by the criminal act of another person, has been sold by him, and the proceeds received and paid over to the criminal, it is held to be no defense that the factor acted throughout the entire transaction in good faith, without negligence, and in the supposition that the criminal was the real owner of the property. (Minn.) 733.

Evidence; admissions.

Evidence that additional precautions were taken, after an occurrence resulting in injury to one person, to prevent others from being likewise injured, is held not to be competent as an admission of negligence on the part of one sought to be held liable for the injury. (Ga.) 118.

Estoppel.

A woman whose name is forged to a deed of her husband's property is held not to be estopped to assert her dower rights in the property, even as against bona fide purchasers, by the fact that, after learning of the forgery, she failed to notify them of her rights, if the purchase was made without her knowledge. (R. I.) 206.

Limitation of actions.

The pendency and dismissal of a former action are held not to extend the time for bringing an action under a statute which gives a right of action for damages for death by wrongful act, which did not exist at common law, but provides that it shall be commenced within two years. (Kan.) 704.

Receivers.

A creditor of an embarrassed corporation, who, for the purpose of getting control of its plant and shielding it from its creditors, collusively obtains the appointment of a receiver, and thereby prevents the owner of the premises on which the plant is located from enforcing his claim for rent, is held to be personally liable for the rent accruing during the receivership. (Ill.) 673.

VIII. CRIMINAL LAW AND PRACTICE.

A conviction of a battery is held to bar a subsequent prosecution for the same acts as an assault with a deadly weapon, with intent to murder. (Cal.) 578.

Evidence that a father refused to permit medicine to be administered to one of his minor children while sick is held not to support a conviction of the father for depriving the child of necessary sustenance within the meaning of a statute which declares such deprivation to be an offense against the laws of the state. (Ga.) 601.

Indictment.

Following the language of the statute pro-

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viding for the punishment of bunco steering, in alleging that one was enticed to a certain place, and then, "by duress or fraud" was compelled to part with money upon a foot race, is held not to be sufficiently certain to state the offense. (Ind.) 789.

Evidence.

The instruments, devices, or tokens used in the commission of a crime are held to be competent and legitimate evidence in the trial of the accused, and the taking of them from his person by an officer who has arrested him upon a charge of his having committed the crime is held not to be an illegal seizure. (W. Va.) 465.

The disclosure by physicians of knowledge obtained as to the condition, with reference to venereal disease, of a prisoner whom they examined against his will upon his trial for rape, is held to be prohibited by a constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, and securing persons against unreasonable searches. (Iowa) 437.

Assault.

One who is assaulted in a public street is held to be justified in using a deadly weapon to defend himself from a public whipping by one greatly his superior physically. (Mo.) 756.

Attempt.

Mere preparatory acts for the commission of a crime, and not proximately leading to its consummation, are held not to constitute an attempt to commit the crime. (Ga.) 598.

Wife as witness against husband.

Offenses committed before marriage are held not to be within an exception of "cases of criminal violence upon one by the other" in a statute forbidding husband or wife to testify against the other. (Cal.) 588.

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GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ACTION OR SUIT.

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1. A contract to indemnify an employer against loss by reason of liability for accidental injuries to employees does not inure to the benefit of an injured employee so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment, so that the judgment cannot be enforced,—especially where the contract provides that no action shall lie against the insurer, as respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. Frye v. Bath Gas & E. Co. (Me.) 444

2. Citizens who have voted to tax themselves for a specific work of public improvement, the value of which is fixed at $20,000, have a standing in court to complain that the property acquired is not being used for the purpose contemplated; and the supreme court of Louisiana in such a case has jurisdiction of an appeal. Sugar v. Monroe (La.) 723

3. That the statutes require an issue as to the validity of a will to be tried by jury, while the question of fraud in the procurement of a deed may be tried by the court, will not prevent an attempt to set aside both instruments by one bill in equity. Williams v. Crabb (C. C. App. 7th C.) 425.

4. Joinder of causes of action for setting aside a deed and a will does not render the bill multifarious, where both grew out of the same subject-matter. Id.

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4a. All parties to a suit need not have an interest in every matter contained therein; it is sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. Id.

5. One of two heirs to an estate is not an indispensable party to a suit by the other to set aside conveyances and a will executed by decedent as having been procured by fraud. Id.

6. A Federal court will not require parties to be brought into a suit whose presence would defeat the jurisdiction of the court, if they are not indispensable. Id.

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1. Prescription does not run against a municipal corporation in regard to land held for the benefit of the public. Norrell v. Augusta R. & E. Co. (Ga.) 101

2. Adverse possession of part of a strip of land dedicated as a city street and accepted by the authorities as such cannot ripen into title by prescription, although such possession is under a deed from the dedicator subsequent to the deed to the municipality, and the part so occupied has never been opened and used by the city as a street. Id.

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2. Questions arising on motion to strike averments from the complaint can be considered on appeal, only when properly presented by bill of exceptions. Western U. Teleg. Co. v. Crocker (Ala.) 398

Hearing and determination.

3. As consent cannot confer jurisdiction, a plaintiff upon whose bill there is a final decree and adjudication against him upon the matters set up in the bill is not estopped to assert, upon appeal, that the court to which he resorted had no jurisdiction of the subject-matter. Freer v. Davis (W. Va.) 556

4. An appeal from the county court to a circuit court under W. Va. Code 1899, chap. 39, §§ 47, 48, and chap. 112, § 14, is to be tried by the record as made up in the county court, and does not give a right to a new trial by jury, or otherwise than by the record, until reversal on the record. Sistersville Ferry Co. v. Russell (W. Va. 513

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Prejudicial error.

5. Plaintiff in an action for personal injuries having charged the defendant with negligence in three particulars, and the trial judge having withdrawn from the consideration of the jury the first two grounds of complaint because of want of evidence to support them, and submitted the case solely upon the third ground, upon which a verdict was found against the defendant, the judgment cannot be sustained upon appeal upon the theory that the evidence would have justified a finding against defendant upon either of the first two grounds. Fielders v. North Jersey Street R. Co. (N. J. Err. & App.) 455

6. A judgment entered on general verdict of guilty upon an information for practising medicine without a license, one count of which is good and sustained by the evidence, will not be set aside on appeal because some counts of the information are insufficient. Parks v. State (Ind.) 190

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1. The maker of a negotiable instrument complete in all its parts is not bound at his peril to guard against the commission of forgery by one into whose hands such instrument may come. Bank of Herington v. Wangerin (Kan.) 717

2. The maker of a negotiable instrument which is delivered to the payee complete in all of its parts is not liable thereon, even to an innocent holder, after the same has been fraudulently altered so as to express a larger amount than is written therein at the time of its execution. Id.

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2. When an insolvent building and loan association goes into voluntary liquidation prematurely, a borrowing member cannot be credited on his debt with the full amount of dues he has paid in on his stock, but his stock payments must share the losses and expenses of winding up, and the balance only be credited on the loan, when it can be ascertained. Id.

3. Upon the voluntary dissolution of a building association the principle of accounting with members is the same whether the association is solvent or insolvent. Id.

4. The form of the proceeding in which a settlement of the accounts between a borrowing member and an insolvent building association is sought cannot affect the method of the accounting. Id.

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1. Charter authority to make regulations to guard against construction of buildings so as to be unsafe or inflammable, or offensive or deleterious to health, or dangerous to life, limb, or property, does not cover an ordinance authorizing the refusal of permits for the erection of buildings unless they are to conform in size, general character, and appearance to those previously erected in the same locality, and to be such as will not tend to depreciate the value of surrounding improved or unimproved property; nor does the grant of general police power, and power to provide for the general welfare, authorize such ordinance. Bostock v. Sams (Md.) 282

2. An ordinance providing for the granting of building permits is not rendered void *in toto* by the invalidity of a provision that no permit shall be granted unless, in the judgment of the proper officers, the size, general character, or appearance of the building will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding property. Id.

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Recovery of Insurance on Life of Person Executed for Crime, see INSURANCE, 11.

Validity of Contract to Insure against, see INSURANCE, 4.

CARRIERS.

Duty and liability toward passengers and persons accompanying them.

Injury to Passengers, see PROXIMATE CAUSE.

1. A carrier is liable for injury to a passenger by a third person whenever it knows, or has opportunity to know, of a threatened injury from such source, whether the third person is a passenger or not, or when the circumstances are such that injury to a passenger from such a source may reasonably be anticipated, and proper precautions are not taken to prevent the injury. Savannah, F. & W. R. Co. v. Boyle (Ga.) 104

2. The presence upon a train of two negro tramps, secreted and stealing a ride thereon, is not alone sufficient to cause the employees in charge of the train to suspect that such tramps are armed with deadly weapons, and to anticipate that when brought into the train under arrest they may endeavor to escape, and, while an employee is attempting to prevent the escape, make a murderous assault with such weapons upon one to whom the railroad company owes the

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duty of protection, and who is taking no part in the effort to prevent the escape. Id.

3. A carrier is not liable for the shooting of a passenger by negro tramps endeavoring to escape after having been brought into the train under arrest for stealing a ride, simply because the employees failed to search and bind them, where it does not appear that there was anything in the circumstances under which the tramps were arrested, or in their manner, to cause the employees to apprehend that they were dangerous characters, or armed with deadly weapons, or likely to resort to violence in an effort to escape. Id.

4. To hold the carrier responsible for an injury received by a passenger while using an excursion ticket, one of the conditions on which is that the passenger assumes all risk of accident, he must show affirmatively that the carrier was guilty of negligence which caused the injury. Crary v. Lehigh Valley R. Co. (Pa.) 815

5. A railroad company is under no obligation to protect persons who resort to its stations to aid the departure of friends who are to become passengers on its cars, from assaults by persons lounging about the stations, although such duty may exist as to the intending passengers. Houston & T. C. R. Co. v. Phillio (Tex.) 392

Excursion and round-trip tickets.

Liability for Injuries Received while Using, see *supra*, 4.

6. One purchasing a round-trip railroad ticket good only on the day of purchase may recover damages in case he is ejected from the only train passing his station on the return trip on that day, for the reason that the ticket is not good on that train because the train is not scheduled to stop at that station. Illinois C. R. Co. v. Harris (Miss.) 742

7. A statement by the agent, when selling a round-trip railroad ticket good only on the day of sale, that, in case the only train returning that day is late, the purchaser may have difficulty in getting it to stop to let him off, has no effect upon his rights under the contract. Id.

8. The right of the holder of a round-trip railroad ticket good only on the day of sale, to return upon the only train passing his station that day, is not affected by the statement of a flagman, when he attempts to board the train, that it does not stop at his destination, and his agreement to leave the train at the last stop before his destination. Id.

Ejection.

Of One Riding on Excursion Ticket, see *supra*, 6.

Mental Feelings as Element of Damages, see DAMAGES, 6.

9. A street-car passenger who is ejected from a car to which he is transferred because of a mistake not noticed by him in the transfer slip given him by the conductor to whom he paid his fare may recover substantial damages from the company, since 59 L. R. A.

it is responsible for the mistakes of its agents, and cannot require passengers to make technical examination of transfer slips. Lawshe v. Tacoma R. & P. Co. (Wash.) 350

Carriers of freight.

10. Although a railroad company enters into a joint contract with another company for the transportation of goods to a point beyond the end of its own line, it is competent for it to enter into an express contract with the shipper, limiting its liability to the transportation of the property over its own line. Union State Bank v. Fremont, E. & M. Valley R. Co. (Neb.) 939

11. An agent employed to solicit traffic for a foreign railroad company having no line of road in Nebraska has implied authority to bind his principal for the safe delivery of goods at a point beyond its own lines, and to contract over what road beyond that line the property shall be transported. Id.

12. A carrier which, having transported goods at consignor's risk C. O. D., presents a bill to the consignee before delivering them, knowing facts which indicate that they have been damaged in transit, must disclose such facts, or it may be compelled to return the money collected, in case the consignment is rejected by the consignee. Hardy v. American Exp. Co. (Mass.) 731

13. That a carrier who collected the bill for goods carried C. O. D., before delivering them, with knowledge of their probable injury in transit, has delivered the fund to the consignor, will not absolve him from liability to return the amount to the consignee, in case notice of refusal to receive the goods is given him within a reasonable time. Id.

14. A notice by a consignee of goods C. O. D., who, before delivery of the goods, paid the bill to the carrier, who presented it knowing the probable injury of the goods in transit, that he put in a claim for the entire shipment, and held the goods subject to the carrier's inspection, may be found by the jury to be a sufficient indication of readiness to rescind, although no tender of the goods was actually made and they were of some value, where the circumstances indicate an absolute denial of liability, and that a tender would have been of no avail. Id.

Governmental control; fares; transfers.

Regulation of Charges as a Denial of Due Process of Law, see CONSTITUTIONAL LAW, 10.

15. Power to prescribe the compensation of horse car companies is conferred on a municipality by charter authority to regulate hackmen, omnibus drivers, cabmen, "and all others pursuing like occupations, and to prescribe their compensation." Chicago Union Traction Co. v. Chicago (Ill.) 631

16. Power to require the giving of transfer tickets between street-car lines operated by one company is included in charter au-

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thority "to prescribe the compensation" of such companies. Id.

17. An ordinance providing that the fare to be charged by a company authorized to construct street railways within certain divisions of the municipality shall not exceed a certain rate "for any distance" does not give a right to charge a full fare upon every car, but entitles the passenger to travel any distance within such divisions for one fare, although in so doing it is necessary for him to change cars. Id.

18. Any doubt as to the right of a street railway company to fix its fares within a specified limit will be resolved against such right. Id.

19. An ordinance regulating the rate of fare "to be charged" by street railway companies, and providing for transfers between lines which do "now or shall hereafter" join, connect, etc., is not limited to roads in existence at the time of its passage. Id.

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Carriers; duty to transport; right of passenger to rely on information received from employee; expulsion; duty of passenger to pay fare to avoid expulsion. 591

Who is a passenger; employee as. 107

Wrongful ejection of passenger; effect of mistake in street-car transfer; conclusiveness of ticket as between conductor and passenger. 350

Passenger purchasing round-trip ticket; failure of only train passing station on date limited for return to stop; liability for carrying person beyond station or ejecting him; conclusiveness of face of ticket; binding effect of ticket agent's statement. 742

Injury to passenger who projects body outside of car by contact with object near track; liability for. 118

Fall of passenger from car caused by lurching of train; proximate cause of death when run over by engine of other company; presumption of negligence. 110

Duty of, to express messenger; injury by tramps; lack of knowledge of danger on the part of carrier's employees. 104

Duty as to mail and mail clerk; liability to owner of lost or destroyed mail; absence of contract or privity; liability where compensation for carriage is paid by another. 796

Condition on ticket exempting carrier from liability. 815

Provision against liability for loss caused by fire; validity of, in case of foreign railroad passing through state. 449

Right of, to limit common-law liability for negligence. 576

Duty to disclose facts as to condition of goods sent C. O. D.; right of consignee to recover money paid for worthless goods; failure of consignee to tender goods. 731

Connecting; right to limit liability to transportation over its own line. 939

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CERTIFIED CHECKS.

See CHECKS, 1.

CHARITIES.

Power of Municipality to Act as Trustee, see MUNICIPAL CORPORATIONS, 1, 2.

Exemption from Taxation, see TAXES, 1, 2.

1. The education and preferment of orphans, being one of the subjects mentioned by stat. 43 Eliz. chap. 4, is to be regarded as a public charity in jurisdictions where that statute is in force. Clayton v. Hallett (Colo.) 407

2. A devise for the establishment of a college for the education "of as many poor white male orphans born of reputable parents as the income shall be adequate to maintain" is not void for indefiniteness, where the executors of the will are given authority to "devise and promulgate such rules and regulations as they shall deem proper for the government of the institution." Id.

3. The appointment of trustees for a college for the education of orphans, with power to control and supervise the college, carries with it, by necessary implication, the authority to designate the beneficiaries. Id.

4. Charitable uses will be enforced in accordance with the principles of the common law, in the absence of statutory prohibition. Id.

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Charities; power of city to take devise for purposes of; what constitutes; adoption of statute of 43 Elizabeth as to charitable uses. 410

Exemption of, from taxation. 947

CHECKS.

Authority of Agent to Indorse, see PRINCIPAL AND AGENT, 1–3.

1. By the certification of a check, the drawee undertakes absolutely to pay it when presented at any time within that fixed by the statute of limitations, and is estopped to deny the possession of funds. Jackson Paper Mfg. Co. v. Commercial Nat. Bank (Ill.) 657

2. That a check is drawn on a bank in a city where the collection of such paper is made through a clearing house, and the check is received after banking hours, does not relieve the payee of the necessity of presenting it the following day. Edminsten v. Herpolsheimer (Neb.) 934

3. A check must be presented not later than the day following its receipt, in order to hold the drawer liable, in the absence of special circumstances, where the payee receives it in the place in which the bank on which it is drawn is located. Id.

4. It is the duty of the holder of a check, if he receives it after banking hours, to present it during banking hours of the next day, if the bank is located in the same town; if not, then to forward it by mail the next day. Id.

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Checks; certification of, by bank; suit against bank by holder of; necessity of proving presentation and sufficient funds for payment. 658

Necessity of prompt presentation; extension of time by sending to agent or through clearing house; special circumstances to excuse delay; what is reasonable time; as between holder and drawer. 935

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Care as to, see NEGLIGENCE, 1, 2; RAILROADS, 2, 3.

CHRISTMAS.
Power of Municipality to Prohibit Conduct of Business on That Day, see MUNICIPAL CORPORATIONS, 5.

CITIZENS.
Japanese; Right to Citizenship, see ALIENS.

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Against Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 1.

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See CONSTITUTIONAL LAW, 4–8.

C. O. D.
Liability of Carrier for Money Collected, see CARRIERS, 12–14.

COLLATERAL ATTACK.
On Judgment, see JUDGMENT.

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See TAXES, 3–6.

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Of Judgment, see JUDGMENT.

CONDEMNATION PROCEEDINGS.
See EMINENT DOMAIN.

CONDITIONAL SALE.
See SALE, 4.

CONFESSIONS.
See EVIDENCE, 4.

CONFLICT OF LAWS.
1. Although in Louisiana a marriage will not be dissolved on grounds antedating the establishment of the marital domicil in the state, it does not follow that its courts will not recognize the validity of a divorce granted upon such grounds in another state. Benton's Succession (La.) 135

2. A divorce granted in a foreign state, which recites that all the facts necessary to the jurisdiction of the court have been established, and presents upon its face no intrinsic nullity, can only be attacked on proof of extrinsic facts undermining the jurisdiction, and will therefore serve as a basis for a presumption of good faith with respect to a subsequent marriage. Id.

3. A judgment of divorce in favor of a wife, rendered by a court of a state in which she has acquired a separate domicil, and valid where rendered, is valid in other jurisdictions without regard to the place of marriage, the offense, or the domicil of the husband. Id.

4. Legitimation of a bastard by the laws of his parents' domicil through their marriage during his minority fixes his status so that he is legitimate everywhere. Fowler v. Fowler (N. C.) 317

5. A wife is authorized to acquire a separate domicil, where the conduct of the husband justifies her in leaving him and furnishes grounds for a divorce; and the law of the domicil so acquired will determine her marital status. Benton's Succession (La.) 135

6. A married woman sued in the state of her domicil may avail herself of the protection of its statute allowing her to plead coverture as a defense to her contracts, when sued there on a note delivered and payable in another state where such defense would not be recognized. First Nat. Bank v. Shaw (Tenn.) 498

7. A note is a contract of the state where it is delivered and payable, although it was signed in another state by a person resident there. Id.

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As to validity of contract; enforceability in other states of contract valid where made; validity of foreign judgment. 449

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in all states; (2) jurisdictions in which foregoing doctrine is denied, or not clearly adopted; (V.) custody of children when international elements involved; (VI.) effect upon property rights of divorce involving international elements: (a) alimony: (1) award of, upon constructive service: (a) against resident; (b) against nonresident; (2) enforcing award of, in another state; (3) effect of divorce in one state or country upon right of action for alimony in another; (b) dower: (1) when divorce obtained by husband; (2) when divorce obtained by wife; (c) other property rights; (VII.) impeaching decree granted in other state: (a) on jurisdictional facts; (b) on the merits; fraud; (VIII.) suits for same cause in different jurisdictions. 135

CONNECTING CARRIERS.

See CARRIERS, 10, 11.

CONSTITUTIONAL LAW.

Stipulations Inserted in Contract Pursuant to Requirements of Unconstitutional Statute; Validity of, see CONTRACTS, 1.
Trial by Jury, Right to, see TRIAL, 1.
See also EMINENT DOMAIN; VOTERS AND ELECTIONS.

1. A constitutional provision prohibiting the appropriation of private property for a right of way by private corporations until compensation has been made or ascertained and paid into court will, if necessary to avoid conflict with the 14th Amendment to the Federal Constitution, be held to be equally applicable to all other persons. Steinhart v. Mendocino County Super. Ct. (Cal.) 404

2. Reading the Bible, offering prayer, and singing hymns during school hours in the public schools, in accordance with the usages of sectarian churches, is an infringement of the constitutional guaranty of religious freedom,—especially where the education of children is made compulsory by statute. State ex rel. Freeman v. Scheve (Neb.) 927

3. An act limiting to eight hours per day the work of laborers, mechanics, etc., employed on behalf of the state or any of the political subdivisions thereof, except in certain stipulated cases; and requiring that every contract for public work shall contain a stipulation that no laborer, workman, or mechanic shall be permitted to work more than eight hours, under penalty of a forfeiture by the contractor of a certain sum for each day any person shall work more than such time; and providing that noncompliance with the terms of the statute shall be deemed a misdemeanor, punishable by fine or imprisonment or both,—is an unconstitutional abridgment of the right to contract, and an invasion of the right of liberty and property. Cleveland v. Clements Bros. Constr. Co. (Ohio) 775

Equal protection and privileges.

4. A rule of compensation for the taking of private property for public use by an individual cannot be provided by the legislature which is less favorable to the property owner than the rule provided by the constitution in case of a taking by a private corporation for a similar purpose, where the constitution prohibits discrimination not justified by intrinsic differences, and requires a uniform operation of general laws. Beveridge v. Lewis (Cal.) 581

5. Requiring street car companies to keep the surface of the streets between their outer rails clean does not illegally discriminate against, or cast the public burden upon, them, where their tracks tend to accumulate dirt, and make the crown of the street flat, so as to render the cleaning of the street much more difficult than it otherwise would be. Chicago v. Chicago Union Traction Co. (Ill.) 666

6. Confining the right to act as agent for foreign insurance companies to residents of the state is not an unconstitutional impairment of the privileges and immunities of citizens of other states, since corporations are not within the protection of the provisions relating thereto, and persons seeking to act for them can acquire no greater rights than the corporations have. Cook v. Howland (Vt.) 338

7. A statute requiring a license of all who announce to the public their readiness to heal, cure, or relieve those suffering from disease is not void on the ground that the classification is unjust and arbitrary because it exempts duly licensed physicians of other states whose practice extends into the state, opticians, and nurses. Parks v. State (Ind.) 190

8. Permitting the licensing of osteopaths, while excluding mental healing, is not an unlawful discrimination which will render the statute void. Id.

Due process of law.

9. A purchaser of property upon which a log lien is claimed is deprived of his property without due process of law by a statute making him personally liable for the full amount of the claim, if a petition for lien is duly filed, proceedings to enforce it are begun in time, and the property has been so changed that the lien cannot be enforced against it. Rogers-Ruger Co. v. Murray (Wis.) 737

10. Only when rates of fare are so unreasonable as to make the enforcement of the law establishing them equivalent to taking property without compensation, will the corporation be held to have been deprived of its property without due process of law, or denied the equal protection of the laws. Chicago Union Traction Co. v. Chicago (Ill.) 631

11. The disclosure by physicians of knowledge obtained as to the condition, with reference to venereal disease, of a prisoner whom they examined against his will upon his trial for rape, is prohibited by a constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, and securing persons against unreasonable searches. State v. Height (Iowa) 437

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12. Forbidding the employment of females in certain establishments more than ten hours a day does not unconstitutionally deprive them of life, liberty, or property. State v. Buchanan (Wash.) 342

13. Requiring a magnetic healer to procure a license before engaging in the healing art does not deprive him of his liberty or property without due process of law, or deny him the equal protection of the laws. Parks v. State (Ind.) 190

14. An act providing for service of summons in a personal action against a natural person who is a citizen of another state, but carries on business in this state, on his agent in charge of the business, without a seizure of his property by the process of the court, is unconstitutional. Cabanne v. Graf (Minn.) 735

Police power.

15. A limitation of the hours of labor on public work is not a valid exercise of the police power, it not appearing that the services and labor to be performed are unlawful or against public policy, or that they are of such character that such limitation and restriction as to the number of hours of labor that should constitute a day's work are necessary to the public welfare. Cleveland v. Clements Bros. Constr. Co. (Ohio) 775

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What is "property" within meaning of Contitution. 726

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Service of summons in personal action against nonresident on agent; constitutionality of statute authorizing. 735

Confining right to act as agent of foreign company to residents of state; as abridgment of privileges and immunities; necessity of reasonableness of police regulations. 338

Constitutionality of burdens imposed on property for benefit of public health and convenience; validity of police regulations. 666

Legislative regulation of rates; impairment of obligation of contract. 639

Statute limiting hours of labor on public work; as impairment of obligation of contract. 777

Constitutionality of statute requiring license from all who advertise to cure, or relieve suffering from, disease; fundamental right to follow industrial pursuit; to contract and dispose of labor; property in profession; due process of law; exemption of nurses as special privilege; class legislation. 190

Limitation of hours of work; as class legislation; as exercise of police power. 343

Constitutionality of law making it a crime to work on holiday. 602

Validity of statute compelling education of children. 435

Deprivation of property without due process of law; requiring one person to pay the debt of another. 740

Statute giving possession of land sought to be condemned to applicant pending proceedings; constitutionality of. 404

Necessity of uniformity in statutes denial of equal protection of the law by discrimination in statute. 582

CONTAGIOUS DISEASES.

Negligent Spreading of Disease, see NEGLIGENCE, 3; PROXIMATE CAUSE, 5.

CONTRACTS.

Joinder of Causes of Action to Set Aside Both Deed and Will, see ACTION OR SUIT, 3.

Validity of Contract Exempting Master from Liability for Negligence, see MASTER AND SERVANT, 1.

By Municipality, see MUNICIPAL CORPORATIONS, 6.

See also SALE.

1. Where a statute peremptorily requires certain stipulations or agreements to be inserted in a contract, and the same are, by force of such statute and because of its provisions, inserted by the contracting parties in their contract, the obligatory and binding force of such stipulations and agreements so inserted depends upon the validity of the statute requiring their insertion; and where such statute is itself unconstitutional, such stipulations and agreements, although incorporated in the contract, are in law without any obligatory or binding force upon the parties to said contract. Cleveland v. Clements Bros. Constr. Co. (Ohio) 775

2. A contract by the publisher of a newspaper to use it in influencing the choice of delegates and the action of a convention in favor of a certain candidate for public office is void as contrary to public policy. Livingston v. Page (Vt.) 336

3. A contract by a father releasing the employer of his minor son from all liability for damages for "injuries" which the son may sustain in the employer's survice will defeat a recovery by the father for the loss of the value of the son's services during minority, although the loss is caused by the homicide of the son, since the word "injuries" will be construed to apply to any and all kinds of bodily harm, whether resulting in disability or in death. New v. Southern R. Co. (Ga.) 115

See also MASTER AND SERVANT, 1.

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To relieve railroad company from liability to minor employee; validity of; strict construction of; effects of failure to read when signing, on binding effect of. 116

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Statute of frauds; effect of part performance validating contract void under statute of frauds; waiver of statute; refusal of equity to permit statute to be invoked in aid of fraud; in consideration of marriage; specific performance of; irrevocability of will made in pursuance of. 307

What evidence is permissible to show, to influence choice of candidate for public office. 336

Action for negligence in regard to, as action on contract; waiver of benefit of. 575

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Right of third person to enforce. 798

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Liability for, when made in good faith; defense of agency. 734

CORPORATIONS.

Insolvency of Building and Loan Association, see BUILDING AND LOAN ASSOCIATIONS.
Agents for Foreign Companies; Exclusion of Nonresidents as an Impairment of Their Privileges and Immunities, see CONSTITUTIONAL LAW, 6.
Service of Summons on Agent of Foreign Corporation, see WRIT AND PROCESS.

Directors of an insolvent manufacturing corporation may apply its assets to their own unsecured claims against it, and to its obligations upon which they are individually liable, although the result is to deprive persons who have contracted with it of any remedy for breach of its contracts. Nappanee Canning Co. v. Reid, Murdock & Co. (Ind.) 199

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Corporations; as persons within protection of 14th Amendment; discrimination against. 582

Corporations; foreign; right of state to impose conditions on, or to exclude from state. 338

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Right to Bring in Parties Whose Presence will Defeat Jurisdiction, see ACTION OR SUIT, 6.
Estoppel to Deny Jurisdiction of, on Appeal, see APPEAL AND ERROR, 3.
See also REMOVAL OF CAUSES.

1. A state cannot, by its legislature, confer a substantial right or remedy in the way of a suit *inter partes*, upon its own citizens, that will not be available to the citizens of the other states; nor can it, by any device, restrict such right or remedy thus made available, to enforcement in its own courts, the conditions of citizenship being such that they would otherwise be enforceable in the Federal courts. Williams v. Crabb (C. C. App. 7th C.) 425

2. A court may prevent the use, during court hours, of a pavement newly laid in the adjoining street, in such a way that the noise of the traffic thereon interrupts the business of the court, both under its common-law powers, and under a statute giving it power to preserve order so near to it as is necessary to prevent interruption, disturbance, or hindrance to its proceedings. *Ex parte* Birmingham (Ala.) 572

3. Whether or not the amount in dispute in a suit by a taxpayer to enjoin a city from issuing bonds because it is already indebted beyond its limit is sufficient to give jurisdiction to a Federal court is determined by the amount of bonds contemplated. Ottumwa v. City Water Supply Co. (C. C. App. 8th C.) 604

4. The extension by a state of equity jurisdiction to suits to set aside probated wills will permit the maintenance of such suits in Federal courts sitting in such state, which acquire jurisdiction through diverse citizenship of the parties. Williams v. Crabb (C. C. App. 7th C.) 425

5. A court of equity sitting in one state has jurisdiction of a suit by one of its citizens holding a mortgage on property in another state, to enjoin another citizen from removing from the property alleged fixtures which he had furnished under a conditional contract,—at least where the nonresident mortgagor voluntarily comes in and submits to the jurisdiction. Schmaltz v. York Mfg. Co. (Pa.) 907

6. The question whether or not the issuance and sale of bonds by a municipality to procure a water supply will create an indebtedness must be solved by the law applicable to contracts in general, and to negotiable bonds in particular, upon which the Federal courts are not bound by state decisions. Ottumwa v. City Water Supply Co. (C. C. App. 8th C.) 604

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Federal jurisdiction of; of suit in equity to set aside probated will; where state statute has extended equity jurisdiction of such

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cases; right of plaintiff defeated on merits to take advantage of lack of jurisdiction. 425

Jurisdiction derived from prerogative of Crown as *parens patriæ*. 410

Construction of foreign statutes; binding effect of decisions of courts of state of enactment. 910

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COVERTURE.

As Defense to Foreign Contract, see CONFLICT OF LAWS, 6.

CRIMINAL LAW.

Attempt to Commit Crime, see ATTEMPT.

Taking from Prisoner Articles Used in Commission of Crime, see SEARCH.

A conviction of a battery bars a subsequent prosecution for the same acts as an assault with a deadly weapon with intent to murder, where the statute permits a conviction of any lower offense necessarily included in a higher one with which a defendant is charged. People v. McDaniels (Cal.) 578

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Criminal law; compelling prisoner to give evidence against himself; admissibility of confession; of evidence of physicians examining prisoner against his will; of other acts of sexual intercourse, in prosecution for rape; of intercourse with other persons than defendant. 438

What constitutes attempt. 598

Former jeopardy; burden of proof as to; conviction of battery to bar prosecution for assault. 578

How intent with which crime committed may be shown. 466

DAMAGES.

Discrimination by Statute between Individuals and Corporations in Fixing Measure of Damages, see CONSTITUTIONAL LAW, 4.

Procuring Execution of Deed under Duress, see DURESS.

Allowance in Equity, see VENDOR AND PURCHASER, 2.

1. An obstruction in the bed of a river, caused by the bulging out of a stratum of plastic clay, due to pressure of a railroad embankment near the riverside, although the result was entirely unforeseen, is the immediate and direct result of the construction of the embankment, for which the railroad is liable, and not a merely indirect, remote, or consequential result. Northern P. R. Co. v. United States (C. C. App. 8th C.) 80

2. One cannot escape liability for any part of the loss caused by injuries negligently inflicted by him on another, for the reason that, because of the condition of the injured person, produced by his voluntary use of alcohol, the shock of the injury brought on delirium tremens, which retarded his recovery. Maguire v. Sheehan (C. C. App. 1st C.) 496

3. General benefit to land not taken cannot be set off against damages to it by the taking of a railway right of way under a constitutional provision requiring compensation to be made in money and in advance. Beveridge v. Lewis (Cal.) 581

4. The deduction of benefits from damages in case of the exercise of the power of eminent domain by an individual is not impliedly authorized by a constitutional provision expressly forbidding such deduction in case of an attempt to exercise the power by a private corporation. Id.

See also EMINENT DOMAIN, 8.

5. A grandmother may recover damages for mental anguish for failure promptly to deliver to her a telegram announcing the serious illness of her grandchild. Western U. Teleg. Co. v. Crocker (Ala.) 398

6. A railroad company is liable in damages for injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though he may not have received any physical injury thereby. Mabry v. City Electric R. Co. (Ga.) 590

7. The measure of damages for injuring a building by the use of explosives near it is the cost of restoring it to its former condition. Fitzsimons & C. Co. v. Braun (Ill.) 421

8. In an action by an infant in the care and custody of its father, for personal injuries, his lessened earning capacity cannot be considered as an element of damages, unless after the period from which he would be entitled to his earnings. Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.) 920

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Damages; for injury to feelings or mental suffering. 479

For mental suffering by failure to deliver telegram. 398

Measure of, in case of injury to property by vibration of earth caused by blasting. 422

Measure of, for breach of contract of sale where order is countermanded. 122

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Injunction against Building, see INJUNCTION, 6.

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Liability for damming back water of stream. 817

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DEATH.

Sufficiency of Evidence to Show, see EVIDENCE, 17.

1. A father who, after a divorce decree granting him the custody of his child, returns the child to the mother and disappears, brings her within a statute permitting a mother to maintain suit for the negligent killing of her child in case the father has deserted his family. Clark v. Northern P. R. Co. (Wash.) 508

2. A judgment recovered by an administrator under the provisions of Neb. Comp. Stat. chap. 21, § 2, giving a right of action for wrongful death, is for the exclusive benefit of the widow and the next of kin of the deceased person; and the fact that the administrator, in his petition for damages, fails to name all the legal beneficiaries provided for in this act, will not bar any legal distributee not named in his petition from receiving his distributive share of the judgment recovered. Oyster v. Burlington Relief Dept. (Neb.) 291

DECLARATIONS.

See EVIDENCE, 5, 6.

DEEDS.

Joinder of Causes of Action to Set Aside Both Deed and Will, see ACTION OR SUIT, 3.

Absolute in Form as Constituting Mortgage, see MORTGAGE.

Estoppel by Deed as to After-Acquired Title, see ESTOPPEL, 1–3.

Executed under Duress, see DURESS.

1. A deed of an undivided interest in land will not be rendered ineffectual by the fact that the grantee had, shortly before, purported to convey the same interest in the same land to the grantor at a time when the fee was in the latter, on the theory that the intent was merely to offset the effect of the former conveyance. Johnson v. Johnson (Mo.) 748

2. What will pass by certain descriptive words in a grant will be excepted by the same descriptive words in an exception. Mitchell v. D'Olier (N. J. Err. & App.) 949

3. Incorporeal rights held as appurtenant to land will pass upon a conveyance of the dominant tenement, although not mentioned in the deed of conveyance. Id.

NOTES AND BRIEFS.

Transfer, by quitclaim deed, of grantor's interest in covenant of seisin and warranty in title deed; passing after-acquired title of grantor; effect of notice or knowledge to overcome written stipulations in; presumption of delivery from recording of. 750

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Damages when Caused by Negligent Injury of Intoxicated Person, see DAMAGES, 2.

DESCENT AND DISTRIBUTION.

Distribution of Proceeds of Judgment in Action for Wrongful Death, see DEATH, 2.

DISCOVERY AND INSPECTION.

Compulsory Physical Examination of Accused for Use on Trial, as Denial of Due Process of Law, see CONSTITUTIONAL LAW, 11.

DISMISSAL.

Of Action as Extending Time for Bringing Action, see LIMITATION OF ACTIONS.

DIVORCE.

See HUSBAND AND WIFE, 2.

DOWER.

Estoppel of Widow to Claim, by Acquiescence to Forged Conveyance, see ESTOPPEL, 4.

DRAINS AND SEWERS.

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Special assessments for; necessity of benefits to sustain. 728

Effect of limitation of municipal indebtedness upon establishment of sewer system. 604

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 9–14.

DURESS.

Instructions to Jury Defining Duress, see TRIAL, 8.

One who conveyed real estate to a bank by warranty deed absolute in form, but intended to secure an indebtedness, may recover a sum in excess of the amount justly due, paid to obtain a reconveyance, where the bank assumed to be the owner of the property and denied the debtor any right or interest therein, and had begun a proceeding to dispossess him, which it threatened to appeal, if the judgment of the trial court was unfavorable, to the court of last resort, where it would probably remain undisposed of for years, and, when the debtor, in great financial distress and with no means of meeting his indebtedness, save by a sale of the property, procured a purchaser at an advantageous price, refused to consent to the sale or reconvey without the payment of such sum,—since under the circumstances the payment of such excess was made under duress and compulsion; and the fact that at the time of such payment the parties entered into a written agreement in the nature of a compromise, which was acquiesced in by the debtor in order to gain control of his property and extricate himself from his financial difficulties, does not affect his right to recover the excess, as the agreement was vitiated by duress for the same reason and to the same extent as the overpayment. First Nat. Bank v. Sargent (Neb.) 296

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Duress; what constitutes. 297

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DYNAMITE.

Judicial Notice as to Its Dangerous Nature, see EVIDENCE, 1.

EARNING CAPACITY.

Injury to, as Element of Damages in Action by Infant, see DAMAGES, 8.

EASEMENTS.

A deed made by the owner of a tract of land, upon a portion of which was located a fresh-water lake, by which he conveyed a portion of the upland adjoining the lake "together with" the right to traverse the lake in boats for pleasure and to take fish and ice therefrom for domestic use, and not for profit, to be exercised by the grantee, her heirs and assigns, grants those rights and privileges as appurtenant to the upland, and not in gross. Mitchell v. D'Olier (N. J. Err. & App.) 949

NOTES AND BRIEFS.

Easement; right to take fish as; essential qualities of; as charge upon property; effect of foreclosure of servient tenement upon. 950

EDUCATION.

Compulsory Education Law as Infringing Parental Rights, see INFANTS, 2.

EIGHT-HOUR LAW.

Constitutionality of, see CONSTITUTIONAL LAW, 3.

EJECTION.

Of Passengers, see CARRIERS, 3.

EJECTMENT.

The holder of state grants which he claims cover the bed of a lake must show with accuracy the particular land he claims before he can recover in ejectment. Webster v. Harris (Tenn.) 324

NOTES AND BRIEFS.

Ejectment; by party ousted from possession of land by one having no title thereto; where title outstanding in third person. 557

ELECTIONS.

See VENDOR AND PURCHASER; VOTERS AND ELECTIONS.

ELECTRICITY.

Generation of, as Constituting a Public Use, see EMINENT DOMAIN, 2.

ELECTRIC RAILWAYS.

See STREET RAILWAYS.

EMINENT DOMAIN.

Deduction of Benefits in Assessing Damages, see DAMAGES, 3, 4.

Measure of Damages; Discrimination by Statute between Individuals and Corporations, see CONSTITUTIONAL LAW, 4.

1. One seeking a right of way for a railway which he intends to sell as soon as it is procured is not in charge of a public use so as to be entitled to exercise the right of eminent domain. Beveridge v. Lewis (Cal.) 581

2. The generation of electricity by water power for the operation of a railroad is not a public use for which property may be taken by eminent domain, where there is nothing which binds the petitioner to serve the railroad, or to give equal advantages to all. Avery v. Vermont Electric Co. (Vt.) 817

3. A railroad company may, under legislative authority, close the entrance to a navigable cove without making compensation to the owners of property on the cove, the value of which is thereby diminished, under a Constitution requiring compensation to be made only for property taken for public use. Frost & Washington County R. Co. (Me.) 68

4. The flowing of land by a dam for manufacturing purposes is a taking within the meaning of the constitutional provision regulating the taking of land by right of eminent domain. Avery v. Vermont Electric Co. (Vt.) 817

5. The right of a riparian owner to use a navigable stream for floating logs is not derived from the state, and he cannot be deprived of such right without just compensation in some form. Hutton v. Webb (N. C.) 33

6. Possession of land sought to be condemned pending the proceedings cannot be given by the legislature to the applicant upon payment into court of sufficient money to compensate the landowner in case the land is finally taken, or for damages in case, for any reason, it is not taken, under a Constitution providing that private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner. Steinhart v. Mendocino County Super. Ct. (Cal.) 404

7. The jury may be permitted, in weighing the evidence in an eminent domain proceeding, to exercise their individual judgment as to values upon subjects within their knowledge which they have acquired through experience and observation. Beveridge v. Lewis (Cal.) 581

8. A business is not property within the meaning of a statute providing a jury trial to determine the damage in case of injury to "property" by the exercise of the right of eminent domain. Sawyer v. Com. (Mass.) 726

NOTES AND BRIEFS.

Constitutionality of statute giving possession of land sought to be condemned to applicant pending proceedings; necessity that payment precede or accompany taking; right to have amount fixed by jury prior to taking; what constitutes a "taking." 404

Generation of electricity for railroad by water power as public use; presumption in favor of public character of use when au-

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thorized by legislature; what degree of public good is necessary; effect of element of private gain. 817

Discrimination against railroads as to; setting off benefits against damages; right of natural persons to exercise. 582

What is "property" within meaning of statute as to good will of business as. 726

EQUAL PROTECTION.

Of the Laws, see CONSTITUTIONAL LAW, 4–8.

EQUITY.

Jurisdiction to Set Aside Will, see ACTION OR SUIT, 3; COURTS, 4.

1. A court of equity has no jurisdiction to settle the title and boundary of lands between adverse claimants, when the plaintiff has no equity against the party claiming adversely to him. Freer v. Davis (W. Va.) 556

2. The publication of an unjust and malicious criticism of a manufactured article is not the subject of equitable cognizance, although the manufacturer has no remedy at law because of inability to prove special damage. Marlin Firearms Co. v. Shields (N. Y.) 310

3. Equity has jurisdiction of a bill by one who by actual fraud has been induced to take a warranty deed for a tract of land containing only about three fourths of the quantity it was represented to contain, and give back a trust deed to secure a part of the purchase money, to cancel the trust deed, and adjust the compensation for the deficit. McGhee v. Bell (Mo.) 761

NOTES AND BRIEFS.

Equity; jurisdiction of, to settle title and boundary of land. 557

Jurisdiction of, over bills to quiet title and remove clouds. 426

Power of, to create equities contrary to law; jurisdiction of, based on "general trend of public opinion." 310

Jurisdiction of, to award damages for deceit; original jurisdiction in matters of fraud; right to retain jurisdiction until complete justice has been done. 766

ESTATES BY ENTIRETIES.

As Property Passing under Husband's Assignment for Benefit of Creditors, see INSOLVENCY.

ESTOPPEL.

To Raise Question on Appeal, see APPEAL AND ERROR, 3.

To Question Validity of Divorce, see HUSBAND AND WIFE, 2.

1. Covenants of seisin and warranty in a conveyance of an undivided part of a certain tract of land will not fail to carry to the grantee such interest, when subsequently acquired by the grantor, by the insertion in the deed of the further descriptive words, "being the interest I hold as heir," and that "acquired by purchase" from other heirs of a certain person deceased, such words being mere surplusage. Johnson v. Johnson (Mo.) 748

2. A quitclaim deed will carry the grantor's interest in a covenant of seisin and warranty in his title deed which runs to him and his assigns, so as to vest in the grantee a title acquired by the warrantor after the execution and delivery of his deed. Id.

3. A sale of an expectancy in lands of a living ancestor may be enforced through the doctrine of estoppel springing from covenants in the deed. Id.

4. A woman whose name is forged to a deed of her husband's property is not estopped to assert her dower rights in the property, even as against bona fide purchasers, by the fact that, after learning of the forgery, she failed to notify them of her rights, if the purchase was made without her knowledge. Hunt v. Reilly (R. I.) 206

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Estoppel; to assert invalidity of devise by admission of will to probate. 409

To claim damages for obstruction of waters of stream. 904

Of married woman to assert dower rights; effect of laches; fraud; in regard to real estate; by failure to give notice of forgery of name. 206

Of public to assert rights in land dedicated to public use, by delay in acceptance. 102

To assert after-acquired title as against grantee. 750

EVIDENCE.

Reception of Evidence, see TRIAL, 2.

Constitutional Rights of Accused as to, see CONSTITUTIONAL LAW, 11.

Judicial notice.

1. Courts will judicially notice the fact that the use of dynamite as an explosive is intrinsically dangerous. Fitzsimons & C. Co. v. Braun (Ill.) 421

Burden of proof.

2. One taking commercial paper upon the indorsement of the payee's agent has the burden of proving the authority to make the indorsement. Jackson Paper Mfg. Co. v. Commercial Nat. Bank (Ill.) 657

Opinion evidence.

3. A millwright with no experience in the manufacture or testing of such articles cannot give his opinion as to what caused a pulley to break. Duntley v. Inman, P. & Co. (Or.) 785

Confessions.

4. The rule excluding involuntary confessions does not apply to testimony of physicians as to the condition of a prisoner whom they examined against his will with reference to having a venereal disease. State v. Height (Iowa) 437

Declarations; res gestæ.

5. Upon trial of an action against a peace officer for shooting one fleeing after

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having a scuffle with men who had insulted his wife and sister, evidence as to the insult and the complaint of the wife to the husband is admissible as part of the *res gestæ*, where those events—the scuffle and the shooting—all occurred within a short space of time. Petrie v. Cartwright (Ky.) 720

6. Testimony that one had no venereal disease cannot be impeached by declarations as to the condition of the sheets of his bed, without laying a proper foundation by questions as to specific matter tending to show venereal disease to which the declaration had reference. State v. Height (Iowa) 437

Privileged communications.

7. Testimony of physicians who examined a prisoner against his will to determine if he had venereal disease cannot be excluded because relating to a privileged communication, where accused made no communications while they were acting as his physicians. Id.

Relevancy and materiality.

8. Evidence that a station agent upon finding children playing with a push car rode a short distance on the car, and said nothing to them about playing with it, is admissible in an action for injury to one of the children while playing on a turntable some 500 yards distant, as showing that the railroad company had knowledge that children frequented the station grounds, and that no objection was made to it. Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.) 920

9. In an action for injury to a child by a turntable, evidence that after the accident, but on the same day, a witness found the turntable unlocked, is admissible as tending to show that it was unlocked before the accident occurred. Id.

10. Evidence that the rules of a railroad company required turntables to be kept locked when not in use, and that immediately after an accident to a child playing upon a turntable the station agent locked it, is admissible in an action to recover for the injuries sustained by the child. Id.

11. Volunteered statements of a witness as to the effect of blasting on his own building, in reply to questions as to noises, in an action for damages for injuries to a building by blasting, of which all irrelevant parts to which the attention of the court is called are stricken out, furnish no reason for the admission of testimony of other property owners that the blasting did not affect their buildings. Fitzsimons & C. Co. v. Braun (Ill.) 421

12. Evidence as to the number of plaintiff's grandchildren and their location is irrelevant in an action by a grandmother for damages for neglect to deliver to her a telegram announcing the serious illness of one of them. Western U. Teleg. Co. v. Crocker (Ala.) 398

13. Evidence that additional precautions were taken after an occurrence resulting in injury, to prevent others from being likewise injured, is not competent as an admission of negligence on the part of one sought to be held liable for the injury. Georgia S. & F. R. Co. v. Cartledge (Ga.) 118

14. Where to establish rape of a child under the age of consent evidence is admitted that defendant had a venereal disease which he communicated to her, he may show that at about the time of the alleged rape she had connection with other men from whom she might have contracted the disease. State v. Height (Iowa) 437

15. The warrant of arrest and return thereon are inadmissible in evidence upon a trial for rape. Id.

16. The instruments, devices, or tokens used in the commission of a crime and taken from the person of the accused by an officer upon his arrest are competent and legitimate evidence on the trial of the accused for the crime. State v. Edwards (W. Va.) 465

Weight; sufficiency.

17. Solemn written instruments, which the parties thereto have allowed to stand unquestioned for years, cannot be overturned and robbed of efficacy and force, as against innocent purchasers for value under them, by the unsupported testimony of one who asserts the overhearing of a conversation between the parties in which they expressed an intent and purpose different from that set down in the writing. Johnson v. Johnson (Mo.) 748

18. Death intestate, unmarried, and without issue is not shown by testimony of a person's sister that he had not been heard from in twenty years, and that at his last communication he was about eighteen years old and unmarried "so far as she knew." Id.

NOTES AND BRIEFS.

Judicial knowledge of the use of transfers on street railways. 591

Burden of proof of navigability of water. 324

Burden of proving forfeiture of title to land. 558

Burden of proof of survivorship among those who perish in common disaster. 654

Burden of proof as to authority of agent to indorse commercial paper. 658

Presumption as to cause of accident. 698

Presumption of negligence from happening of accident. 815

Presumption of negligence from happening of accident to employee. 303

Presumption of negligence from lurching or stoppage of train causing injury. 110

Presumption of negligence from killing of stock on railroad. 211

Presumption as to law of other state. 910

Presumption as to intention to change common law by statute, in absence of express provision. 771

Presumption of intention of testator that property should descend according to law. 125

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Of physician; confidential communications; of confession; burden of proof to show that confession was voluntary; of previous acts of sexual intercourse, in prosecution for rape; compelling exhibition of body; admissibility of warrant of arrest and return of officer thereon. 438

Admissibility in evidence against accused of documents or other things taken from him:—(I.) Introductory; (II.) constitutional restrictions: (a) general statement —application; (b) unreasonable searches and seizures; (c) compelling evidence against self; (III.) effect of illegal or improper seizure; (IV.) rule as to articles unlawfully possessed, or in which the public has an interest; (V.) to what proceedings foregoing rules apply; (VI.) conclusion. 465

City ordinance as evidence to prove that act complained of was forbidden by it; violation of ordinance as evidence of negligence. 456

Of subsequent precautions after happening of accident. 119

Of conveyance of land by special commissioner under decree of court to show title; necessity of introducing whole record of the case. 557

As to safety of appliances; by person inexperienced in manufacture of. 787

EXAMINATION.

Of Witnesses, see WITNESSES.

EXCAVATION.

Blasting; Injuries from, see BLASTING.

EXCEPTIONS, BILL OF.

See APPEAL AND ERROR, 1.

EXCURSION TICKETS.

Rights of Holders, see CARRIERS, 6–8.

EXECUTORS AND ADMINISTRATORS.

Distribution of Proceeds of Judgment in Action for Wrongful Death, see DEATH, 2.

1. A claim for back wages and for nursing a person during his last illness is properly rejected, it being shown that the claimant had been originally employed as housekeeper by the testator, but that in the course of time there had ceased to be any question of wages between them, and that she and her children and grandchildren shared testator's home with him and were provided for by him, and that he further provided for them in his will. Benton's Succession (La.) 135

2. A dative executrix should deposit the funds coming into her hands in a bank established in the parish where such succession is opened, which pays interest on deposits, if there is such a bank, and, if there is no such bank, she should deposit such funds in a solvent bank in such parish which pays no interest; and if she fails so to do, and fails to file annual accounts, and pays out such funds without authority of the court, for matters in which the succession is not concerned, she should be destituted of her office. Id.

3. The fees and expenses of attorneys, and the expense of litigation between different heirs or claimants as to their respective rights, do not constitute general charges against the succession. Id.

EXEMPTION.

From Taxation, see TAXES, 1, 2.

Of Timber Culture Claim, see PUBLIC LANDS.

EXPECTANCY.

NOTES AND BRIEFS.

Expectancy; validity of conveyance of, by heir. 750

EXPLOSIONS.

Blasting; Liability for Injuries Resulting from, see BLASTING.

FACTORS.

1. In an action as for conversion, brought against a factor by the true owner of personal property which has come to the possession of the former by the criminal act of another person, has been sold by him, and the proceeds received and paid over to the criminal, less expenses and commission, it is no defense that the factor acted throughout the entire transaction in good faith, without negligence, and in the supposition that the criminal was the real owner of the property. Johnson v. Martin (Minn.) 733

2. The owner of property which has been received and sold by a factor in good faith as the property of another person may recover its value of the factor, although a common carrier was guilty of negligence in permitting the property to be diverted from its true destination by means of a forged way bill, and placed in the possession of the factor through a forged bill of lading. Id.

FALSE PRETENSES.

Conviction under Common-Law Indictment for Larceny, see INDICTMENT, ETC., 5.

1. Where both possession and title to property are obtained by false pretenses, with intent to defraud, the offense is obtaining money by false pretenses, in which case the statute declares that the offender shall be deemed guilty of larceny. State v. Edwards (W. Va.) 465

2. Where a person, by means of some fraud or trick, procures the delivery of money or goods to him by the owner, with the intent to steal the same, it amounts to a taking of the property, within the definition of larceny, unless the delivery of the possession is made for the purpose of passing the title to the property, as well as its possession; and if possession be acquired by such means and with such intent, and the goods or money are afterwards converted by the taker to his own use, the offense is larceny. Id.

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FEDERAL COURTS.
See COURTS; REMOVAL OF CAUSES.

FELLOW SERVANTS.
See MASTER AND SERVANT, 13–17.

FENCES.

A statute and custom depriving the owner of unfenced land of the right to recover for injuries caused by trespassing animals do not require him to keep the property safe for such animals, so as to charge him with the loss in case he leaves poisonous liquids used in his business exposed where, without his knowledge, the animals drink it and perish. Beinhorn v. Griswold (Mont.) 771

FERRIES.

1. Ownership of land on the West Virginia side of the Ohio river is sufficient to enable the owner to sustain an application to establish a ferry over it, without his showing that he owns land on the Ohio side of the river. Sistersville Ferry Co. v. Russell (W. Va.) 513

2. A sufficient description of a proposed ferry is given in a notice of application therefor and in the application, where it is described to be across the Ohio river, from a point in a certain district of a certain county in West Virginia, on lands belonging to persons named, to such persons' landing on the farm of other persons named, in a certain county in the state of Ohio. Id.

3. A report of viewers appointed to report upon an application for the establishment of a ferry, signed by two of three viewers, the order of the county court authorizing two to act, is good. Id.

4. Where there are already two ferries within a mile of each other, and the owners of one of them apply for the establishment of a third one between them, and its establishment will injure the revenue of the other existing ferry, and it does not appear that the travel will well support three ferries, and there is no imperative public need of the third ferry, it should not be established. Id.

5. The owner of a ferry cannot recover compensation or damages for injury to his ferry, flowing from loss of patronage incident to the establishment of a second ferry, either from the owner of the second ferry or the county. Id.

NOTES AND BRIEFS.

Ferries; establishment, regulation, and protection of:—(I.) Definition; (II.) establishment: (*a*) necessity of license: (1) prescriptive rights; (2) license usually necessary; (*b*) authority to establish: (1) character of water: (*a*) in general; (*b*) boundary waters; (*c*) interference with commerce; (2) power of municipality: (*a*) to establish and regulate; (*b*) to operate or lease; (3) exercise of authority: (*a*) who may exercise; (*b*) restrictions on exercise; (*c*) other matters; (*c*) practice: (1) in general; (2) contesting grant: (*a*) right to contest; (*b*) method of contesting; (*d*) who entitled to: (1) riparian owner; (2) priorities; (*e*) limitation of rights; (*f*) other matters; (III.) landings: (*a*) no right to use; (*b*) on opposite shore; (*c*) acquisition of right; (IV.) exclusiveness of right: (*a*) license may be exclusive; (*b*) grants strictly construed; (V.) regulation and supervision; (VI.) transfers and contracts: (*a*) right to transfer; (*b*) other contracts; (VII.) rights and duties of ferryman: (*a*) in general; (*b*) right to tolls; (*c*) interference with rights of: (1) absence of competition; (2) carriage without compensation; (3) bridges; (4) other matters; (*d*) remedy for violation of right: (1) who entitled to; (2) action at law; (3) equitable remedy; (4) defenses; (*e*) damages; (VIII.) extinguishment: (*a*) by abandonment; (*b*) by other means. 513

FIRE INSURANCE.
See INSURANCE.

FIXTURES.

Right of Tenant to Remove Fixtures, see LANDLORD AND TENANT.
Reserving Title to, see SALES, 4.

1. The removal of ovens placed by a tenant on leased premises is not prevented by the fact that to effect it the bricks and iron would have to be removed piece by piece, thereby destroying for the time their character as ovens. Baker v. McClurg (Ill.) 131.

2. A building erected for a tenant intending to carry on the bakery business, who erects an oven through openings left in the floors to receive it, will not be injured by removal of the oven, if it will be left by such removal in the same condition as it was when first erected. Id.

3. The ultimate purpose of a building erected for the use of tenants who intend to carry on the bakery business is not shown to be limited to that business, so that ovens and fixtures placed in it by the tenants cannot be removed, by the fact that openings are left in the floors through which to extend the ovens, if by closing such openings the building would be as well adapted for any of the ordinary uses of buildings of its general character as for a bakery. Id.

4. Ovens, engine, boilers, and shafting placed by a tenant in a leased building for carrying on the bakery business, with the intention of removing them, are removable as trade fixtures. Id.

5. A building erected on stone posts set in the ground on another's land, under a parol agreement that it shall remain the property of the builder, does not pass by a conveyance of the land to a bona fide purchaser for value and without notice of the agreement. Peaks v. Hutchinson (Me.) 279

NOTES AND BRIEFS.

Fixtures; refrigerating plant as; conditional sale reserving title; rights of bona fide mortgagee. 909

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FOREIGN CARS.
Liability of Company Furnishing, to Servants of Domestic Company, see MASTER AND SERVANT, 4.

FOREIGN DIVORCE.
See CONFLICT OF LAWS, 1–3.

FOREIGN JUDGMENT.
As Bar to Subsequent Action, see JUDGMENT, 3, 4.

FORGERY.
Raised Note; Liability of Maker to Innocent Holder, see BILLS AND NOTES, 2.

FORMER JEOPARDY.
See CRIMINAL LAW.

FORMER RECOVERY.
See JUDGMENT.

FRANCHISE.
NOTES AND BRIEFS.
What constitutes. 582

FRAUD.
Remedies of Purchaser on Discovering Fraud, see VENDOR AND PURCHASER, 2.

One who, by suppressing his title deed, and by fraudulent misrepresentations as to the quantity of land in a tract, has induced an ignorant, old person to purchase it in the belief that it contained the quantity represented, cannot defeat a suit in equity to cancel the trust deed securing the purchase money and adjust the equities, on the ground that the purchaser was negligent in not utilizing the means at his command to ascertain the true quantity of the land. McGhee v. Bell (Mo.) 761

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Fraud; in sale of land; remedy of party defrauded; right to retain property and recover damages; measure of damages for. 766

FRAUDS, STATUTE OF.
See CONTRACTS.

FREIGHT.
Carriage of, see CARRIERS.

GARNISHMENT.

1. A claim against a railroad company for unliquidated damages for breach of a shipping contract is not subject to garnishment. Waples-Platter Grocer Co. v. Texas & P. R. Co. (Tex.) 353

2. That a claim for unliquidated damages for breach of contract has been reduced to judgment does not render it subject to garnishment pending an appeal therefrom. Id.

NOTES AND BRIEFS.

Garnishment; of judgment of trial court; effect of pending appeal; unliquidated claims. 353

Of unliquidated claims:—(I.) scope; (II.) generally; (III.) claims in tort; (IV.) claims on contract: (*a*) damages from breach of definite contract; (*b*) contract to pay unliquidated amount: (1) generally; (2) claims subject to lien; (3) claims subject to forfeiture; (4) claims subject to estimate; (5) claims on unadjusted insurance losses; (6) claims to surplus on pledge; (7) claims to surplus on deposit; (8) claims to surplus on chattel mortgage; (9) claims to surplus on assignment for creditors; (10) claims on *quantum meruit;* (11) claims to support; (12) claims payable in goods; (*c*) claims on unsettled accounts; (*d*) partnership claims; (V.) unliquidated claims in equity: (*a*) equitable claims generally; (*b*) claims under trusts; (VI.) distributive shares and residuary legacies, before settlement; (VII.) set-off or recoupment of unliquidated claims; (VIII.) summary. 353

GIFT.

A verbal assignment of a policy of life insurance by the insured, accompanied by words indicating an intention to give, and by a delivery of, the policy, does not constitute a complete gift; and in such a case a court of equity will not interfere, at the instance of the alleged donee, to complete the gift, when she has not acted to her injury or incurred expense on the faith of the incomplete gift. Steele v. Gatlin (Ga.) 129

HEIRS.
As Indispensable Parties to Suit to Set Aside Will, see ACTION OR SUIT, 5.

HIGHWAYS.
Adverse Possession, Loss of Title by, see ADVERSE POSSESSION, 2.
Interruption of Business of Court by Noisy Use of, see COURTS, 2.
Encroachment of Building, Rights of Adjoining Owner, see INJUNCTION, 8, 9.
Encroachment of Building on, see NUISANCES.

1. A private way does not become a public one by user, under a statute providing that roads that have been used as such for ten years or more shall be deemed public highways, where it was built for private gain, from a public highway to a private wharf and ferry landing, and has always been maintained by private enterprise, the township having in no way indicated an intention to accept it, while the ferry license was granted on the express condition that the licensee should maintain the way, although no objection has ever been made to its use by anyone. Stickley v. Sodus Twp. (Mich.) 287

2. An owner of land abutting on a public street has an easement of view from every part of the street, of which he cannot be deprived by encroachments placed on it by an

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adjacent proprietor. First Nat. Bank v. Tyson (Ala.) 399.

3. A city which voluntarily constructs a cinder bicycle path along the side of one of its streets must construct and maintain it so that it will be reasonably safe for the ordinary use for which it is intended. Prather v. Spokane (Wash.) 346

4. The location of a bicycle path is not so far a governmental function that the city making it will be relieved on that ground from liability for injuries caused by a location which is unsafe for the ordinary travel for which it is intended. Id.

5. That one using a bicycle path constructed by the city for that purpose might have used the street without injury will not relieve the city from liability for injuries caused by the unsafe condition of the path. Id.

6. A city which locates a turn in a bicycle path at a street corner, within 4 feet of the gutter of the cross street, into which persons using it are liable to ride and be injured, without any barrier, sign, or other means of notifying travelers of the danger, is liable to a traveler who, after dark, in the exercise of ordinary care, goes over the curb and is injured. Id.

NOTES AND BRIEFS.

Highways; presumption as to ownership of freehold by adjoining proprietors; presumption that dedication has been refused from failure to appropriate to public use; necessity of promptness of acceptance of dedication; acceptance of part only of dedication; interest of municipality in; power of legislature to permit use of highway for other than highway purposes. 101

Requiring abutting property owners to clean snow from sidewalk. 667

Control of; obstruction of, as nuisance; paving by city as nuisance; power of court to prevent use of, during court hours. 573

What constitutes public park or alley as, within meaning of statute allowing recovery for injuries on; effect of public user to make road a highway; where way is opened as private passway; necessity of acceptance by public authorities. 289

Injury by defect in; effect of ordinance requiring street railway company to repair; necessity of notice to city of defect; duty of traveler to use ordinary care to avoid injury. 456

Injury from running into curb or gutter; location of bicycle path too near gutter; duty of city to light streets; to keep highway in safe condition for public travel; liability for defect in plan of construction. 346

Encroachment upon, as nuisance; right of abutting owner to maintain action to restrain; easement of light, air, and view from; power of municipality to license encroachment. 400

HOMICIDE.

1. A peace officer acting without a warrant cannot kill a fleeing person who refuses to stop when commanded to do so, on suspicion that he has been guilty of felony, where the offense was in fact only a misdemeanor. Petrie v. Cartwright (Ky.) 720

2. One assaulted in a public street, where he has a lawful right to be, is not bound to retreat before taking measures to defend himself. State v. Bartlett (Mo.) 756

3. A person is justified in using a deadly weapon to defend himself from a public whipping by one greatly his superior physically. Id.

4. The right to defend one's self from a public horse whipping is not defeated by the circulation of slanders about relatives of the assailant. Id.

HUSBAND AND WIFE.

Attachment in Suit for Breach of Promise of Marriage, see ATTACHMENT.
Effect of Foreign Divorce, see CONFLICT OF LAWS, 1-3.
Right of Wife to Require Separate Domicil and What Law Governs Marital Status, see CONFLICT OF LAWS, 5.
Coverture as Defense to Foreign Contract, see CONFLICT OF LAWS, 6.
Right of Mother, after Divorce, to Maintain Action for Killing of Child, see DEATH, 1.
Estoppel of Married Woman to Assert Dower Rights, see ESTOPPEL, 4.
Marriage as Partial Performance of Contract to Convey Property in Consideration Thereof, see SPECIFIC PERFORMANCE.
As Witnesses against Each Other, see WITNESSES, 2, 3.

1. A married woman may contract to permit her husband to erect a building on her land, which shall remain his property, under a statute empowering her to make any and all contracts "in her own name for any lawful purpose," and to contract with her husband equally as with anyone else. Peaks v. Hutchinson (Me.) 279

Marriage.

2. Persons who have for years recognized the validity of a marriage contracted in good faith cannot be heard to have it decreed void and the children born of it illegitimate and without rights, on the ground that a divorce obtained by the wife from a former husband was invalid. Benton's Succession (La.) 135

3. A marriage contracted in good faith is entitled to complete legal effect, so far as it concerns the rights of a daughter born thereof who has always been recognized by the parents as their daughter, and considered and treated by the father's relatives and the world generally as such, when attacked, after the husband's death, by his relatives and a legatee under his will, on the ground of the invalidity of a divorce obtained by the wife from a former husband. Id.

4. A marriage only putative produces

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civil effects as relates to a party in good faith and his or her children. Id.

NOTES AND BRIEFS.

Husband and wife; parol contract to convey property in consideration of marriage; sufficiency of marriage as performance to satisfy statute of frauds; validity of voluntary settlement made after marriage. 307

Capacity of married woman to contract; what law governs note of married woman. 499

Wife's dower right; common-law right to; when attaches; accepting provision in will in lieu of; right to election between testamentary provision and dower; inheritance tax upon. 807

Estoppel of married woman; to assert dower rights; effect of laches and fraud. 206

Assignment by husband for benefit of creditors to pass estate by entireties. 340

Conflict of laws as to divorce 135

Wife as witness against husband on trial for offense committed before marriage; in case of personal violence. 588

Right to attachment or order of arrest in breach of promise case. 954

ILLEGITIMACY.

Conflict of Laws as to, see CONFLICT OF LAWS, 4.

INDEBTEDNESS.

Of Municipality, see MUNICIPAL CORPORATIONS, 7–9.

INDICTMENT, INFORMATION, AND COMPLAINT.

Effect on Appeal of Insufficient Counts Where Other Counts are Good, see APPEAL AND ERROR, 6.

1. An affidavit and information for practising medicine without a license, contrary to the provisions of a statute, is sufficient if in the form prescribed by the statute. Parks v. State (Ind.) 190

2. Following the language of the statute providing for the punishment of bunco steering, in alleging that one was enticed to a certain place, and then, "by duress or fraud," was compelled to part with money upon a foot race, is not sufficiently certain to state the offense; but the acts constituting the fraud and duress should be set out. Haughn v. State (Ind.) 789

3. Refusal to send a child to school need not be charged to be "unlawful" if the facts averred show that it is. State v. Bailey (Ind.) 435

4. An information cannot be amended by the prosecuting attorney of the county in which it originated, after it has been removed for trial to another county. State v. Bartlett (Mo.) 756

5. When possession of property is obtained by means of fraud, trick, or device, so as to make the taking felonious, and the taker converts the property to his own use, the offense is common-law larceny, and a conviction may be had upon a common-law indictment for larceny; and in such case the indictment need not specify the means by which the larceny was effected. State v. Edwards (W. Va.) 465

NOTES AND BRIEFS.

Indictment; charging offense in language of statute. 789

Right of prosecuting attorney to amend information. 757

INFANTS.

Effect on Will of Subsequent Adoption of Child, see WILLS, 2.

Lessened Earning Capacity as Element of Damages, see DAMAGES, 8.

Legitimation of Bastard in One State as Affecting His Status in Another, see CONFLICT OF LAWS, 4.

See also PARENT AND CHILD.

1. Evidence that a father refused to permit medicine to be administered to one of his minor children while sick does not support a conviction of the father for depriving such child of necessary sustenance, within the meaning of a statute which declares such deprivation to be an offense against the laws of the state. Justice v. State (Ga.) 601

2. The rights of a parent are not infringed by a law compelling the education of children. State v. Bailey (Ind.) 435

NOTES AND BRIEFS.

Infants; custody of; after divorce decree; abandonment by father; subrogation of mother to rights of father; action by mother for negligent killing of; duty of railroad company to, as trespassers; negligence of. 508

Compulsory education of. 435

Duty to trespassing children; injury by turntable; negligence of. 921

INHERITANCE TAX.

See TAXES, 3–6.

INJUNCTION.

Against Unauthorized Publication of Likeness for Advertising Purposes, see PHOTOGRAPHS.

Jurisdiction of State Court to Restrain Its Citizens from Interfering with Property in Another State, see COURTS, 5.

Taxpayer, Right of, to Maintain Suit for Injunction, see ACTION OR SUIT, 2.

See also EQUITY, 2.

1. An injunction to prevent irreparable injury is authorized upon showing an intention to remove from a brewery plant a refrigerator which is a constituent part of, attached to, and necessary for the operation of, it. Schmaltz v. York Mfg. Co. (Pa.) 907

2. An intention to take forcible possession of a machine which the court may restrain, is shown by notices that the one giving them intends to remove it immediately

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by his employees, and asking the stoppage of work to facilitate the removal. Id.

3. Where irreparable mischief is being done or threatened to real estate, going to the destruction of the substance of the estate,—such as the extraction of oil and gas,—and the title to the land is in dispute, the parties claiming under hostile titles, a court of equity will enjoin the trespass and preserve the property and rights of the parties pending the determination, in a court of law, of the question of title; and this, although no action at law has been instituted, if it appears from the bill that the complainant intends immediately to put the question of title into a course of judicial determination, and prosecute it diligently. Freer v. Davis (W. Va.) 556

4. A riparian owner cannot be enjoined from cutting trees along the stream on the ground that it facilitates evaporation to the injury of the lower proprietor. Fisher v. Feige (Cal.) 333

5. Felling trees into a stream to the injury of the water will not be enjoined if it does not appear that the injury thus done to the quality of the water is material. Id.

6. A riparian owner cannot be enjoined by a lower owner from building a dam on his own land, if it does not appreciably diminish the amount of water which would naturally flow onto the neighbor's land. Id.

7. Injunction will not be granted against the unlawful raising of the height of the water of a public lake, where, upon complaint, it was drawn down, and repetition of the act is improbable, while the one responsible therefor is of unquestioned ability to respond for the damages. State v. Sunapee Dam Co. (N. H.) 55

8. The owner of a building abutting on a highway is specially injured by the erection of pillars in the street in front of an adjoining lot, so as to be entitled to an injunction, where they obstruct the light and air coming from the street to his property, and the view to and from his property along the street, so as to depreciate the rental value of the property. First Nat. Bank v. Tyson (Ala.) 399

9. One whose property is injured by the erection of pillars in the highway need not apply to the municipal authorities for relief before applying for an injunction. Id.

NOTES AND BRIEFS.

Injunction to restrain extraction of oil from land; power to appoint receiver as incident to grant of. 557

To restrain obstruction of stream. 91, 881

To restrain encroachment on public street; right of abutting owner to maintain action for; what is irreparable injury. 400

To restrain severance of fixtures on mortgaged property; where mortgagor is insolvent; to prevent irreparable or permanent injury; to restrain legal proceedings in other state where statutory remedy exists. 910

To enjoin publication of libel; to restrain publication of portrait for advertising purposes; necessity that property right should exist to justify. 479

To restrain publication of false and malicious statements in regard to property or business. 310

INSOLVENCY.

Of Corporation, see CORPORATIONS.

See also BUILDING AND LOAN ASSOCIATIONS; RECEIVERS.

Estates of a debtor and his wife by entireties, except her right of survivorship, pass by his assignment of all his estate, real and personal, for the benefit of creditors, under statutes making everything pass which might be taken in execution against him, and providing that neither the wife's separate property nor its products shall be liable for his debts. Laird v. Perry (Vt.) 340

INSPECTORS.

As Fellow Servants, see MASTER AND SERVANT, 13–17.

INSTRUCTIONS.

See TRIAL, 8, 9.

INSURANCE.

Action by Injured Employee on Employer's Indemnity Policy, see ACTION OR SUIT, 1.

Agents for Foreign Insurance Companies; Exclusion of Nonresidents as an Impairment of Their Privileges and Immunities, see CONSTITUTIONAL LAW, 6.

Verbal Gift of Insurance Policy, see GIFTS.

1. A policy of life insurance is a chose in action, even before the death of the insured. Steele v. Gatlin (Ga.) 129

2. To vest the legal title to a policy of life insurance in an assignee, it is essential that the assignment should be in writing. Id.

3. A common-law assignment for benefit of such creditors as become parties thereto is not a payment of a judgment for accidental injury in favor of an employee who does not become a party to the assignment, so as to raise a liability on the part of one who has insured the employer against loss by reason of liability for accidental injuries to employees, which is expressly limited to loss actually sustained and paid in satisfaction of a judgment after trial of the issue. Frye v. Bath Gas & E. Co. (Me.) 444

Validity.

4. A contract written to insure against a capital conviction in the established courts of competent jurisdiction, in the event that such conviction is unjust and unwarranted by the evidence, is void as being against public policy. Burt v. Union C. L. Ins. Co. (C. C. App. 5th C.) 393

Warranties; representations; conditions.

5. A clause rendering an insurance policy void if any change takes place in the in-

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terest, title, or possession of the subject of insurance refers to change after the issuance of the policy and before the fire. Steinmeyer v. Steinmeyer (S. C.) 319

6. The entry of a judgment setting aside, in favor of creditors, a voluntary deed, does not change the ownership of the grantee from sole and unconditional, within the meaning of a policy of insurance in favor of the grantee, which is to be void in case the assured has not such ownership. Id.

7. A provision of an insurance policy rendering it void if, without consent of the insurer, mechanics are employed in building, altering, or repairing the premises for more than fifteen days at any one time, is operative regardless of the reasonableness of the repairs. German Ins. Co. v. Hearne (C. C. App. 3d C.) 492

8. Rubbing and polishing woodwork, repairing walls and ceilings, repairing and reburnishing plumbing and gas fittings, and repairing the gutters and spouts are within the provisions of a fire insurance policy making it void in case mechanics are engaged in repairing the building for more than fifteen days at any one time. Id.

Persons entitled to proceeds.

9. Representatives of the beneficiary must show her survivorship, or the fund will go to the heirs in case of the death, in the same disaster, of a member of a mutual benefit society and the beneficiary of his certificate, which provides that, in the event of the death of the beneficiary before the decease of the member, the benefit shall be paid to his heirs. Middeke v. Balder (Ill.) 653

10. Insurance effected on the property by a grantee under a voluntary deed which has been set aside in favor of creditors of the grantor does not inure to their benefit. Steinmeyer v. Steinmeyer (S. C.) 319

Cause of death.

11. The innocence of an insured who was executed after conviction of a capital crime does not change the rule that insurance cannot be recovered upon the life of a person who is executed for crime, even if the policy makes no provision for forfeiture on that account. Burt v. Union C. L. Ins. Co. (C. C. App. 5th C.) 393

Extent of recovery.

12. A coach specially equipped and used as a pay car, and not a vehicle for the transportation of passengers, is not a passenger car within the meaning of an insurance policy granting double indemnity to the insured if injured while riding as a passenger on a passenger car; and this is so although it had formerly been used as a passenger car, and was capable of being so used again. Travelers' Ins. Co. v. Austin (Ga.) 107

13. A paymaster of a railroad company, traveling upon business of the company from station to station on the line of the company, and stopping between stations for the purpose of paying off employees of the company wherever they may be, is not, while so doing, a "passenger" within the meaning of a clause in a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a passenger car using steam as a motive power. Id.

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Insurance; interpretation of contract of; who is a "passenger" within meaning of. 107

Verbal assignment of policy; validity of. 129

By grantee in deed set aside in favor of creditors; grantee as trustee for creditors; effect of clause as to sole ownership; construction of policy most favorable to insured; failure of insurer to ascertain interest of insured in absence of misrepresentations; forfeiture not favored. 319

State control over foreign insurance corporations; regulation of business within state. 338

Execution of insured after conviction of capital crime; effect of innocence; crime committed while insane; public policy as to recovery on policy where insured has died at hands of the law; enforceability of contract originating in fraud of insured. 394

Provision rendering policy void in case mechanics are employed in building or repairing premises for more than fifteen days. 492

Death of member of mutual benefit society and beneficiary in same disaster; presumption of survivorship; rights of heirs of beneficiary. 654

Against liability of employer; right of injured employee to recover. 445

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Of Person Injured Retarding Recovery; Effect on Measure of Damages, see DAMAGES, 2.

IRREPARABLE INJURY.

See INJUNCTION, 1, 3.

JAPANESE.

Right to Citizenship, see ALIENS.

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Of Causes of Action, see ACTION OR SUIT, 3.

JOINT TORT FEASOR.

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Liability of, to parties who have contributed to injury. 575

JUDGMENT.

Foreign Divorce, see CONFLICT OF LAWS, 1-3.

For Former Judgment in Criminal Case, see CRIMINAL LAW.

See also APPEAL AND ERROR, 3.

1. A decree in a suit between a member of a partnership and the representative of a deceased member, adjudging that certain real estate is the property of the partnership, is not conclusive of the question

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whether or not it is within the provisions of a statute exempting timber-culture claims to public land from liability for debts contracted prior to the issuance of the final certificate therefor. Adams v. Church (Or.) 782

2. A judgment naturalizing a person who is shown by the face of the proceeding not to be entitled to naturalization may be collaterally attacked. Re Yamashita (Wash.) 671

3. A foreign judgment rejecting a claim after a fair trial upon the merits is a bar to a subsequent attempt by the same plaintiff to recover the same claim from the same defendant in the local courts, although such judgment involves a mistake as to the force and effect of the local laws,—at least, if such mistake was caused by plaintiff's failure to inform the court as to such law. MacDonald v. Grand Trunk R. Co. (N. H.) 448

4. The owners of goods shipped on a through bill of lading which exempted the carrier from loss by fire occurring through its own negligence, and destroyed by fire occurring through the carrier's negligence in a state where such contract is void, cannot, after unsuccessfully litigating the question of the carrier's liability in the country of their residence, relitigate such question in the state where the loss occurred, on the theory that the judgment is a foreign one, and not binding in such state. Id.

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Judgment; when final. 802

Conclusiveness of; of prior suit in action for malicious prosecution. 501

Of foreign court; conclusiveness of; when based on void contract; *res judicata*. 449

Res judicata; collateral attack on. 783

JUDICIAL NOTICE.
See EVIDENCE, 1.

JUDICIAL SALE.

An exception in a sheriff's deed of land sold under foreclosure proceedings, of a certain tract conveyed by the mortgagor to a named person and recorded in a certain place, "as fully as the same is therein described," is sufficient to preserve to the grantee of such tract the privilege of fishing in and taking ice from a lake on the mortgaged land which had been included in her grant. Mitchell v. D'Olier (N. J. Err. & App.) 949

JURISDICTIONAL AMOUNT.
To Give Federal Courts Jurisdiction, see COURTS, 3.

JURY.
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As bar to right to injunction against obstruction of waters of stream. 884

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See also WATERS, 7–11.

LANDLORD AND TENANT.
What Constitutes Fixtures as between Landlord and Tenant, see FIXTURES.
Injuries to Tenants; Liability of Landlord's Agent, see PRINCIPAL AND AGENT, 6.
Liability of Receiver of Tenant for Rent, see RECEIVERS.

The surrender by a partnership of a lease before the expiration of the term, and the acceptance of a re-execution by one of the partners for the balance of the term upon the same conditions as the original lease, for the purpose of releasing the other from further liability thereon, are not sufficient to destroy title to the trade fixtures, although they are not reserved in the new lease. Baker v. McClurg (Ill.) 131

LARCENY.
See FALSE PRETENSES; INDICTMENT AND INFORMATION, 5.

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LIBEL AND SLANDER.
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Allegations that the publication of one's likeness by another person for advertising purposes exposes him to disgrace, ridicule, or obloquy are necessary to a complaint setting forth such publication as a libel. Roberson v. Rochester Folding Box Co. (N. Y.) 478

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Libel; publication of woman's portrait as; injunction to restrain publication of libel. 478

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By criticism of manufactured article; injunction to restrain. 310

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Statute Making Purchaser of Property Liable for Amount of Existing Lien, as a Denial of Due Process of Law, see CONSTITUTIONAL LAW, 9.

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Liens; statute imposing on purchaser of property subject to, personal liability for amount of; constitutionality of. 738

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

The pendency and dismissal of a former action do not extend the time for bringing an action under Kan. Civ. Code, § 422, which gives a right of action for damages for death by wrongful act, which did not exist at common law, but provides that it shall be commenced within two years, since this limitation is a condition imposed upon the right of action, and it is not affected by a provision of the general statute of limitations, extending the time for commencing a new action under such circumstances. Rodman v. Missouri P. R. Co. (Kan.) 704

LOAN ASSOCIATIONS.

See BUILDING AND LOAN ASSOCIATIONS.

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Interference with Use of Stream for Floating; Right of Riparian Proprietor to Compensation, see EMINENT DOMAIN, 5.

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Mail; duty of carrier transporting; liability to owner of lost or destroyed mail. 796

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Malice; effect of, to render action unlawful. 334

In prosecution of action; how inferred. 501

MALICIOUS PROSECUTION.

1. The court will not, in an action for malicious prosecution, look behind the final judgment in the original suit, and ascertain whether or not, upon the contentions made by the bill as a whole, the defendant, against whom the judgment was entered, was in fact the successful party. Swepson v. Davis (Tenn.) 501

2. Matters which were not passed on in the original suit cannot be considered by the court upon the trial of an action for malicious prosecution, and the effect which they might have had in the decision of the original suit, if considered, determined. Id.

3. A suit for partnership accounting, which results in a judgment in plaintiff's favor for a small balance, will not sustain a simple action for malicious prosecution, in which there is no allegation of successful refutation of false and malicious allegations made for the purpose of securing an enhanced judgment against defendant, although complainant alleged mismanagement of the business and misappropriation of funds, which allegations were not sustained, and did not become the basis of any decree. Id.

NOTES AND BRIEFS.

Malicious prosecution; of civil suit; without arrest of person or attachment of party; adverse decision against defendant in civil suit as proof of probable cause for bringing action; failure of plaintiff to recover all he sued for; necessity that suit terminate in favor of defendant. 501

MALPRACTICE.

See PHYSICIANS AND SURGEONS, 3, 4.

MANDAMUS.

One seeking a mandamus to compel the issuance of a permit to erect a building on a city lot must show his right to build there, in order to show that the petition is bona fide and founded on substantial right. Bostock v. Sams (Md.) 282

MARRIAGE.

Breach of Promise; Attachment in Suit for, see ATTACHMENT.

See also HUSBAND AND WIFE.

MASTER AND SERVANT.

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Constitutionality of Statute Regulating Hours of Labor of Females, see CONSTITUTIONAL LAW, 12.
Regulation of hours of Labor as a Valid Exercise of Police Power, see CONSTITUTIONAL LAW, 15.
Employer's Indemnity Insurance, see INSURANCE, 3.
See also PLEADING; PROXIMATE CAUSE.

1. A contract by a father releasing a railway company from all liability for injuries to a minor son while in the company's employ is valid and binding to the extent of exempting the employer from liability for negligent acts of itself and its servants which are not criminal. New v. Southern R. Co. (Ga.) 115

See also CONTRACTS, 3.

Duty and liability of master.

2. A master is not liable for the death of a servant because he failed to furnish a better belt shifter, where the one furnished was safe and suitable when properly used, and the servant made no objection to using it. Duntley v. Inman P. & Co. (Or.) 785

3. That one employed on the night shift in a mill had never seen the machinery tested is no evidence that proper inspection and tests of it were not made. Id.

4. A railway company which delivers a defective freight car to a connecting line is not liable in damages to an employee of the latter, who is injured by reason of such defects, after the car has been inspected by the company receiving it, since the loss of control over the car and over the servants having it in charge relieves the delivering company from responsibility to the employees of the receiving company. Missouri, K. & T. R. Co. v. Merrill (Kan.) 711

5. The master's duty to exercise reasonable care in furnishing a place and appliances for the work, that shall be reasonably safe for those engaged in the general employment is not avoided by the employment of competent agents for its performance. Smith v. Erie R. Co. (N. J. Err. & App.) 302

6. As between a railroad company and such of its employees as are required, in the performance of their duties, to travel upon its trains, the company is bound to exercise reasonable care so to construct and maintain the track and roadbed as to make them reasonably safe for such travel. Id.

7. A signal by a section foreman to a brakeman on a hand car to stop the car does not require him to do so without warning other men thereon, and thereby imperil their safety, so as to bring an injury caused by stopping without warning within a statute making employers liable for injuries to servants which result from the act or omission of any person, done or made in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. Thacker v. Chicago, I. & L. R. Co. (Ind.) 792

8. Want of care on the part of a master is not shown by mere proof of the breaking of a piece of machinery under his control, so as to render him liable for the death of a servant caused thereby. Duntley v. Inman, P. & Co. (Or.) 785

9. An act requiring every mine owner or operator to employ a competent fire boss, whose duties shall be to "examine every working place every morning with a safety lamp before miners or other employees enter their respective working places," does not prescribe the limit of care to be exercised by such mine owner or operator towards employees engaged in working in their mines; and if, through the negligence of such fire boss, one of the employees is injured by the explosion of gas therein, the owner or operator is liable in damages for such injury. Schmalstieg v. Leavenworth Coal Co. (Kan.) 707

Assumption of risks.

10. The risk of injury from a defect in a railroad track or roadbed negligently permitted to remain in bad repair is not among the ordinary and natural risks that are assumed by a trainman, and is not assumed unless it becomes known to him, or is so obvious that by the exercise of ordinary care on his part it would be observed. Smith v. Erie R. Co. (N. J. Err. & App.) 302

11. A servant has the right to take it for granted that his master has performed his duty by exercising reasonable care for the servant's safety in furnishing a safe place for work and safe appliances, until he is warned or notified of a danger arising from the master's negligence, or until the danger becomes so obvious that a reasonably prudent servant under the circumstances would observe it. Id.

12. Undertaking to work as brakeman, or continuing at work without complaint, with knowledge that the railroad company habitually exceeds the speed fixed by ordinance in running trains through a municipality, is an assumption of the risk of such excess of speed so far as the protection of the ordinance is concerned. Martin v. Chicago R. I. & P. R. Co. (Iowa) 698

Fellow servants and their negligence.

13. Trackmen charged with the inspection and repair of the tracks and roadbed are not fellow servants of a trainman, so as to absolve the master from liability for injury to the latter by the negligence of the former. Smith v. Erie R. Co. (N. J. Err. & App.) 302

14. A railroad company is responsible for the negligence of trackmen charged with the inspection and repair of the tracks and roadbed, where such negligence causes injury to a trainman traveling thereon. Id.

15. Servants to whom a master delegates his duty of furnishing a safe place for work and safe appliances are not fellow servants engaged in a common employment with those for whose reasonable safety the duty is imposed upon the master. Id.

16. The negligence of a fellow servant does not relieve the master from liability to

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a coservant for an injury which would not have happened had the master not been negligent himself. Loveless v. Standard Gold Min. Co. (Ga.) 596

17. A railroad section hand thrown from a hand car by the application of the brakes by a brakeman, without warning, on the signal of the foreman, cannot hold the railroad company liable for the resulting injuries, under a statute making an employer liable for injuries caused by negligence of a fellow servant who at the time is acting in the place and performing the duty of the employer in that behalf, the person injured conforming at the time of the injury to the order of some superior having authority to direct. Thacker v. Chicago, I. & L. R. Co. (Ind.) 792

Liability of master to third persons.

18. A master is not responsible for a wrong done by his servant without his authority, and not for the purpose of executing his orders or doing his work. Holler v. Ross (N. J. Err. & App.) 943

19. A person employed to watch the personal property of a company, stored upon the real property of another, will not be deemed to be acting within the line of his duty if he shall shoot a person trespassing upon the realty, because that person refuses to go off the premises, or to halt, or to throw up his hands, at his command. Id.

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Master and servant; negligence of fellow servant; in use of defective appliance; assumption of risk. 597

Injury by servant acting in excess of authority. 315

Injury by servant in preventing damage or loss to master's property; acting in excess of authority; shooting of trespasser by servant. 944

Liability for negligence of servant in absence of contractual relation; independent contractors with government; *respondeat superior*. 796

Binding effect on railroad company of ticket agent's statements. 742

Master's duty to furnish suitable machinery and appliances; who are fellow servants. 303

Injury to servant; *res ipsa loquitur*; failure to provide suitable appliances. 786

Injury to employee by gas in mine; negligence of fire boss whom master is required by statute to employ; who are fellow servants. 708

Running train at speed in violation of ordinance; who entitled to protection of ordinance; right of employee to presume that company will obey law; effect of custom on liability; continuance of employment as waiver of right to damages; assumption of risk; contributory negligence. 698

MAXIMS.

1. Æquitas agit in personam. Schmaltz v. York Mfg. Co. (Pa.) 907

2. Ejusdem generis. Chicago Union Traction Co. v. Chicago (Ill.) 631

3. Fiat justitia ruat cœlum. Missouri, K. & T. R. Co. v. Merrill (Kan.) 711

4. Interest reipublicæ ut sit finis litium. MacDonald v. Grand Trunk R. Co. (N. H.) 448

5. Nemo tenetur seipsum accusare. State v. Height (Iowa) 437

6. Noscitur a sociis. Chicago Union Traction Co. v. Chicago (Ill.) 631; State, Children's Seashore House, Prosecutor, v. Atlantic City (N. J. Err. & App.) 947

7. Nullum tempus occurrit regi. Norrell v. Augusta R. & Electric Co. (Ga.) 401

8. Nullum tempus occurrit reipublicæ. Id.

9. Res ipsa loquitur. Duntley v. Inman, P. & Co. (Or.) 785

10. Sic utere tuo. Boston Ins. Co. v. Chicago, R. I. & P. R. Co. (Iowa) 801

11. Sic utere tuo ut alienum non lædas. Parks v. State (Ind.) 190; *Ex parte* Mayor of Birmingham (Ala.) 572; Boston Ins. Co. v. Chicago, R. I. & P. R. Co. (Iowa) 801

12. Stare decisis. Missouri, K. & T. R. Co. v. Merrill (Kan.) 711

13. Volenti non fit injuria. First Nat. Bank v. Sargent (Neb.) 296; Martin v. Chicago, R. I. & P. R. Co. (Iowa) 698

14. When a court of equity has taken jurisdiction for one purpose, it will go on and do complete justice between the parties, even to the extent of determining legal rights. Freer v. Davis (W. Va.) 556

NOTES AND BRIEFS.

Qui facit per alium facit per se. 797

Res ipsa loquitur. 786, 815

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Which of two innocent persons must bear loss. 206, 575

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MENTAL HEALING.

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Requirement of License as a Denial of Due Process of Law, see CONSTITUTIONAL LAW, 13.

MILL.

NOTES AND BRIEFS.

What constitutes. 817

MINES.

Liability of Mine Operator for Injuries to Miner, see MASTER AND SERVANT, 9.

1. An agreement whereby certain lands, in consideration of $50, are leased for the sole purpose of boring and operating for oil and gas, and laying pipes and building tanks, etc., thereon to take care of the products, for the period of fifteen years; with a

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provision that the lessee shall complete one well on the premises within one year from its date, or pay the lessor a rental of 50 cents an acre for each year the lease may remain in full force after the first year; immediately followed by the stipulation that the $50 is to pay all rentals on the lease for the period of one year from the date thereof, and that when the first well is completed "then all cash rentals shall cease,"—does not bind the lessee to do anything further after completing one well on the premises; and upon his abandonment of further operations for more than eighteen months, leaving the well unprotected, so that it caves in and partially fills up, the lessor has the right to lease the land to another. Parish Fork Oil Co. v. Bridgewater Gas Co. (W. Va.) 566

2. The mere drilling of a well and the discovery of oil do not give a vested interest in the oil to the lessees in an oil and gas lease providing for the completion of one well within a year, or the payment of a stipulated rental for each year the lease may remain in force, so as to give them the right to cease operations, refuse to develop the property, and simply hold it for speculative purposes, but merely vests in them the right to produce and take the oil in accordance with the terms of the contract. Id.

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Intoxication of Injured Person Which Retarded Recovery, see DAMAGES, 2.

MORTGAGE.

Sheriff's Deed on Foreclosure, see JUDICIAL SALE.

A deed absolute in form will be treated as a mortgage when it is given to secure payment of a debt, although the parties may have agreed that upon default of payment the deed shall become absolute. First Nat. Bank v. Sargent (Neb.) 296

MOTIVE.

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As element of civil wrong. 334

MUNICIPAL CORPORATIONS.

Jurisdictional Amount in Suit to Restrain Issuance of Bonds, see COURTS, 3.

Adverse Possession as against Municipality, see ADVERSE POSSESSION, 1.

Negligent Construction and Maintenance of Bicycle Path, see HIGHWAYS, 3–6.

Negligent Construction and Maintenance of Highways, see HIGHWAYS.

Compelling Street Railways to Clean Street between Tracks, see STREET RAILWAYS, 2.

See also PUBLIC IMPROVEMENTS.

Power to administer trust.

1. A municipality may take property in trust for the education of poor white male orphans under statutory authority to take gifts by devise, and providing for the assistance of charitable organizations, and for the good order, health, good government, and general welfare of the city. Clayton v. Hallett (Colo.) 407

2. The capacity of a municipality to take property in trust is to be determined, not at the testator's death, but when the devise is, by the terms of the will, to take effect. Id.

Ordinances and regulations.

Regulation of Construction of Buildings, see BUILDINGS.

Power to Regulate Street Railroad Rates, see CARRIERS.

3. Invalid ordinances are not ratified by a provision in a new municipal charter preserving and continuing in force ordinances which had been adopted under the old charter. Bostock v. Sams (Md.) 282

4. An ordinance requiring all street railways to pave, repave and keep in repair the space between their tracks and between the rails of their tracks, and for the space of 1 foot outside of each outer track, is an invalid assumption of the power of taxation, and cannot be sustained as an exercise of the police power. Fielders v. North Jersey Street R. Co. (N. J. Err. & App.) 455

5. A municipal corporation cannot, under the general welfare clause, prohibit one from carrying on a lawful vocation on Christmas Day, when there is nothing in the character of the business which is calculated to interfere with the peace, good order, and safety of the community. Watson v. Thomson (Ga.) 602

Contracts.

6. The incorporation of a statute limiting the hours of labor on public works into a contract for the construction of a sewer does not make the provisions thereof binding on the contractor, if the statute is invalid, or estop him from contesting its validity. Cleveland v. Clements Brothers Constr. Co. (Ohio) 775

Indebtedness.

Duty of Federal Court to Follow State Decisions Relating to, see COURTS, 6.

7. Provision for a mortgage on a waterworks system to be obtained with the proceeds of bonds which the mortgage is to secure does not imply an indebtedness on the part of the mortgagor within a constitutional provision limiting municipal indebtedness, when the bonds are to be paid out of a sinking fund to be provided by a special tax on the property within the municipality. Swanson v. Ottumwa (Iowa) 620

8. The issuance of bonds by a municipality to procure funds for a water supply,

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which are payable out of a sinking fund to be provided by a special tax upon the property within the municipality, and for which there can be no general liability on the part of the city, does not create an indebtedness within the meaning of a constitutional limitation of municipal indebtedness. Id.

9. A constitutional provision that no city shall become indebted beyond a certain limit, "in any manner or for any purpose," cannot be evaded by making a present levy of an annual tax, to extend over a long period of years, for the payment of interest-bearing bonds, with the proceeds of which a municipal water supply is to be immediately procured, on the ground that it is merely anticipating the future revenue for present use. Ottumwa v. City Water Supply Co. (C. C. App. 8th C.) 604

NOTES AND BRIEFS.

Municipal corporations; power of legislature over; limitation of powers of; limiting hours of labor on public contracts. 776

Limitation of powers of, to those specified by charter; right to take property in trust for educational and charitable purposes; education of orphans as charity; effect of limiting benefits to "white" orphans; how question of city's capacity to execute trust may be raised. 410

Ordinance restricting use of property; necessity of uniform rule of action; effect of arbitrary will of governing authorities; right of property owner to judicial determination of question of nuisance. 282

Duty of, to abate nuisance by obstruction of street. 573

Presumption of reasonableness of ordinance; police regulations as to streets. 666

Running of prescription against interest of, in highway. 101

Failure to keep highway in repair; liability for injuries sustained by; how enforced; necessity of notice of defects; ordinance requiring street railway to pave street; validity of. 456

Construction of bicycle path by city; liability for injury caused by defect in; duty to erect barriers to prevent people riding into curb or gutter; liability for insufficient lighting of street. 346

Power to erect public buildings; what included in; lease of public buildings; interference by courts with discretionary powers of municipal corporations. 723

Liability for damming back water of stream. 853

Powers of, as to establishment and operation of ferries. 513

Power of, to authorize obstruction of navigable waters. 77

Power to prevent work on legal holiday. 602

Right to regulate rates of fare on street railroads; to require furnishing of transfers; strict construction of powers of; con- to use of streets by railway as contract. 639

Effect of limitation of municipal indebtedness upon the acquisition of a water supply or sewer system. 604

Limitation of indebtedness; what constitutes indebtedness; obligations payable out of special fund to be raised by taxation, or from proceeds of waterworks, etc. 607

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NAVIGABLE WATERS.

See WATERS.

NEGLIGENCE.

Blasting; Liability for Injuries Resulting from, see BLASTING.

Injuries to Passengers, Liability of Carrier, see CARRIERS.

Injuries to Travelers from Defects in Highways, see HIGHWAYS, 4–6.

Validity of Contract Exempting Master from Liability for, see MASTER AND SERVANT, 1; CONTRACTS, 3.

Causing Injury to Servant of Another, see MASTER AND SERVANT, 4.

Allegations of, see PLEADING.

In Delivering or Sending Telegram, see TELEGRAPHS.

Question of Law or Fact, see TRIAL, 4.

See also DAMAGES; MASTER AND SERVANT; PHYSICIANS AND SURGEONS, 3, 4; PROXIMATE CAUSE; STREET RAILWAYS.

1. When the owner of dangerous premises knows, or has good reason to believe, that children so young as to be ignorant of the danger will resort thereto, he is bound to take such precautions to keep them from such premises, or to protect them from injuries likely to result from the dangerous condition thereof while there, as a man of ordinary care and prudence, under like circumstances, would take. Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.) 920

2. A railroad company is liable for injury to a child by a turntable to which children were in the habit of resorting, with the knowledge of the company and its employees, where it took no means to prevent the children from playing upon the turntable, and failed to keep it guarded or properly fastened. Id.

See also RAILROADS, 2, 3.

3. One is not guilty of negligence in sleeping with a child coming down with smallpox, where she does not know that there is any smallpox in the neighborhood, and has no reason to doubt the mother's statement that she supposes the child's ailment to be chicken pox, so as to prevent her recovery for injuries caused by contracting the disease, from one whose negligence induced it in the child. Henderson v. O'Haloran (Ky.) 718

4. One who attempts to take fish from a

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private lake contrary to law, knowing that it is guarded by a watchman with a gun which is sometimes discharged, cannot recover for a wound unintentionally inflicted upon him by a shot from the gun, although it was negligently fired. Magar v. Hammond (N. Y.) 315

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Negligence; injury caused by acts of two parties; who liable. 575

In absence of violation of legal duty to exercise care; co-operation of wrongful act of plaintiff to produce damages sustained; unforeseen results of act; as to trespassers. 315

Effect of increase of injury because of condition of party injured; failure of injured party to exercise care; pre-existing tendency to disease; proximate cause. 496

Presumption of, from happening of accident. 315

Presumption of, from happening of accident to employee; contributory negligence. 303

Presumption of, from lurching or stoppage of train causing passenger to fall or be thrown from car. 110

Liability for natural and probable consequences of act. 712

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In maintaining dangerous attractions for children; turntables; contributory negligence of child. 921

Subsequent precautions as admission of, in case of accident. 119

Sufficiency of general allegation of, in complaint; presumption of, in case of killing of stock on railroad. 209, 211

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NUISANCES.

Pillars erected in front of a building so as to extend 22 inches onto the sidewalk are a public nuisance. First Nat. Bank v. Tyson (Ala.) 399

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Obstruction of street as; duty of city to abate. 573

Encroachment upon street as. 400

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Lawful acts as. 422

OFFICERS.

Right of Peace Officer to Kill Fleeing Person, see HOMICIDE, 1.

A member of a board of education of a school district in a city having a population of over 1,500, organized under the provisions of Neb. Comp. Stat. chap. 79, subd. 14, declaring school districts in such cities to be bodies corporate, and prescribing the powers and duties of boards of education, is a ministerial officer within the meaning of the term as used in Neb. Crim. Code, § 180, providing for the punishment of certain public officers for malfeasance in office. State v. Loechner (Neb.) 915

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Officers; member of board of education as. 916

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As part of realty; injunction to restrain extraction of. 557

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See MUNICIPAL CORPORATIONS, 4, 5.

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OSTEOPATHY.

Discrimination in Favor of, see CONSTITUTIONAL LAW, 8.

License of, see PHYSICIANS AND SURGEONS, 2.

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Osteopathy; as practice of medicine. 188

PARENT AND CHILD.

Legitimation of Bastard in One State as Affecting His Status in Another, see CONFLICT OF LAWS, 4.

Release of Master by Father of Minor Servant, see CONTRACTS, 3.

Right of Mother, after Divorce, to Maintain Action for Killing of Child, see DEATH, 1.

Criminal Responsibility of Father for Refusing to Permit Medicine to be Administered to Child, see INFANTS, 1.

Statement of the residence of the parents of a child about to be adopted, in a written consent filed by them, is a sufficient compliance with a statute requiring the residence of the parents of the child to be stated among other things in a petition for adoption. Flannigan v. Howard (Ill.) 664

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Rights of adopted child. 664

Duty of parents to children; effect of divorce decree; abandonment by father as renunciation of claim to child; subrogation of mother to rights of father; right of mother to maintain action for wrongful killing of child. 508

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Compulsory education of children; as infringement of rights of parents. 435

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To Actions Generally, see ACTION OR SUIT, 4–6.

PARTITION.

A petition for partition, to which persons having an interest in the land are not made parties, cannot be maintained. Johnson v. Johnson (Mo.) 748

PARTNERSHIP.

NOTES AND BRIEFS.

Partnership; debts of, are debts of each partner personally; rights in property of, when insolvent. 783

Garnishment of uncertain amount due from one to the other. 376

PASSENGERS.

Duties and Liabilities of Carriers toward, see CARRIERS.

PAYMENT.

Payment to Agent, see PRINCIPAL AND AGENT, 4.

That a party to whom money due another is paid is not in possession of the evidences of the indebtedness is not conclusive of the question of authority to make the collection, but such authority may be inferred from the fact that similar acts, through a series of transactions relating to a like business, have been uniformly ratified by the creditor. Harrison Nat. Bank v. Austin (Neb.) 294

PERSONAL INJURIES.

See DAMAGES; MASTER AND SERVANT; STREET RAILWAYS.

PESTHOUSE.

Unlawful Location as Proximate Cause of Spread of Contagious Disease, see PROXIMATE CAUSE, 5.

PHOTOGRAPHS.

Publication of, for Advertising Purposes as Constituting a Libel, see LIBEL AND SLANDER.

Unauthorized Publication of, for Advertising Purposes, see PRIVACY.

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PHYSICIANS AND SURGEONS.

License; Statute Requiring, as an Unlawful Discrimination, see CONSTITUTIONAL LAW, 7, 8.

Privileged Communication, see EVIDENCE, 7.

Affidavit and Information for Practising Medicine without a License, see INDICTMENT AND INFORMATION, 1.

1. A magnetic healer who styles himself "Professor," and holds himself out to the public as a healer of disease, and whose treatment in a particular case consisted of holding an affected limb and rubbing it, is within the terms of a statute requiring a license of persons who announce to the public a readiness to cure disease, or who use in connection with their names the word "Professor," or any word intended to designate them as practitioners of medicine in any of its branches. Parks v. State (Ind.) 190

2. The practice of osteopathy is not within the provisions of a statute making the practice of medicine or surgery without a license a misdemeanor. State v. McKnight (N. C.) 187

3. The skill required of a physician in treating a dislocated and broken bone is not limited to that of ordinary skilful and prudent physicians of the vicinity, if that does not equal the skill and prudence possessed by physicians in similar communities. Burk v. Foster (Ky.) 277

4. A physician is not absolved from liability for failure to exercise proper skill in a particular case by the fact that the result is as good as is usually obtained in like cases. Id.

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Meaning of "practice of medicine;" statute requiring license for; constitutionality of; as police regulation; exemption of nurses as osteopaths; class legislation; magnetic healer as physician; who is a "surgeon." 190

Meaning of words, "medicine," "physician;" what constitutes practice of medicine; osteopathy as. 187

PIERS.

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As obstruction to navigation. 68

PLEADING.

See also INDICTMENT, ETC.

1. A general allegation of negligence, while good against a general demurrer, is not good against a demurrer on the ground of uncertainty, under Idaho Rev. Stat. § 4168, subd. 2, requiring the complaint to contain a statement of the facts constituting the cause of action, in ordinary and concise language. King v. Oregon Short Line R. Co. (Id.) 209

2. In an action for injury to a child by a turntable, a petition which alleges that plaintiff was induced by other small children, with the knowledge and consent of defendant, its agents and servants, and by the invitation of defendant, to come to the turntable, is sufficient as against a demurrer *ore tenus* on the ground that there was no allegation of the authority of any agent of defendant to invite plaintiff upon its turntable, or any facts which constitute such express invitation. Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.) 920

3. Negligence on the part of the foreman in charge of repairmen, which caused injury

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to one of them, is charged by an allegation that he negligently gave the brakeman on a hand car a signal to stop it suddenly and quickly, when it was going at the speed of 20 miles per hour, without giving other persons on the car notice thereof, obedience to which would necessarily endanger the lives and limbs of such persons; and that by reason of the giving of such order, and its obedience, the injuries complained of were received. Thacker v. Chicago, I. & L. R. Co. (Ind.) 792

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POLICE POWER.

See CONSTITUTIONAL LAW, 15.

Power of Municipality to Compel Street Railways to Pave between Tracks, see MUNICIPAL CORPORATIONS, 4.

POLITICAL PARTIES.

See VOTERS AND ELECTIONS.

POSTOFFICE.

1. A railroad company carrying mail under contract with the United States government owes no duty to the sender of a particular registered package of mail, which will give him a right of action in case the package is destroyed through the negligence of the company's servants. Boston Ins. Co. v. Chicago, R. I. & P. R. Co. (Iowa) 796

2. The operation of trains and care of switches are not duties, the personal performance of which the exercise of ordinary care requires of a railroad company under its contract to carry the mails, so as to give the sendee of a package a right of action against it for the loss of the package through negligence in such performance. Id.

PREJUDICIAL ERROR.

See APPEAL AND ERROR.

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Title Acquired by, see ADVERSE POSSESSION.

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Prescriptive right to obstruct navigable stream. 79

Prescriptive right to dam back water of stream. 838

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PRINCIPAL AND AGENT.

Burden of Proving Agent's Authority to Indorse Commercial Paper, see EVIDENCE, 2.

Liability of Principal for Wilful or Negligent Acts of Agent, see MASTER AND SERVANT.

1. A superintendent of a mill, with authority to manage the running of it, has no implied authority to indorse commercial paper given in payment of mill accounts, where such power is not necessary to the performance of the duties imposed on him, and he is not accustomed to perform acts of a similar nature. Jackson Paper Mfg. Co. v. Commercial Nat. Bank (Ill.) 657

2. One purchasing from an agent, upon his indorsement, commercial paper payable to the order of his principal, cannot imply authority to make the indorsement from the facts that he had seen the agent in charge of the principal's mill, engaged in the management of his business, opening mail, giving orders to employees, and countersigning checks drawn by the principal for supplies. Id.

3. Rightful possession by an agent of a check payable to his principal gives no authority to indorse and transfer title to it. Id.

4. Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence and acquainted with business usages would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal. Harrison Nat. Bank v. Austin (Neb.) 294

5. The drawee of a check, having notice of the agency of the indorser by the form of his signature, is bound to take notice of the limitations upon his authority. Jackson Paper Mfg. Co. v. Commercial Nat Bank (Ill.) 657

6. An agent having charge of buildings to be leased for his principal, with authority to make necessary repairs, is liable for injuries to tenants caused by his failure to make them. Lough v. John Davis & Co. (Wash.) 802

NOTES AND BRIEFS.

Fraud of agent inducing payment of money; right to recover from agent where money has been paid over to principal. 731

Power of agent to indorse commercial paper; burden of proving authority; duty to take notice of limits of authority. 658

Liability of agent to third party for misfeasance or malfeasance. 802

Effect of statement of ticket agent to bind principal. 742

PRIVACY.

Publication of Likeness for Advertising Purposes as Constituting a Libel, see LIBEL AND SLANDER.

The unauthorized publication of one's likeness by another person for advertising purposes will not support an action for injunction or for damages on the theory that it is an invasion of a "right of privacy." Roberson v. Rochester Folding Box Co. (N. Y.) 478

NOTES AND BRIEFS.

Right of; publication of woman's portrait for advertising purposes as an invasion of; injunction to protect. 479

PRIVATE WAY.

Conversion into Public Highway by User, see HIGHWAYS, 1.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 7.

PROXIMATE CAUSE.

1. To render a railroad company liable for the death of a brakeman who fell from the train while it was running at greater speed than he had consented to, such speed must have been, not only negligent, but the operating cause of the injury. Martin v. Chicago, R. I. & P. R. Co. (Iowa) 698

2. The act of a clerk delivering mail from a moving train, in pushing a mail grab out 13 or 14 inches from the car to serve as a support as he leans forward to hand out the mail, by reason of which the grab comes in contact with a semaphore post and is thrown back, catching and crushing his hand against the side of the car, is the proximate cause of the injury, where there is no necessity to make any use whatever of the grab, which is designed to be used only in collecting mail from cranes; and the carrier is not liable, although it is negligent in placing the post too near the track. Georgia S. & F. R. Co. v. Cartledge (Ga.) 118

3. The negligent jolting of a train, by which a passenger is hurled through the rear door and left in an insensible condition upon the track, is the proximate cause of his death, where he is subsequently run over and killed by an engine belonging to another company which the first company knew had a right to use the track, and was likely to use it at any time. Southern R. Co. v. Webb (Ga.) 109

4. While the general rule is that if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still, if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act. Southern R. Co. v. Webb (Ga.) 109

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5. The contraction of smallpox by a guest from an inmate of the house, who is conceded to have contracted the disease because of the unlawful location of a pest hospital near by, is a proximate result of such unlawful location, so as to render the city making it liable for the injury thereby caused to the guest. Henderson v. O'Haloran (Ky.) 718

NOTES AND BRIEFS.

Proximate cause; what is; in case of negligent injury; pre-existing tendency of party injured to disease; injury increased by delirium tremens caused by voluntary use of alcohol. 496

Of injury by post near railroad track; negligence of party injured. 118

Effect of intervening agency; act of third person; of death of passenger thrown upon track and killed by engine of other company; as question for jury. 110

Of damage caused by bulging of railroad embankment. 83

PUBLIC BUILDINGS.

Use of School Buildings for Theatrical Performances, see SCHOOLS, 3.

NOTES AND BRIEFS.

Power of municipality to erect and control; right to lease. 723

PUBLIC IMPROVEMENTS.

Power of Municipality to Compel Street Railways to Pave between Tracks, see MUNICIPAL CORPORATIONS, 4.

1. To provide a sewerage system for a designated district, the legislature may, within reasonable limits, determine that the cost shall fall upon such district, and fix the principles upon which it shall be apportioned. Smith v. Worcester (Mass.) 728

2. When the legislature places the cost of sewers for a particular district upon such district, individual landowners within it cannot show that they have received no benefit, because that question has been decided by the legislature. Id.

NOTES AND BRIEFS.

Public improvements; liability of contractor engaged in, for injuries caused by; in absence of negligence. 421

Necessity of special benefits to justify assessment for. 728

PUBLIC LANDS.

A decree requiring the owner of a timber-culture claim to public land to convey it to a partnership of which he is a member, in accordance with his agreement to do so, does not remove the claimant's interest in the property from the protection of the statute exempting such claims from liability to the satisfaction of debts contracted before the issuing of the final certificate therefor, even in favor of debts of the partnership. Adams v. Church (Or.) 782

NOTES AND BRIEFS.

Timber-culture claim; exemption of, from debt contracted prior to issuing of final certificate. 783

PUBLIC POLICY.

Contract Violative of Public Policy, see CONTRACTS, 2.

QUESTIONS FOR JURY.

See TRIAL, 3–6.

QUIETING TITLE.

NOTES AND BRIEFS.

Extent of jurisdiction of equity over bills for. 426

RAILROAD RELIEF ASSOCIATION.

1. A stipulation in a benefit certificate of a railroad relief association, providing that, where members of that department elect to accept the benefits provided by the certificate, they must waive all right of action against the railroad company for injury received, is valid. Oyster v. Burlington Relief Dept. (Neb.) 291

2. The full penalty prescribed by statute having been recovered for the unlawful killing of a railroad employee who was a member of the voluntary relief department of the railroad company, the beneficiary named in the certificate of such employee cannot maintain a cause of action against the railroad company on such benefit certificate. Id.

NOTES AND BRIEFS.

Railroad relief association; provision in certificate of, as to waiver of right of action for injuries; prosecution of suit on behalf of children as bar to action on certificate by widow as beneficiary; where full penalty prescribed by statute has been recovered. 292

RAILROADS.

Obstruction of River by Railroad Embankment, see DAMAGES, 1.

Right to Close Entrance to Navigable Cove without Compensation under Legislative Authority, see EMINENT DOMAIN, 3.

Injuries to Employees, see MASTER AND SERVANT.

Liability for Loss of Mail, see POSTOFFICE.

See also CARRIERS; EMINENT DOMAIN; RAILROAD RELIEF ASSOCIATION.

1. A railroad company does not, by permitting a circus to exhibit on its vacant land adjoining its switch yard, invite citizens to cross the yard to reach the show grounds, so as to be charged with the duty of exercising care to protect them from danger, and rendered liable to one injured by the operation of trains while attempting to cross the yards after having been expressly told to keep out, where the show grounds can be reached without danger by the highway, which is merely a somewhat longer route. Clark v. Northern P. R. Co. (Wash.) 508

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2. A railroad company is liable for injury to a child of immature years who gets upon the running board of an engine as it enters a playground, according to a general custom of children playing there, well known to the railroad employees, and who is injured while attempting to jump therefrom at a point where children have been, for a long time previous, in the habit of alighting, even though the employees in charge of the train have no actual knowledge of the child's presence upon the engine, since under the circumstances they should anticipate the presence of children upon the train, and take measures to protect them. Ashworth v. Southern R. Co. (Ga.) 592

3. Where a number of children ranging in age from six to fifteen years are, with the knowledge and without the disapproval of the employees of a railroad company in charge of its trains, permitted to board and ride upon the trains while they are passing over a side track through a playground of the children to a point beyond, and while they are returning from such point to the main line of the road, the children alighting from the trains at the limits of the playground, both going and returning; and this custom is a continuous one,—it is the duty of the employees of a train who are aware of this custom, to anticipate that when the train enters the playground the children will attempt to ride upon it and alight from it at the point where they have been accustomed to do so; and they are under a further duty, consequent upon the first, to take proper measures to prevent injury to such children. Id.

See also NEGLIGENCE, 2.

4. The only duty which a railroad company owes to a trespasser upon or about its property is not to injure him wantonly or wilfully; but this rule does not relieve the company, under all circumstances, from anticipating the presence of a trespasser upon its property, and from taking proper precautions to prevent injury to him. Id.

NOTES AND BRIEFS.

Railroads; discrimination against, in statute as to condemnation of land; power of individual to own and operate. 582

Intersection of street railways with; right to compel. 489

Compelling construction and maintenance of cattle guards by; requiring to elevate tracks and maintain viaducts; special tax on, for maintaining railroad commission. 666

Obstruction of stream by railroad embankment. 83

Obstruction of waters of stream by railroad bridge. 863

Injury to children playing on turntable; implied invitation to children. 923

Liability of company transferring defective car to other company for injury thereby to latter's employees. 712

Duty of, to persons attending exhibition on railroad property; toward infants trespassing on tracks in switch yards; effect of contributory negligence. 508

Contract with, by father to relieve from liability for injuries to minor employee; validity of; construction of. 116

RAISED NOTE.

Liability of Maker to Innocent Holder, see BILLS AND NOTES, 2.

RAPE.

NOTES AND BRIEFS.

Against child as act of criminal violence. 588

Admissibility of evidence of other acts of sexual intercourse on trial for; of intercourse with other persons. 438

REAL PROPERTY.

Conveyances of, see DEEDS.

Grant of Easement as Being One Appurtenant to Land, and Not in Gross, see EASEMENTS.

Estoppel by Deed as to After-Acquired Title, see ESTOPPEL, 1–3.

Passing of Estate by Entireties under Husband's Assignment for Benefit of Creditors, see INSOLVENCY.

Every purchaser of land takes title subject to any defects, reservations, and exceptions that are referred to in the deed by which he acquires title, or that may be ascertained by reference to his chain of title as spread forth upon the public record. Mitchell v. D'Olier (N. J. Err. & App.) 949

NOTES AND BRIEFS.

Real property; forfeiture of title to, by nonentry or nonpayment of taxes. 557

RECEIVERS.

1. A creditor of an embarrassed corporation, who, for the purpose of getting control of its plant and shielding it from its creditors, collusively obtains the appointment of a receiver, and thereby prevents the owner of the premises on which the plant is located from enforcing his claims for rent, will render himself personally liable for the rent accruing during the receivership. Link Belt Machinery Co. v. Hughes (Ill.) 673

2. A landlord of an embarrassed corporation, who intervenes in receivership proceedings against it, asserting a prior lien for rent, and asking leave to distrain therefor, does not waive or forfeit his rights on the ground of having assented to the proceedings, where he has consistently insisted on the priority of his claim. Id.

3. The owner of property leased to an embarrassed corporation, for which a receiver is collusively appointed at the instance of one of its creditors, does not, by accepting the proceeds in the receiver's hands as a payment on his claim for rent, exhaust his remedy so as to prevent the court from requiring the creditor to pay the deficiency. Id.

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NOTES AND BRIEFS.

Receivers; what necessary to obtain appointment of; appointment as incident to grant of injunction. 557

Liability for rent of premises occupied by; fraud in procuring appointment of. 677

RECORDS.

Recording Contract of Conditional Sale, see SALE, 4.

REGISTERED MAIL.

Liability of Mail Carrier to Sender for Loss of, see POSTOFFICE.

RELEASE.

Of Master for Damages That may Arise from Future Injuries, see CONTRACTS, 3.

RELIGIOUS FREEDOM.

Reading Bible in Schools as Infringement of, see CONSTITUTIONAL LAW, 2; SCHOOLS, 1.

REMOVAL OF CAUSE.

After the dismissal of an action in a Federal court to which it has been removed from a state court, without prejudice and without a determination of the merits, plaintiff may again invoke the jurisdiction of the state court, and the latter may proceed to a determination of the controversy irrespective of, and unaffected by, the former removal to, or jurisdiction in, the Federal court. Rodman v. Missouri P. R. Co. (Kan.) 704

RES GESTÆ.

See EVIDENCE, 5, 6.

RES JUDICATA.

See CRIMINAL LAW; JUDGMENT, NOTES AND BRIEFS.

RÉSUMÉ.

For Résumé of Contents of Book, see p. 961.

RIGHT OF PRIVACY.

Unauthorized Publication of Likeness for Advertising Purposes, see PRIVACY.

Publication of Likeness for Advertising Purposes as Constituting a Libel, see LIBEL AND SLANDER.

RIPARIAN PROPRIETORS.

See WATERS.

ROUND-TRIP TICKETS.

Rights of Holders, see CARRIERS, 6–8.

SALE.

1. Notice by a purchaser, before the time for the performance of the contract, that he will not accept the goods, operates at common law as a breach of the contract; and the only remedy of the vendor is an action to recover damages for such breach. Oklahoma Vinegar Co. v. Carter (Ga.) 122

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2. A written contract for the purchase and sale of goods can only be rescinded by the consent of both parties, and the buyer cannot release himself therefrom by countermanding his order before delivery, and notifying the seller that he will not accept the goods if shipped. Id.

3. One who ships goods to a purchaser after notice of countermand cannot maintain an action to recover the contract price of the goods, under a statute providing that, where a purchaser refuses to take and pay for goods bought, the seller may store the property for the vendee and sue him for the entire price; and his only remedy is an action for the breach of the contract. Id.

4. Failure to record a contract of conditional sale reserving title to a machine which becomes a fixture in a manufacturing plant will make it of no effect as against a subsequent bona fide mortgage of the whole plant, under a statute making conditional sales of property placed in possession of the buyer void as against subsequent mortgages in good faith, unless the contract is recorded. Schmaltz v. York Mfg. Co. (Pa.) 907

NOTES AND BRIEFS.

Sale; effect of countermanding order; measure of damages in case of. 122

When title to goods sent C. O. D. passes. 731

SCHOOLS.

Reading of Bible in, as Infringement of Religious Freedom, see CONSTITUTIONAL LAW, 2.

Infringement of Rights of Parents by Compulsory Education Law, see INFANTS, 2.

Ministerial Nature of Office of Member of Board of Education, see OFFICERS.

1. Enforced attendance upon religious services is forbidden by the Nebraska Constitution; and pupils in a public school cannot be required, either to attend such services or to join in them. State *ex rel.* Freeman v. Scheve (Neb.) 927

2. Whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities; but whether the practice of Bible reading has taken the form of sectarian instruction is a question for the courts to determine upon evidence. Id.

3. Permitting the use of a school building for theatrical performances as a business, whether in combination with its use for school purposes or otherwise, is a breach of faith, and will be enjoined, where the building has been constructed with the proceeds of bonds based upon a tax voted to be imposed to erect a building for school purposes, though the municipal authorities may make such casual and incidental use of the building as is not inconsistent with, or prejudicial to, the main purpose for which it is erected. Sugar v. Monroe (La.) 723

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NOTES AND BRIEFS.

Schools; statute compelling education of children; validity of. 435

Reading of Bible in, as "sectarian instruction;" use of school building for religious purposes. 928

Members of board of education as ministerial officers. 916

SEARCH.

Searching the person of one accused of crime and taking therefrom the instruments, devices, and tokens used in the commission of the crime, is not an unreasonable search or illegal seizure, within the meaning of the constitutional provision against such searches and seizures. State v. Edwards (W. Va.) 465

NOTES AND BRIEFS.

Search; admissibility in evidence against accused of articles obtained by. 466

SELF-DEFENSE.

See HOMICIDE.

SEQUESTRATION.

An application to set aside a seizure by judicial sequestration of land belonging to a decedent's estate, and to bond the same, is properly refused where there are conflicting claims as to its ownership, to determine which another suit is pending, and it derives its principal value from timber on it, and the probability is that it will be denuded of such timber if allowed to go into the possession of either of the claimants. Benton's Succession (La.) 135

SEWERS.

See DRAINS AND SEWERS; PUBLIC IMPROVEMENTS.

SHERIFF'S DEED.

See JUDICIAL SALE.

SPECIFIC PERFORMANCE.

Marriage does not take a parol contract to convey property in consideration thereof out of the provisions of a statute making void every agreement made upon consideration of marriage except mutual promises to marry, unless they are in writing, so that the conveyance can be enforced in equity. Hunt v. Hunt (N. Y.) 306

NOTES AND BRIEFS.

Specific performance; of contract to convey property in consideration of marriage. 308

STATUTE OF FRAUDS.

See SPECIFIC PERFORMANCE; CONTRACTS, NOTES AND BRIEFS.

STATUTES.

1. A title, "An Act Regulating the Practice of Medicine, Surgery, and Obstetrics" is sufficient to cover a definition of the practice of medicine, and to designate those who must obtain a license before engaging in such practice. Parks v. State (Ind.) 190

2. A title, "Concerning the Education of Children," is sufficient to cover matter relating to the duties of parents and guardians concerning the attendance of children at school, the appointment of a truant officer, and the definition of a misdemeanor, in failing to comply with the law. State v. Bailey (Ind.) 435

3. A title, "An Act Entitled 'An Act Amending An Act Concerning the Education of Children,' Approved March 8, 1879," sufficiently refers to the title of the former act to comply with the requirements of the Constitution as to the amendment of statutes, where the title of the former act was "An Act Concerning the Education of Children." Id.

4. The construction of a statute by the lower courts of the state of its enactment is not binding on the courts of another state. Schmalts v. York Mfg. Co. (Pa.) 907

NOTES AND BRIEFS.

Statutes; necessity of uniformity of. 582

Effect of change of phraseology or omission of word in revision of; effect of partial invalidity of; construction of; when susceptible of two interpretations; reading words into or out of a statute. 738

Sufficiency of title; amendatory act; necessity of reference to title of act amended. 435

Imposing restriction upon right to dispose of property by will; strict construction of. 664

Remedial; how construed; removal of causes; effect of, on right to bring new action in state court after dismissal in Federal court. 704

Statute of 43 Eliz. as to charitable uses; adoption of, in United States. 411

To regulate the "practice of medicine, surgery, and obstetrics;" sufficiency of title to include magnetic healers. 192

Effect of failure to prescribe punishment for breach of; construction of technical words; inquiring into purpose of enactment; meaning of word "medicine;" strict construction of penal statute. 187

Presumption as to change in rules of common law by. 771

STOCK EXCHANGE.

Seat in, as Constituting Property Passing to Trustee in Bankruptcy, see BANKRUPTCY.

NOTES AND BRIEFS.

Stock exchange; seat in, as property; right of court to order sale of. 94

STREET RAILWAYS.

Requirement as to Cleaning Street between Rails, as a Deprivation of Equal Protection of the Laws, see CONSTITUTIONAL LAW, 5.

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Defective Transfer Ticket; Ejection of Passenger Holding, see CARRIERS, 9.
Power of Municipality to Require Street Railways to Pave and Keep in Repair a Portion of the Highway, see MUNICIPAL CORPORATIONS, 4.
Regulation of Charges, see CARRIERS, 15–19.

1. No right of action is conferred upon a person injured by a defect in the pavement between the rails of a street railway track, by an ordinance requiring all street railway companies to pave and keep in repair, under the direction and to the satisfaction of the proper municipal authorities, the space between the rails of their tracks and between the tracks and for 1 foot outside of each outer track, at the same time providing that, if any company fail so to pave or keep the pavement in repair, the city authorities may cause the work to be done, and the company shall, on demand, pay the cost thereof. Fielders v. North Jersey Street R. Co. (N. J. Err. & App.) 455

2. A municipality cannot, in granting authority to a street car company to operate cars in its streets, deprive itself of the power to compel the company to clean the street between its outer rails, if the exercise of such power is necessary to the health and comfort of the people. Chicago v. Chicago Union Traction Co. (Ill.) 666

3. Electric railway companies are entitled to track connections with intersecting steam roads, where the incorporation of both classes of roads is provided for by the same statute, the various provisions of which, including those for track connections, refer "to every railroad corporation," thereby including every railroad incorporated under the provisions of the act. Re Stillwater & M. Street R. Co. (N. Y.) 489

4. To entitle a company operating a system of street railways which were originally constructed under charters granted to separate companies, to the benefit of contracts between the municipality and such companies fixing the rates of fare to be charged by them, it must show the assignment of such contracts to itself. Chicago Union Traction Co. v. Chicago (Ill.) 631

5. Authority to a street car company to lease its franchises and property does not include the right to transfer a privilege to fix the rates of fare to be charged, not exceeding a specified rate. Id.

6. A corporation organized for the purpose of leasing street railroads under the provisions of a general incorporation law which makes it subject to such regulations as the legislature may deem advisable is bound by a statute conferring on the municipality power to regulate its rates of fare notwithstanding contract rights of the lessee roads upon that subject. Id.

7. A street car company, by leasing its road and franchises, impliedly agrees that the lessee shall operate them in accordance with the provisions of its own charter, so far as the provisions of the two charters are in conflict. Id.

NOTES AND BRIEFS.

Street railways; power of city to regulate rates of; to require furnishing of transfers; charter of, as contract; assignment of charters; effect of lease to transfer franchises and privileges; effect of consolidation of companies on rights as to rates; consent of city to use of streets by, as contract. 639

As railroad; right to track connection with steam railroads. 489

Compelling lighting and watering of tracks by; right to require removal of snow from tracks. 666

Ordinance requiring street railways to keep pavement in repair; validity; liability for injury through disregard of ordinance. 456

Ejection of passenger because of mistake in transfer. 350

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Interruption of Business of Court by Noisy Use of, see COURTS, 2.
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SUBROGATION.

NOTES AND BRIEFS.

Of insurer paying loss to rights of insured. 797

SUCCESSION TAX.

See TAXES, 3–6.

SURVIVORSHIP.

As between Insured and Beneficiary Killed in Same Disaster, see INSURANCE, 9.

TAXES.

Exemptions.

1. A charitable corporation is entitled to exemption from taxation, not only on the amount of property which its charter permits it to hold, but also on the increased amount which N. J. P. L. 1890, p. 46, authorizes all charitable corporations to hold, notwithstanding a clause in this act that nothing therein contained shall be construed to exempt the property of such corporations from taxation, where the charter of the corporation contains no provision as to exemption, and the general tax law provides that all buildings used exclusively for charitable purposes, with the land whereon they are erected and which may be necessary to the fair enjoyment thereof, shall be exempt. State, Children's Seashore House, Prosecutor, v. Atlantic City (N. J. Err. & App.) 947

2. Land purchased by a charitable corporation for the purpose of removing thereto its institution after a sale of the property then occupied by it, and which, pending such sale, is occupied by a camp for the accommodation of the overflow from the main institution during the summer months, and by a one-story frame structure used exclusively as

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a kitchen and laundry for the camp, and in which no one sleeps, is not exempt from taxation under a statute which exempts all buildings used exclusively for charitable purposes, with the land on which they are erected and which may be necessary for the fair enjoyment thereof, and the furniture and personal property used therein, since neither the frame structure nor the tents are "buildings" within the meaning of the statute. Id.

Succession tax.

3. The words "intestate laws" in a statute imposing a transfer tax upon property passing by the intestate laws of the state refer to the laws which govern the devolution of estates of persons dying intestate, including applicable rules of the common law which are in force, so that the tax will be applicable to a widow's dower interest and her award under the administration laws. Billings v. People (Ill.) 807

4. Life estates may be subjected to an inheritance tax where the remainder is to lineal descendants, and exempted therefrom where the remainder is to collateral heirs or strangers, without transcending the legislative power of classification. Id.

5. A transfer tax law is not unconstitutional for lack of uniformity in imposing the tax upon lineal descendants to whom a life estate is given with remainder to lineal descendants, while lineal descendants taking a fee are exempt. Id.

6. The tax on the remainders under a will giving to certain persons life estates with remainders over in case such persons should die leaving no children is not presently payable on the death of the testator, notwithstanding the statute provides that the value of the property shall be immediately appraised, and, after deducting the value of the life estate, the tax "on the remainder shall be immediately due and payable," since the reversionary interests are incapable of valuation, and the literal language of the statute must give way to reasonable interpretation. Id.

NOTES AND BRIEFS.

Taxes; extension of statute levying, by implication; strict construction of; inheritance tax; discrimination in; on wife's dower. 808

Exemption of charities; intention to use property at future time. 947

TAXPAYER.

Right of, to Restrain Improper Use of Public Buildings, see ACTION OR SUIT, 2.

TELEGRAPHS.

Mental Anguish as Element of Damages for Delay in Delivering Telegram, see DAMAGES, 5.

1. Delivery of a telegram directed to a person in care of a railroad company at a certain place, to the ticket agent of the company there, after making extensive search for the sendee, relieves the telegraph company from further liability. Lefler v. Western U. Teleg. Co. (N. C.) 477

2. Information as to the contents of a telegram need not be given to the sendee's agent when delivery is made to him. Id.

3. A telegraph company is not liable for the loss sustained by performance of a contract closed at a price quoted in a message as changed in transmission, where the sendee, from his knowledge of the market, knew that a mistake must have occurred, and acted in bad faith, since, the contract not being binding on the sender, he cannot voluntarily perform it and throw the loss on the company. Germain Fruit Co. v. Western U. Teleg. Co. (Cal.) 575

NOTES AND BRIEFS.

Telegrams; sufficiency of delivery of. 477

Degree of care which must be exercised in transmission of; error in quotation of price; conditions on telegraph blank. 575

Failure to deliver; damages for mental suffering caused by. 398

TORTS.

See BLASTING.

TRACK CONNECTIONS.

Between Electric and Steam Railways, see STREET RAILWAYS, 3.

TRANSFER TAX.

See TAXES, 3–6.

TRANSFER TICKETS.

By Street Railway Companies, see CARRIERS, 16.

Defect in, as Justifying Ejection of Passenger, see CARRIERS, 9.

TREES.

Injunction to Restrain Cutting along Stream, see INJUNCTION, 4, 5.

TRESPASSER.

Right of Action by, for Negligent Shooting, see NEGLIGENCE, 4.

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Trespass; liability of party committing, for indirect injury resulting from. 496

Duty to person trespassing. 316

Right of trespasser to recover for injuries not wilfully inflicted; effect of passive acquiescence by owner in use of property on liability for condition of; trespass on unenclosed land by cattle; liability for injury to. 771

TRIAL.

Reception of evidence.

2. An objection that evidence offered is incompetent, immaterial, and irrelevant is sufficient if the evidence is "no evidence at all." State v. Bartlett (Mo.) 756

Questions of law and fact.

3. Whether the possession of property obtained by a trick or device was obtained

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with intent to steal is a question for the jury. State v. Edwards (W. Va.) 465

4. Ordinarily the question of negligence is one of fact for the jury, to be determined from all the facts and circumstances shown in evidence, and it is error for the court to group certain facts in evidence together, and instruct the jury that they constitute negligence. Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.) 920

5. Whether or not a consignee of goods C. O. D., who, before receiving the goods, pays the bill, which is presented by the carrier with knowledge of facts indicating that the goods are damaged, exercises due diligence in claiming a return of the money because of such damage, is for the jury, when the claim is not made before the money, by due course of mail, would be transmitted to the consignor. Hardy v. American Exp. Co. (Mass.) 731

6. The construction of notices given by a conditional seller of a machine of intention to remove it from the plant in which it was incorporated is for the court. Schmaltz v. York Mfg. Co. (Pa.) 907

Instructions.

7. Where the pleadings raise an issue of fact, and under the evidence but one finding can be justified, it is not error for the trial court to assume the existence of the fact so established, and instruct the jury accordingly. First Nat. Bank v. Sargent (Neb.) 296

8. It is not necessary, in defining duress, to state that the will must be overpowered or the party complaining thereof bereft of the quality of mind essential to the making of a contract; and an instruction that duress is an unlawful restraint, intimidation, or compulsion of another to such an extent as to induce him to do some act which he is not legally bound to do, contrary to his will and inclination, is sufficient. Id.

9. An instruction authorizing the jury, in arriving at a verdict, to bring to bear their own knowledge, observation, and experience in the business affairs of life, is erroneous when not limited to such knowledge, observation, and experience as they share in common with men generally. Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.) 920

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VENDOR AND PURCHASER.

As to Fixtures, see FIXTURES.

1. One induced to purchase a tract of land by misrepresentations as to the quantity contained is not bound to rescind *in toto* upon discovering the fraud, but may retain the tract and obtain an adjustment of equities as to the deficiency. McGhee v. Bell (Mo.) 761

2. In adjusting the equities where a tract of land is sold for a lump sum under a fraudulent representation as to the quantity it contains, compensation may be made for the deficiency at the rate per acre which would have been paid had the quantity been as represented, there being no evidence to show that one part of the tract is more valuable than another. Id.

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Contract to Use Newspaper to Influence Action of Political Convention, Validity of, see CONTRACTS, 2.

1. The legislature may recognize the existence of political parties, and within reasonable limits regulate the means by which partisan voters shall be protected in exercising individual preferences for party candidates. State *ex rel.* McCarthy v. Moore (Minn.) 447

2. A statute forbidding the printing of the name of a candidate for office in more than one column, and, in case of nomination of the same person by more than one party, forcing him to choose on which ticket his name shall be printed, and directing that, on failure to make such choice, it shall be printed on the ticket first filed, with the words "No nomination" on the others, is an unconstitutional interference with the

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rights of political parties and candidates. Murphy v. Curry (Cal.) 97

3. Prohibiting the placing on an official ballot of the name of an unsuccessful contestant for a party nomination at the primary election is a reasonable regulation, and does not violate Minn. Const. art. 7, § 7, providing that any person entitled to vote at any election shall be eligible to any elective office, since the blank space provided for by law in the official ballot, where the voters may write the name of any qualified citizen if they wish to vote for him, protects his eligibility and enables him to be elected if he receives the requisite votes. State ex rel. McCarthy v. Moore (Minn.) 447

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Closing Entrance to Navigable Cove by Construction of Railroad as a Taking of Property Requiring Compensation, see EMINENT DOMAIN, 3.

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Restraining Riparian Owner from Cutting Trees Along Bank of Stream, see INJUNCTION, 4, 5.

Restraining Upper Proprietor from Constructing Dam, see INJUNCTION, 6.

Municipal Waterworks; Issuance of Bonds as an Indebtedness within Meaning of Constitutional Limitations, see MUNICIPAL CORPORATIONS, 7–9.

See also FERRIES.

1. The right of the legislature to regulate the rights common to riparian owners does not empower it to permit a lower owner to dam the water back on the upper owner's land when necessary to do so to develop the full power of the stream, and require the upper owner to take his share of the value of the stream in money. Avery v. Vermont Electric Co. (Vt.) 817

2. The motive of a riparian owner in cutting trees along the bank of a stream whereby evaporation is accelerated, in felling them into the stream to the injury of the water, and in building dams, does not affect his legal liability for such acts. Fisher v. Feige (Cal.) 333

Obstruction of navigable waters.

3. The prohibition against obstructions in navigable waters, made by the act of Congress of September 9, 1890 (26 Stat. at L. 454, chap. 907), applies to an obstruction subsequently caused by adding material to a railroad embankment along a river, by which plastic clay was forced up in the bed of the river, although the railroad had been previously built, where it had no vested right under its charter to improve its roadbed in such a manner as to obstruct navigation. Northern P. R. Co. v. United States (C. C. App. 8th C.) 80

4. The decision by Congress that a bridge across a navigable body of water, erected under authority of a state statute which provides that it shall not unnecessarily obstruct the navigation, is lawful, is conclusive upon the state courts as to whether or not the conditions have been complied with. Frost v. Washington County R. Co. (Me.) 68

5. A bridge across navigable water will continue to be lawful until the Secretary of War orders its modification, under an act of Congress declaring it to be so, with the proviso "that such modifications are made in their present position, condition, and elevation as the Secretary of War may order in the interests of navigation." Id.

6. The right to obstruct a navigable stream by an upheaval of plastic clay, caused by the pressure of a railroad embankment near the river, is not granted by an act of Congress authorizing the construction of the railroad parallel to the river, where the existence of the clay was unknown to Congress, and the result was not foreseen by anyone. Northern P. R. Co. v. United States (C. C. App. 8th C.) 80

Lakes.

Restraining Unlawful Raising of Height of Water, see INJUNCTION, 7.

7. The legislature may authorize the level of the water of a public lake to be drawn down for manufacturing purposes, although public rights of navigation are thereby impaired, and the shore line in front of private riparian property is changed. State v. Sunapee Dam Co. (N. H.) 55

8. The inconvenience to owners of land on the shore of a public lake in reaching the water because of the act of the state in authorizing a lowering of the water level, and the lessening thereby of the enjoyment of residences upon or near the shore, furnish no legal ground of complaint, being *damnum absque injuria*. Id.

9. A corporation empowered by its charter to lower the water level of a public lake for manufacturing purposes must exercise the right in a reasonable manner, so as to cause no unnecessary injury to rights of navigation or of the owners of lands upon the shore. Id.

10. A lake, although 20 miles long and 7 wide, with water in some places 18 feet deep, is not navigable in the technical sense, so as to place the title to its bed in the state, where it is covered and filled with trees, stumps, logs, and snags, through which

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there are no proper channels to make navigation available. Webster v. Harris (Tenn.) 324

11. The owner of land bordering on a lake navigable only in the ordinary sense, even though his title does not extend beyond the water's edge, has a right to have the water remain in place, so that the lake cannot be drained by other riparian owners. Id.

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Increasing flow of surface water by railroad embankment, consequential injuries. 83

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Liability for damming back water of stream:—(I.) Right to dam back: (a) no natural right; (b) legislative authority: (1) in general; (2) for improvement of navigation; (c) grant of right: (1) form and manner; (2) object; (3) effect; (4) extent; (d) license; (e) prescriptive rights: (1) right may be acquired by prescription; (2) what necessary to give right; (3) extent of right; (4) prevention and loss of right; (f) abandonment of rights; (g) right as against public: (1) in general; (2) nuisance; (h) title to land flowed; (II.) who are liable: (a) public generally; (b) corporations; (c) one who has parted with property; (d) purchaser of property; (e) other persons; (III.) what is obstruction: (a) bridges: (1) generally; (2) railroad bridge: (a) duty as to construction; (b) measure of care required; (c) liability for injury; (d) other matters; (b) drift and *débris;* (c) other obstructions; (d) illegal, though beneficial; (e) change in obstruction: (1) repairing dam; (2) increasing height of dam; (3) change of location; (IV.) effect of character of stream; (V.) effect of flood: (a) ordinary freshets; (b) extraordinary floods; (VI.) character of injury; (VII.) remedy: (a) abatement; (b) suits generally: (1) statutory action; (2) common-law action; (3) equitable remedies; (4) indictment; (5) joinder; (c) pleading; evidence; (d) limitation; (e) venue; judgment; (f) damages; (VIII.) who may sue: (a) in general: (1) owner; (2) one in possession; (3) joinder of parties; (b) grantee; (c) survivorship; (IX.) defenses: (a) contributory negligence; (b) estoppel; (c) contributing cause; (d) right to repair injury 817.

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Suit to Set Aside; Heirs as Indispensable Parties, see ACTION OR SUIT, 5.

Devise for Charitable Purpose, see CHARITIES.

Suit to Set Aside; Jurisdiction of Federal Courts, see COURTS, 4.

1. Subsequently acquired real estate passes under a will devising "all my real estate, of whatsoever nature or kind soever, and wheresoever situated," under a statute giving power to devise the real estate which testator hath, "or at the time of his death shall have." Clayton v. Hallett (Colo.) 407

2. The adoption of a child after the making of a will brings it within the provisions of a statute providing that on the birth of a child after making of a will, un-

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less an intention to disinherit it shall appear from the will, the devises and legacies shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of testator had he died intestate, where, by statute, an adopted child, for the purpose of inheritance, is declared to be in law the child of the parents the same as if he had been born to them in lawful wedlock. Flannigan v. Howard (Ill.) 664

3. A distribution *per stirpes*, and not *per capita*, should be made under a will directing that two thirds of all the residue of the estate not disposed of should be distributed in equal shares to such persons in life at the decease of testatrix as would then be the heirs at law of her deceased husband had he survived her, and that the other one third should be distributed in equal shares to the heirs at law of the testatrix then in life. MacLean v. Williams (Ga.) 125

4. Where a will has been probated, whereby the testator disposes of his entire estate, there is no error in refusing to probate an alleged will of older date, which gives nothing which is not given in the will already probated. Id.

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WITNESSES.

1. One who has testified that no prior accident had ever happened by the use of a pulley and belt by which an employee was injured, during the four years that it had been running, cannot be cross-examined as to other accidents which had happened in the mill during that time. Duntley v. Inman, P. & Co. (Or.) 785

2. Offenses committed before marriage are not within an exception of "cases of criminal violence upon one by the other," in a statute forbidding husband or wife to testify against the other. People v. Curiale (Cal.) 588

3. An act of sexual intercourse with a female by her consent when she was under the age when she could legally consent is not an act of criminal violence within the meaning of an exception of evidence as to such acts, in a statute forbidding a woman to be a witness against her husband. Id.

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A manager of an agency established in Nebraska by a foreign railroad corporation for the purpose of soliciting traffic over its line of road is a managing agent, within the meaning of the statute with reference to the service of summons upon such corporations. Union State Bank v. Fremont, E. & M. Valley R. Co. (Neb.) 939

NOTES AND BRIEFS.

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